

Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (Control & Prevention) Act, 2017

(First in South Asia)

“A People-Centric Law”

- Shri J.P. Nadda,

Hon’ble Union Minister of Health and Family Welfare, Govt. of India



Pondicherry AIDS Control Society



“At the beginning of the fourth decade of the HIV epidemic, profound stigma and discrimination is a fact of life for those with the disease – not just socially, but within our legal system”

- Sean Strub, US HIV Activist, One of the board of directors of the Amsterdam-based Global Network of People Living with HIV/AIDS (GNP+) (Courtesy: Healthline)

Thirty two years ago the world was just becoming aware of a new epidemic called the Acquired Immune Deficiency Syndrome or AIDS, caused by HIV virus.

“The HIV epidemic not only affects the health and life of individuals, it impacts households, communities, and the development and economic growth of entire nations”



Global summary of the AIDS epidemic | 2015

**Number of people
living with HIV in 2015**

Total	36.7 million	[34.0 million – 39.8 million]
Adults	34.9 million	[32.4 million – 37.9 million]
Women (15+)	17.8 million	[16.4 million – 19.4 million]
Children (<15 years)	1.8 million	[1.5 million – 2.0 million]

**People newly infected
with HIV in 2015**

Total	2.1 million	[1.8 million – 2.4 million]
Adults	1.9 million	[1.7 million – 2.2 million]
Children (<15 years)	150 000	[110 000 – 190 000]

AIDS deaths in 2015

Total	1.1 million	[940 000 – 1.3 million]
Adults	1.0 million	[840 000 – 1.2 million]
Children (<15 years)	110 000	[84 000 – 130 000]

Past Cases...

- LX v. Union of India [*Delhi High Court (CWP – 7330/2004, 5 May 2004)*]
- Shri Subodh Sarma & Anr. v. State of Assam & Ors. – Guwahati High Court (2000)
- Lucy R. D’Souza v. State of Goa [*Bombay High Court (AIR 1990 Bom 355)*]
- Sankalp Rehabilitation Trust v. Union of India – Supreme Court of India
 - Formulation of guidelines, incorporation of HIV in Public Health & Government’s obligation to provide ART and other treatments to HIV+ persons
- Mr. X v. Hospital Z (AIR 2003 SC 664, (2003) 1 SCC 500) – Supreme Court of India
- A, C & Ors. v. Union of India & Ors. (1999) – Bombay High Court
 - Right to marry for HIV+ person, but with a rider that the person should obtain informed consent from the spouse (Mutual consent) – IPC restricts marriage of people with communicable diseases
- M. Chinnaiyan v. Sri Gokulam Hospital & Queen Mary’s Clinical Laboratory (National Consumer Dispute Redressal Commission, 2006)
- P v. Union of India (2001) — Kolkata High Court (Negligence in blood transfusion)
 - Blood transfusion - patient’s consent, effect of untested blood
- India Network of Positive People v .T.A. Majeed & Ors. (2007) – Supreme Court
- Karnataka Network for People living with HIV/AIDS (KNP+) v. Mr. Balachandra K Pagali Nayak and Others – Karnataka High Court (WP NO.8852/2006(GM)RES)
 - Quack claiming cure for AIDS

...Past Cases

CSS v. State Of Gujarat (2001) [Unreported Special Civil Application No. 11766 of 2000 (Gujarat High Court)]

RR v. Superintendent of Police & others [Unreported (2005) Karnataka Administrative Tribunal]

X v. The Chairman, State Level Police Recruitment Board & Ors, 2006 ALT 82

- HIV-positive but otherwise medically fit for for the post of unarmed police constable (Discrimination)

A v Union of India [Unreported In the High Court at Bombay *WP No. 1623 of 2000*]

X v. State Bank of India (2002) – Bombay High Court

MX v. ZY AIR 1997 Bom 406 – Bombay High Court

- Job confirmation or Promotion or Extension of service in sub-marine denied and the Court left it to the authorities to decide (Discrimination)

S v. Director General of Police, CISF and others [Unreported (2004) High Court at Bombay in WP No. 202 of 1999]

G v. New India Assurance Co. Ltd. (2004) – Bombay High Court

- Positive wife denied of post even on compassionate ground, Court order to create supernumerary post. (Discrimination)

Mr. Badan Singh v. Union of India & Anr. Delhi High Court (2002)

- Denial of benefits after incapacitation (Discrimination)

Mr. X v. Hospital Z (1998) 8 SCC 296, AIR 1998 SCW 3662 — Supreme Court of India

- Medical Ethics, Confidentiality and Suspended Right

Need for the Act....

- The HIV epidemic has significant social, economic, legal and human rights dimensions.
- Presence of widespread misinformation, stigma and discrimination, inequalities, violation of rights on people living with HIV in all spheres of society including the health care system and the marginalised communities found it difficult to access services
- Prejudice, negative attitudes and abuse were directed at people living with HIV/AIDS
- Fear of losing income/livelihood, family/social support; there was loss of hope and reputation and feelings of worthlessness
- Needed to give legal protection for the Targetted Intervention projects to contain HIV legally and effectively through programmes like condom promotion and NSEP. But, Acts like the Immoral Traffic Prevention Act, 1956, the Narcotics Drugs and Psychotropic Substances Act, 1985 jeopardize these initiatives (especially the staff) had put barriers in containing HIV.
- India is also a signatory to the declaration in the General Assembly of the United Nations (2001) that necessitated to legislate this Act in order to secure the global commitment to enhancing the coordination and intensification of national, regional and international efforts to combat HIV/AIDS in a comprehensive manner.

....Need for the Act

- India was obligated to enact legislation that will fulfil the obligations such as the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of all forms of Discrimination Against Women
- Inadequacies of existing laws especially to address discrimination, healthcare issues.
- Policies prior to the Act were not considered at all in the legal system and for jurisprudence.
- Judgements given not on well-defined principles but on the understanding/predilections of the Judges on HIV/AIDS which resulted in inconsistencies within the legal system.
- Needed to provide holistic coverage, consistency, clarity and predictability in order for courts to effectively pass judgment in HIV/AIDS cases
- Needed to provide certainty for people to seek remedy from a strong and reliable legal system
- Equality enshrined in the Indian Constitution is available only against certain State entities and there was no restriction on discriminatory practices in the private sector

Making of the Act...

- In late '80s, the First HIV litigation (*Lucy D`Souza Vs State of Goa, 1990*) was filed in Goa
- In late '90s, right-based organisations stepped in to formulate policy and judicial action
- The process of drafting the Act started with the International Policy Makers Conference on HIV/AIDS, held in May 2002 in New Delhi
- An Advisory Working Group (AWG), chaired by the NACO was formed.
- In 2004, the draft Bill was ready after nationwide consultations with stakeholders including people living with HIV (PLHIVs), high risk groups (HRGs), women and children's groups, healthcare service providers, trade unions, lawyers and civil society organisations (CSOs)
- The HIV/AIDS Act was finalised by NACO in 2006 after taking feedback from State Governments, State AIDS Control Societies (SACS) and Central Government Ministries, and the same was submitted to the Union Law & Justice Ministry, Govt. of India.
- In the intervening years, many corrections took place as per the representations by various agencies.
- Tabled in the Parliament in 2014. Passed in the Rajya Sabha on 21.03.2017 and in Lok Sabha on 12.04.2017
- ***NOTIFIED IN THE GAZETTE OF INDIA ON 21-04-2017 (Union Law Department) & 10-09-2018 (Union Health & Family Welfare Ministry) AND BECAME A LAW***

Objective / Purpose

- ✓ Prevention and control of HIV
- ✓ Addressing the problems people living with HIV/AIDS considering all its aspects
- ✓ Wiping out denial, discrimination and rights violations on the ground of one's HIV status in public and private institutions – health care settings, employment, educational institutions, family and community,
- ✓ Protecting and securing the human rights of persons who are HIV positive, affected and vulnerable
- ✓ Establishing right to autonomy and consent, privacy and confidentiality, equality and non-discrimination
- ✓ Protecting the rights of healthcare providers and other persons in relation to the Virus and the Syndrome especially while giving medical service with standard procedures.
- ✓ Securing a global commitment to enhancing the coordination and intensification of national, regional and international efforts to combat it in a comprehensive manner as per declaration in the General Assembly of the United Nations (2001) in which India is also a signatory

Structure of the Act



- ✓ An introduction that highlights
 - The purpose of the law
- ✓ The Act is classified into 14 chapters
- ✓ There are totally 50 sections
- ✓ Definitions and meanings for terms like HIV, AIDS, Discrimination, Protected Person, etc.
- ✓ Explanations and Illustrations given wherever needed (Eg: Chapter-9 on “Promotion Of Strategies For Reduction Of Risk”, Sec.22)

Highlights

- Introduces “test and treat” policy which means any person testing positive will be entitled for free treatment by the State and Central governments. Earlier, this was restricted by a CD4 count rate (**Sections 13-14**)
- Emphasis given to infection management. (**Sec.14(2)**)
- Prohibits HIV testing being used as a pre-requisite for securing a job, accessing health care or education. (**Sec.3(I)**)
- Informed consent does not include screening by licensed blood banks, medical research or any such purpose where the test is anonymous and not meant to determine the said person’s HIV status. (**Sec.6**)
- An HIV positive person shall have to disclose his HIV status only if required by a court order. (**Sec.8(1)(i)**)
- Both civil and criminal proceedings against the law-breakers (**Sections 37-39**)

Salient Features...

- **Rights based Approach: (Preamble)**
 - Embodies principles of human rights
 - Seeks to establish a humane and egalitarian legal regime to support India's prevention, treatment, care and support efforts vis-à-vis the epidemic
 - Safeguard their property rights. Every person above the age of 18 has the right to reside in a "shared household" and enjoy all the facilities.
- **Right to a safe working environment: (Sec.19)**
 - For doctors, healthcare workers and other persons whose occupation may put them at risk of exposure to HIV.
 - Imposes an obligation on healthcare institutions to provide necessary universal precautions and prophylaxis from hazards due to occupational exposures
- **Special Attention to Women and Children: (Sections: 9, 16, 18, 32 & 33)**
 - Set of provisions define specific rights for women, children and people in the care and custody of state
 - The State and Central government to facilitate access to welfare schemes especially for women and children.
 - Gives right to minors to reside in a "shared household" and prohibits people from spreading any hatred against them.

Salient Features...

- **Prohibition of discrimination: (Sections 3 & 4)**
 - Provides protection against discrimination in employment, education, healthcare, travel, and insurance
 - Ensures access to private and public places in both the public and private sectors.
 - Strictly bans unfair treatment given to people living with and affected by HIV when it comes to accessing public facilities, such as shops, restaurants, hotels, public entertainment venues, public facilities and burial grounds.
- **Informed consent for HIV testing, treatment and research: (Sec.5)**
 - Mandates the provision of non-coerced, written consent after giving full details about the risks, benefits and alternatives
- **Non-disclosure of HIV-related information: (Chapter 4, Sec.8-10)**
 - Recognizes a person's right to privacy and confidentiality of HIV status with certain exceptions.
 - Prohibits individuals from publishing information or advocating feelings of hatred against those who are HIV positive and even those who are living with them.
- **Access to treatment: (Sec.13 & 14)**
 - Requires the State to provide free of cost access to comprehensive HIV-related treatment including antiretroviral drugs (ART) and diagnostics.
 - Ensures the right to HIV prevention, testing, treatment and counselling services.

... Salient Features

- **Promotion of risk reduction strategies: (Sec.22)**
 - For groups at higher risk of HIV infection in Targeted interventions through promotion of condoms among sex workers and men who have sex with men and distribution of clean needles to people who inject drugs.
- **Legal immunity to risk reduction programmes: (Sec.22)**
 - Strengthens the efforts taken by the stakeholders to prevent HIV Certain in view of certain criminal laws that impede these services by threatening providers and recipients with prosecution.
- **Information, education, and communication (IEC): (Sec.17)**
 - Obliges the government to make HIV-related information accessible to all by way of standard multi-lingual / regularly updated / easily understood IEC materials with gender sensitivity aspects and with community inputs.
- **Implementation mechanisms:**
 - Includes institutional grievance redressal and Health Ombudsman (**Sections 23-28**)
 - Special procedures to be followed in Courts (**Sections 34-36**)

Special Provisions

- Right of Residence: (**Sec.29**)
 - Person living with HIV/AIDS has the right to reside in the ‘shared household’
 - No exclusion from the ‘shared household’ in a discriminatory manner.
- Central government has to specify the guidelines for HIV-related information, education, communication before marriage (**Sec.30**)
- Persons in care or custody of the State (**Sec.31**) have the right to HIV prevention, counselling, testing and treatment services.
 - Persons convicted
 - Persons under trial
 - Persons under preventive detention
 - Minors in Juvenile homes
 - Persons under ITP Act
 - Persons in any State/Central Govt. custodial homes
- Person below the age of 18 but above the above 12 with sufficient maturity of understanding can act as a guardian for his/her sibling take decisions in matter of:
 - Admission to educational establishments; care and protection, treatment, operating bank accounts, managing property, etc. (**Sections 32 & 33**)

“Shared Household” means:

- A household where a person lives (or)
- At any stage has lived in a domestic relationship
- Either singly or along with another person
- Whether owned or tenanted,
- Either jointly or singly,
- Any such household in respect of which either person or both, jointly or singly, have any right, title, interest or equity
- A household which may belong to a joint family of which either person is a member, irrespective of whether either person has any right, title or interest in the shared household.

Competent Court & Nature of Offence

- Courts above the rank of a Judicial Magistrate First Class (JMFC) shall take cognizance of an offence under this Act **(Sec.41)**
- Offences under this Act shall be cognizable (arrest without warrant) & bailable as per Section 2 of the Code of Criminal Procedure, 1973 **(Sec.42)**

Statutory conditions

- Appointment of Ombudsman by the State Government **(Sec.23)**
- Appointment of Complaints Officer in all establishments with 20 or more persons **(Sec.21)**
- Formulation of Rules for smooth implementation of the Act by Central and State Governments. **(Sec.47 & 49)**
- Formulation / Updation of various policies / guidelines including HIV/AIDS Policy by Central and State Governments **(Sec.12)**

Legal Procedures – Health Ombudsman

- **Procedure for complaint:-**

The complaints may be made to the Ombudsman under sub-section (1) of section 24 in such manner, as may be prescribed, by the State Government **(Sec.27)**

- **Orders of Ombudsman:-**

The Ombudsman has to pass appropriate orders within a period of thirty days of the receipt of the complaint after giving an opportunity to the parties concerned **(Sec.28)**

- **Authorities to assist Ombudsman:-**

All authorities including the civil authorities functioning in the area of the Ombudsman shall assist in the execution of orders passed by the Ombudsman **(Sec.29)**.

- **Report to State Government:- (Sec.30)**

- Report to the State Government every 6 months mentioning the number and nature of complaints received, the action taken and orders passed in relation to such complaints
- Same report has to be published on the website of the Ombudsman
- Copy of the report to be forwarded to the Central Government.

Legal Procedures - Court

- **Suppression of identity** of the **protected person** will be ensured by substituting the name of such person with a pseudonym in the records of the proceedings (**Sec.49**)
- The proceeding or any part thereof may be conducted in camera (**Sec.34(1)(c)**)
- Publication of any kind leading to the disclosure of the name or status or identity of the applicant is prohibited. (**Sec.34(1)(d)**)
- The Court shall **take up and dispose of the proceeding on priority basis** all the Legal proceeding concerning or relating to an HIV-positive person (**Sec.34(2)**)
- In the maintenance application, the court has to consider interim maintenance, the medical expenses and other HIV-related costs that may be incurred by the applicant (**Sec.35**)
- While sentencing, the court has to determine the availability of proper healthcare services at such place for HIV positive persons (**Sec.36**)
- This Act has the overriding effect over any other law (**Sec.43**)

Punishments & Penalties

Offence	Explanation	Section	Punishment / Imprisonment	Penalty / Compensation
Contravening the provisions of Section 4	<ul style="list-style-type: none"> • Propagating (by way of publishing) / exposing protected persons • Feelings of hatred, discrimination or physical violence against any protected persons (as in Sec.4) 	37	<ul style="list-style-type: none"> • Not less than 3 months • May extend upto 2 years 	Upto Rs. 1 lakh
Failure to comply with orders of Ombudsman	Within such time as may be specified in such order (as under section 26)	38	Nil	<ul style="list-style-type: none"> • Upto Rs.10,000/- • If non-compliance continues – upto Rs.5000/- per day of failure
Breach of confidentiality of the HIV status***	*** No penalty if the disclosure is pursuant to any order or direction of a court	39	Nil	Upto Rs.1 lakh

Related Laws and other Legal Provisions (cited in the Act)

- “Domestic relationship”, Sec.2 of the **Domestic Violence Control (DVC) Act**, 2005 (Sec.2)
- “Child Welfare Committees”, Sec.29 of **Juvenile Justice (JJ) Act**, 2000 (Sec.16)
- Sections. 176 and 177 of **Indian Penal Code (IPC)** (Sec.24) that deal with false information given to Ombudsman and punishment/fine
- Persons in care or custody of State – as per Sec.56 of JJ Act and Sec.104 of **ITPA** (Sec.31)
- Offences in this Act come under Sec.2 of **CrPC** i.e. cognizable (arrest without warrant) and bailable (Sec.42)
- Sections 45, 269 and 270 of **IPC** on marrying with communicable diseases
- **Articles 14** (right to equality) and **16** (right to non-discrimination in government employment) of the **Constitution**
- **Article 21** (right to life which includes right to health)
- **Article 19(1)(d)** (right to move freely throughout the country) – Against quarantining
- A patient’s “right to confidentiality” (Art.21) was not enforceable in a situation where the patient is HIV positive, if he stood the risk of spreading it to his prospective spouse (Sec.20A & Sec.33(m), **Indian Medical Council (Amendment) Act**, 1964)

Chapters and Sections

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II PROHIBITION OF CERTAIN ACTS

3. Prohibition of discrimination
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III INFORMED CONSENT

5. Informed consent for undertaking HIV test or treatment
6. Informed consent not required for conducting HIV tests in certain cases
7. Guidelines for testing centres, etc.

IV DISCLOSURE OF HIV STATUS

8. Disclosure of HIV status
9. Disclosure of HIV-positive status to partner of HIV-positive person
10. Duty to prevent transmission of HIV

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11. Confidentiality of data
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Chapters and Sections

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ANTI-RETROVIRAL THERAPY AND OPPORTUNISTIC INFECTION MANAGEMENT FOR PEOPLE LIVING WITH HIV

13. Central Government and State Government to take measures Anti-retroviral Therapy and Opportunistic Infection Management
14. by Central Government and State Government

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15. Welfare measures by Central Government and State Government
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18. Women and children infected with HIV or AIDS

Chapters and Sections

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22. Strategies for reduction of risk

X APPOINTMENT OF OMBUDSMAN

23. Appointment of Ombudsman.
24. Powers of Ombudsman.
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27. Authorities to assist Ombudsman.
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Chapters and Sections

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- 41. Court to try offences
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- 47. Power of Central Government to make rules
- 48. Laying of rules before both Houses of Parliament
- 49. Power of State Government to make rules and laying thereof
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Way Forward... Next

- Sensitization of Judiciary and Law officers
- Execution of the provisions of the law
- Information Dissemination to general public about the Act
- Concerns on mandatory Pre-Employment Testing
- Disclosure before marriage
- Pre-Marital HIV Testing
- More clarity on Social Security and HIV/AIDS
- Vaccine Research and Ethical Concerns (Medical Ethics)
- The Juveniles and HIV/AIDS
- Disability and HIV/AIDS
- Prisoners and HIV/AIDS
- Workplace and HIV/AIDS – Extensions, medical expenses, etc.
- The Right to Marry
- Concerns regarding untested blood transfusion
- Quacks
- Jobs on compassionate grounds
- Prevailing misconceptions
- Marriage of HIV+ persons (Concordant and Discordant)

Section 14 (1) states, “*The measures to be taken by the central or state governments under **section 13** shall include measures for providing, **as far as** possible, anti-retroviral therapy and opportunistic management to people living with HIV or AIDS.*”

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- NGOs, CBOs and CSOs
- Lawyers Collective
- UNAIDS and other UN organisations
- Media

“This is an important step forward for people living with and affected by HIV in India and around the world.”

- **Steve Kraus, Director, UNAIDS Regional Support Team for Asia and the Pacific.**

