

GENERAL LAW AND FAMILY LAW RELATING TO HIV/AIDS: A BANGLADESHI PERSPECTIVE

Dr. Taslima Monsoor *

HIV related law can be defined as that branch of the law that specifically addresses the problem, issues and challenges posed by the HIV epidemic by (i) supporting and channelling resources for epidemiological surveillance, policy initiatives and interventions; (ii) mandating interventions for healthier life styles and other preventive measures such as education, counselling, treatment and disease management; (iii) establishing the rights and duties of persons with HIV / AIDS as well as of others; (iv) regulating human behaviour and laying down norms for conduct; (v) specifying the quality and use of products such as blood, semen, organs, tissue, HIV test kit and condoms; and (vi) creating a supportive and an enabling environment in which affected individuals and communities as well as others can mutually co-exist to enhance their quality of life.¹ Acquired Immunodeficiency Syndrome or AIDS is a fatal disease and it has been spreading worldwide alarmingly. It is considered the most devastating epidemic in human history. About 40 million (4 crore) people around the world are currently living with HIV. About 5 million (2.5 crore) people died from AIDS so far including about 3 million (30 lakhs) in this year alone. Everyday 15000 new infections take place. If the devastating disease continues to spread at the present rate, it is estimated that, by 2010 in Africa alone more than 4 crore (40 million) children will become orphan due to AIDS.²

Bangladesh has not yet been able to get a clear picture of the epidemic of the Human immunodeficiency virus or HIV as it is little known how many people are living with HIV and AIDS.³

* Dean, Faculty of Law, University of Dhaka

1 Jayasuriya, D.C.: 'HIV Law : The expanding frontiers'. In HIV Law, *ETHICS AND HUMAN RIGHTS*. New Delhi, 1995, pp. 9-33, at p. 11.

2 Hoque, Abunasar Ehsanul: PRESENT SITUATION & FUTURE PROBLEM OF AIDS IN BANGLADESH. WHY AIDS IS A BIG PROBLEM FOR BANGLADESH? In *abunasar.hoque@yale.edu*

3 UNAIDS : HIV & AIDS : *Resource Guide for Media Professionals in Bangladesh*. Dhaka 1997, p. 42.

It is a recognised fact that the Human immunodeficiency virus or HIV is spreading fast in Bangladesh making AIDS (Acquired Immunodeficiency syndrome) a perilous and dangerous problem in Bangladesh. However, the Government and the public in Bangladesh bear a wrong perception that AIDS is not a big problem for a traditional Muslim country like Bangladesh. However, such a perception is wrong as the statistics give a different picture. Many studies report that premarital and extra-marital sex in Bangladesh is common and widespread. Caldwell et al (1997) found that nearly half of their respondent had engaged in sex before marriage in Bangladesh. The same study found that a significant proportion of all types of male travellers separated from their wives occasionally engage in commercial sex. If we look at the Islamic countries like Indonesia, which has not been saved from HIV and AIDS by its cultural and religious value, we can easily foresee the future for Bangladesh.

The atrocity of the problem is not being visualised for lack of data or proper statistics. The World Health Organization estimate in 1993 that 20,000 individuals were infected with HIV in Bangladesh and that over 100,000 people could be infected by 1997. However, there was no sentience surveillance at that time to prove or disprove this estimate.⁴ We are still uncertain about the exact number of HIV positive people. Government reports 208 infected persons whereas SEA/WHO regional office estimated that 13,000 adults are living with HIV/AIDS in Bangladesh till April 2001.⁵ It was reported in Worlds AIDS Day (1st Dec.) that 136 HIV positives are added to the country list of Bangladesh this year.⁶

People in Bangladesh, is at risk of a rapidly spreading HIV infected epidemic because of number of reasons. They range from lack of knowledge, lack of concern, surrounded by countries with high numbers of people with this infection, Pre and extra marital sex, sexually transmitted diseases are

⁴ Ibid.

⁵ Hoque, p.2.

⁶ The Daily Star, Dhaka Monday December 1, 2003, p.12.

common, intravenous drug use, commercial sex workers, low use of condom, faulty blood transfusion services and international migration. The HIV virus is present in body fluids, e.g., blood, semen, vaginal fluid, breast milk and other body fluids containing blood. When any of these body fluids from an infected individual enters into another uninfected individual she/he may get infected with HIV. The main ways people acquires HIV infection are the following:

Having unsafe sex (without properly using a latex condom throughout the sexual intercourse) with someone who has HIV. Unsafe (without Blood screening or HIV testing) blood transfusion (Transfusion of HIV infected/ contaminated blood).

Using needles for intravenous drug use that are contaminated with HIV.

Body piercing or tattooing or being cut with needles, razors, or other sharp objects that are contaminated with HIV and have not been properly sterilized.

In addition, children can be infected in the womb, during childbirth, or during breast feeding if their mothers are HIV infected.⁷

In the context of HIV/AIDS, Bangladesh is considered as a "Low Prevalence but High Risk" country. Bangladesh, being one of the world's highly populated countries, is highly susceptible to the transmission of epidemic. Recent sentinel surveillance by the Bangladesh Government reveals that the high-risk groups such as injecting drug users; commercial sex-workers, and truck drivers have 2% prevalence of HIV. Third Sentinel Surveillance shows that a majority of married men reported to have unprotected sex with commercial sex workers, street girls, and other men.⁸ In Bangladesh, the intravenous drug users (IDU) are the most potential carriers of HIV/AIDS

7 UNAIDS 1997, pp. 43-45.

8 HIV in Bangladesh: where is it going, Background document for the dissemination of the third round of national HIV and behavioral surveillance, Nov, 2001.

among the vulnerable groups in the country.⁹ The fourth round of the National Serological Surveillance found presence of 4% HIV infection among the IDU's in Dhaka.¹⁰ According to the National AIDS Committee and surveillance team members and experts, this rate is quite alarming as it remains 1% less than the highest 5% HIV epidemic index.

The social and cultural environment is not favorable for the people, who have already been identified as infected or affected from HIV/AIDS. Curses of poverty, illiteracy, ignorance, increased number of migrant workers, **unsafe practice** in health service, unsafe sex practice, and proximity of Bangladesh to the so-called 'Golden Triangle' & high prevalence of sexually transmitted diseases (STDs) make Bangladesh alarmingly vulnerable. With the theme- Live and let live the country observed the World AIDS Day this year.

National Programmes which ought to be taken are highlighted as follows:

1. Multi sectoral response to HIV/ AIDS;
2. Maximising **public awareness** towards HIV/ AIDS;
3. NGO's to reach out to eradicate HIV/AIDS;
4. Strengthen blood safety system and STD services;
5. Ensure effective case and support those infected and their families;
6. Protection of Human Rights so that stigma is reduced.

Since there is neither any vaccine nor any drug to cure this fatal disease which can spread to others, urgent action is needed for its prevention. There are **three** ways for prevention. One is the **information communication**; the other is education and finally legal enforcement. The **use** of electronic media, radio, and television when focusing **attention on the** causes of HIV/AIDS will prove in some way **effective prevention** to the mass population. The **curricula of the secondary and higher**

9 The Daily Star Dhaka Monday December 1, 2003, p.12.

10 Ibid, p.11.

secondary education should include the issue of HIV/AIDS but that will not be enough to solve this hypercritical problem ahead of us.

A) General Law and HIV/AIDS:

The legal response to HIV/AIDS is important to equalize the dilemma of individual Human Rights vis-à-vis public rights. There is a traditional misunderstanding that the public health threat of HIV/AIDS is opposed to the individual rights of the AIDS victims. Thus the AIDS victims according to the conventional attitude should not have any rights. There must be a compromise. We can not deny the Human Rights of the AIDS affected people on the other hand the public health, safety and security has to be taken into serious consideration. The public health laws have to be reviewed to ensure that they adequately address the issues raised by AIDS. The Public health authorities may not consider the public secure unless, for instance, infected persons undertakings of behaviour modification or lifestyle change are credible or can be reliably policed.¹¹ In this perspective the pattern of law is prescriptive and coercive.

It is provided in the international guidelines that the states should review and reform public health legislation. So that it ensures that it adequately addresses the public health raised by HIV/AIDS and is consistent with international human rights obligations.¹² After the HIV/AIDS cases were being reported from most of the countries they had age old laws dealing with contagious diseases, these laws have continued to remain in force without being updated to address current infection control and disease management systems or the rights and duties of the affected persons and communities.¹³ Bangladesh has already the law for transmission of any contagious diseases under section 269 and 270 of the Bangladesh Penal Code 1860. If

11 Cook, J. Rebecca : 'Human Rights, HIV infection and women., In *HIV-LAW, ETHICS AND HUMAN RIGHTS*. New Delhi, 1995, pp. 235-270, at p. 259.

12 Guidelines for state action no. 3, in *HIV/AIDS and Human Rights International guidelines*. United Nations, New York and Geneva, 1988, p. 12.

13 Jayasuriya (1995), p. 11

such diseases are transmitted punishment is provided which will range from six months to two years. But is it enough punishment when one can take away another life by transmission of the disease? State should implement and provide legal support services that will educate PLHAs or people living in AIDS and HIV about their rights and free legal services to enforce those rights.¹⁴

i) Individual Right vs. Collective Right:

The aphorism that a virus has no rights is a traditional approach.¹⁵ The response we are reflecting in this article is that it is necessary to advance a particular human rights value in relation to HIV/AIDS. It has been rightly stated that:

There is no society in which sex workers, injecting drug users, male homosexuals and women are not marginalised, stigmatised and generally disempowered. The experience of a number of countries in responding to HIV/AIDS is that removal of legal and social disabilities, if not the empowerment of these groups, is critical to a country's ability to deal with HIV/AIDS.¹⁶

Confidentiality and privacy is specially considered in HIV/AIDS related disease otherwise PHAS are stigmatised, condemned, marginalised and alienated in our societies. However legislation mandating reporting of HIV infection is consistent with human rights principles where public health authorities are obliged to undertake public health protection without undue disclosure of their identities.¹⁷

The Constitution of Bangladesh guarantees a set of rights pertaining to Human Rights within the meaning of our study of HIV/AIDS and Human Rights. These rights inter alia have been elaborated in articles 31, 32, 33 and 35, of the Constitution.

14 Guidelines for state action no. 7, in *HIV/AIDS and Human Rights International guidelines*. United Nations, New York and Geneva, 1988, p. 20.

15 David Buchanan: "Public health vs. Individual rights" ' In *Law, ETHICS & HIV*. Proceedings of the UNDP inter country consultation, Philippines, 1993 pp. 221-227.

16 *Ibid.*, p.222

17 Cook, (1995), p. 259.

Article 31 reads that:

To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with the law, is the inalienable right of every citizen, wherever he may be. Also for every other person for the time being within Bangladesh and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

Article 32 reads as:

No person shall be deprived of the life or personal liberties save in accordance with law.

Article 33 reads as:

No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

Article 35 reads as:

- (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.
- (2) No person shall be prosecuted and punished for the same offence more than once.
- (3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.
- (4) No person accused of any offence shall be compelled to be a witness against himself.
- (5) No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.

- (6) Nothing in clause (3) or clause (5) shall affect the operation on any existing law which prescribes any punishment or procedure for trial.

The Constitution of Bangladesh, 1972, contains some basic features of which fundamental rights as enumerated in Part III of the Constitution is one. The Constitution guarantees under Article 26 that all existing laws inconsistent with the fundamental rights would be declared void and the state is forbidden not to the make any law inconsistent with the fundamental rights. Right to equality before the law; equality of opportunity in public employment; right to protection of law; protection of right to life and personal liberty; safeguards as to arrest and detention; protection in respect of trial and punishment; freedom of movement and protection of home and correspondence; all these rights are guaranteed under Articles 27-43 of the Constitution of Bangladesh, 1972. Even the Government is not immune although they have sovereign immunity if they violate fundamental human rights. In a case in India a HIV positive wife of a sailor were allowed not to evicted from the Naval Headquarters and be reinstated in his job.¹⁸

The enjoyment of any right is subject to reasonable restrictions imposed by law in the interest of security of the state or public order or public health. Preventive measures to protect from HIV/AIDS related disease could be identified in different legislation. The Indian Penal Code of 1860 is applicable to Bangladesh. The Code in Chapter XIV dealing with Offences Affecting Public Health and Safety under section 270 states:

Whoever malignantly i.e., by malice, does any act which is, or which he knows or has reason to believe to be likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or both.

18 Grover, Anand : "In the Public Interest Litigation for PLHA." In *Human Rights and HIV/AIDS : Effective Community Responses*. (HRI) Human Rights Internet, Ontario, 1988, pp. 76-78. At p. 77.

The Epidemic Diseases Act, 1897 under section 2 empowers the Government that if it is satisfied that the state is threatened with outbreak of any dangerous epidemic disease to take measures. The Government can take any measure which it thinks fit and could prescribe temporary regulations that would be required to be observed by the public or any class of persons necessary to prevent the outbreak and spread of such disease. It further provides for the inspection of persons travelling by railway or otherwise and the segregation in hospital or temporary accommodation or otherwise of persons suspected by the Inspecting Officer of being infected with any such disease.

Thus, laws are there for public safety from an epidemic by segregation from the infected people of the general population. There are no specific regulations prohibiting or restricting the use of un-sterilised injections, but compulsory screening of blood before transfusion have been made mandatory by a recent Statute. Moreover there are laws which prevent sexual transmission i.e. kidnapping, trafficking, rape and prostitution which are not enough to tackle the situation prevalent in Bangladesh. It has to be presented clearly that trafficking, rape and kidnapping are also human rights violations.¹⁹

The Cruelty to Women Deterrent Punishment Ordinance, 1983 was repealed and the Repression against Women and Children (special enactment), Act xviii of 1995 was promulgated²⁰ which

19 Weschler, Joanna, : 'Documenting Human Rights Abuses :HIV/AIDS and the trafficking of Burmese women and girls into Thai Brothels.' In *Human Rights and HIV/AIDS : Effective Community Responses*. (HRI) Human Rights Internet, Ontario, 1988, pp. 64-66, ATP. 66.

20 The Repression Against Women and Children (special enactment), Act xviii of 1995 provided under section 9 punishment for kidnapping or abduction for immoral activities with imprisonment for life or rigorous imprisonment for a term of 7 years which may extend to 10 years and shall be liable to fine.

The Repression Against Women and Children (special enactment), Act xviii of 1995 provided under section 9 punishment for trafficking life imprisonment and also liable to fine. However, The Repression Against Women and Children (special enactment), Act xviii of 1995 has repealed the Cruelty to Women (Deterrent Punishment) Ordinance, 1983 which provided death sentence for trafficking under section 5.

The Repression of Women and Children (special enactment), Act xviii of 1995 provided death penalty for ten crimes against women and children (under sections 4, 5(b), 5(d), 6(1)-(4), 7, 10(1) and 12). The crimes affecting women and children include causing death by corrosive substance, causing permanent damage of the body by corrosive substance, for rape, for rape with murder, for rape with attempt to murder, for group rape, for group rape with murder, for dowry death and for trafficking of children.

however was repealed by The Prevention of Cruelty to Women and Children Act, 2000.

Persons selling and buying minor girls for prostitution may be imprisoned for 10 years as provided in sections 372 & 373 of the Penal Code. The punishment is less with regard to the prevailing situation when poor girls are enticed away to prostitution. The punishment should be more severe. This has been changed by the Cruelty to Women and Children Prevention Act 2000 under section 5(1) has been extended in the sense that if any person with the intention of prostitution or any other illegal activities send some women abroad or bring them from abroad or transfer or hire any women for any type of cruelty or for this type of purpose retain or possess or have custody of any such women will be entitled to death sentence or life imprisonment or 20 years maximum or minimum 10 years rigorous imprisonment.

Under section 6 for trafficking of children the person will also be liable to death sentence or life imprisonment and also liable for fine.

Under section 7 for Abduction of women and children for other purposes then referred in section 5 (prostitution) then the person will be liable for life imprisonment or 14 years rigorous imprisonment and will also be liable for fine. However, in reality the Acts and Statutes are seldom affected.

B) Family Law and HIV/AIDS:

Before British-India Muslim law had been administered as the law of the land.²¹ The law of the Moghul Empire was founded on Sharia, Fatwa-i-Alamgiri²² and Hedaya²³; these sources were also identified by other authors.²⁴ The non-Muslims had been governed in matters of their personal laws by their own personal and customary laws.²⁵

21 Gledhill, Alan: The republic of India. Westport 1970, p.220; O'Malley, L.S.S. (ed.): Modern India and the West-a study of the interaction of their civilization. London 1968, p.110.

22 A collection of decisions or fatwas made in the reign of Aurengzeb.

23 Hedaya was translated by Charles Hamilton and first published in 1791. There are complaints about the Hedaya's accuracy see Ali, Syed Ameer: Mohammedan Law. Calcutta 1912, Vol.I, pp.244-254.

24 Rankin, George Clause: Background to Indian law. Cambridge 1946, p.4; Ali, Syed Ameer: 'Islamic jurisprudence and the necessity for reforms'. In Wasti, Syed Razi (ed.): Syed Ameer Ali in Islamic history and culture. Lahore 1968, pp.223-230, at p.224.

25 Ramadan, Said: Islamic law and its scope and equity. 1961, p.143; Fyzee, A.A. Asaf: 'Development of Islamic law in India'. In Singh, Attar (ed.): Socio-cultural impact of Islam on India. Chandigarh 1976, pp.107-115, at p.112.

The personal laws of the Christians and Parsis were codified by the British by the Parsi Marriage and Divorce Act, 1865, the Indian Divorce Act, 1869, the Indian Christian Marriage Act, 1872, the Indian Succession Act, 1925 and the Special Marriage Act, 1872. Tahir Mahmood states that the English Matrimonial Causes Act, 1857, has found itself reproduced into these Indian statutes.²⁶

The judges who were administering justice at this time were either British or Western-trained. There is no evidence in the literature on whether these judges were dedicated to the traditional knowledge. English and other laws and concepts were often introduced by the judges when there was a lack of knowledge of traditional Arabic or Sanskrit texts. Moreover, there was a general difficulty for the judges in properly ascertaining the terms of Islamic law from the authoritative Arabic texts.²⁷ This led to scholarship on translations and to the compilation of commissioned texts.²⁸ However, up to 1856 the judges were assisted by law officers, i.e. Muftis or pandits, to declare the rule of law applicable to a case.²⁹ Thus it was acknowledged that a great part of Islamic law has been modified deliberately or accidentally by the judiciary since 1772, when the East India Company first undertook to administer India directly and it was circumscribed to personal laws only.³⁰ Tahir Mahmood points out that Muslim personal law cover the following topics: 'Marriage and its dissolution, family rights and obligations, testamentary and intestate succession, personal property, religious and charitable endowments and pre-emption'.³¹

26 Mahmood, Tahir: Personal laws in crisis. New Delhi 1986, pp.98-99.

27 Coulson, N.J.: A history of Islamic law. Edinburgh 1964, p.155.

28 Baillie, Neil B.E.: A digest of Moohummudan law. 2nd ed. London 1875; Hamilton, Charles: The Hedaya. Lahore 1975; Macnaghten, W.H.: Principles and precedents of Muhummuden law. Calcutta 1825; Wilson, Roland Knyvet: A digest of Anglo-Muhammadan law. London 1895.

29 Rankin (1946), p.139; Jung, Ibn. S. Mohamedullah: A dissertation on the administration of justice of Muslim law. Allahabad 1926, p.91.

30 Derrett, J. Duncan M.: Religion, law and the state in India. London 1968. p.514.

31 See Mahmood, Tahir: Family law reform in the Muslim world. Bombay, 1972. p.167.

Bangladesh inherited the legacy from British-India and Pakistan and has a dual legal system consisting of the general and the personal law. The general law is based on egalitarian principles of sexual equality but the personal or family law, based on religion does not operate on the basis of absolute equality to men and women.

The family law in Bangladesh is based on religion. That is why the personal laws are regarded as religio-personal law. This projects that the law of Bangladesh is a reflection of a plural society having a complicated legal history. The laws which are in force in Bangladesh comprise the General Law and the Family Law. Moreover, the family law as practised in Bangladesh also consists of legislation that is based on egalitarian principles during British-India and Pakistani period.³² There are also reforms in Bangladeshi period but it is acclaimed that the laws did not cross the parameters of Sharia.

This historical review establishes that in Bangladesh religion has played a major role in determining the law that governs personal relations. This can have a positive and a negative impact in relation to the HIV/AIDS. On the positive side, if the laws provide satisfactory remedy to the issues arising from the disease than it can be enforced with no objection and with full support from the community. In the negative side, the laws may have to be changed or reformed so as to provide more suitable approach to the HIV/AIDS epidemic.³³ But if the required change is not provided in the divine laws or is not even within its periphery it will be difficult to effect. However, reforms have been made in Muslim Family Laws where it did not conflict with the basic tenets of the

32 See for details, Monsoor, Taslima: *From patriarchy to gender equity: Family Law and its impact on women in Bangladesh* (Ph.D Thesis, University of London) a book published by the University Press Limited (UPL) Dhaka, 1999.

33 For thorough understanding see, Siraj, Mehrun: "Law, traditional Family customs and HIV infection-- A Malaysian perspectives". In *Law, Ethics & HIV-Proceedings of the UNDP Inter Country consultation*. 1993. pp.41-54, at p.43.

religion. Law reforms in Family Law were made as, the Child Marriage Restraint Act, 1929 (CMR Act), The Dissolution of Muslim Marriages Act, 1939 (DMMA), the Muslim Family Laws Ordinance (MFLO) 1961, the Dowry Prohibition Act, 1980. The Family Courts Ordinance 1985, the Prevention of Cruelty to Women and Children Act, 2000. Thus, reforms have been made on religious family law on procedural barriers to polygamy, restraint of child marriage, registration of all marriages have been made compulsory etc.

Tahir Mahmood says that there are methods by which reform in Islamic Family law can be made they are Thakhayyur, Talfiq, Siyasa Sharia and Ijtihad.³⁴ Thus, reforms can be made in Islamic family law by employing these techniques. Moreover, within the set parameters of Islam reforms can be affected as there is no prohibition against any change. However, in the pre Islamic age there were people who were gays and lesbians which is one of the causes of the HIV/AIDS. It might be that the disease was also prevalent at that time but not in the form of an epidemic.

This historical backdrop of family law of the majority of Bangladeshi people reflects the following issues:

i) Dissolution of Marriage and HIV/AIDS:

Muslim marriage being a sanctified civil contract can be terminated although it is the most detestable permitted thing in the eyes of Allah. Justice S.A.Rahman said in the case of *Khurshid Bibi .v. Md. Amin*:

Marriage among Muslims is not a sacrament, but is in the nature of a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones. But legally in essence, it remains a contract between the parties which can be subject of dissolution for good cause. ³⁵

³⁴ See for details, Mahmood, Tahir: *Family Law Reform in the Muslim World*. Bombay 1972, p.12.

³⁵ PLD 1967(S.C.) 59, at p.97.

The question that arises is that whether HIV/AIDS should be regarded as a just cause for the dissolution of marriage. Moreover there is confusion whether the non disclosure of the fact that the spouse was suffering from HIV positive before marriage will affect the right to privacy or can it be regarded as a ground for dissolution. Several states in Australia, the Republic of Korea and Singapore have made it a criminal offence for a person who is aware of his or her HIV status to have sexual intercourse with another unless they disclose that fact.³⁶

There are different forms of dissolution of marriage by the act of the husband is talaq (repudiation), Ila (vow of continence), Zihar (injurious assimilation), by the act of the wife is talaq-e-tafwid (Delegated divorce), by mutual consent is Khula (redemption), Mubarra (Mutual freeing) and by judicial process is Lian (Mutual imprecation) and Faskh (Judicial rescission).

A Muslim woman can also take HIV/AIDS as a ground for dissolution if her husband delegates the right of talaq. Moreover if she is unable to obtain the former forms of dissolution she can always apply her Khula rights and pay her Dower or other property to have her freedom from being infected with this deadly virus.

In Faskh (Judicial rescission) a Muslim woman can apply for a divorce under section 2(vi) of The Dissolution of Muslim Marriages Act of 1939 when the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease. This section may be extended to include HIV/AIDS as grounds for dissolution of marriage. Moreover, a Muslim woman can apply for dissolution of her marriage under section 2(viii) (a) & (b) of The Dissolution of Muslim Marriages Act of 1939 when the husband associates with women of evil repute or leads an infamous

36 Jayasuriya, 1995, at p. 25.

life and attempts to force her to lead an immoral life. Thus pre and extra-marital sexual relations are prohibited and is regarded as *zina* under the Islamic law and the legislation in Bangladesh. If these deterrent prohibitions are successfully enforced it will control sexual relations and vis-à-vis spread of HIV/AIDS. However, the actual effect of the relevant provisions of the statutes will depend on the interpretation of the courts.

ii) Maintenance of Wife and other relatives during the disease of AIDS:

According to Islamic law the liability to maintain rests entirely on the males, as a father, husband, brother and son. Females are not obliged to maintain anyone except her illegitimate child. It is incumbent on a husband to maintain his legally wedded wife. The authorisation of the wife to maintenance derives from the injunctions of the Holy Quran, Prophet's Tradition and Consensus of the jurists.³⁷

In Bangladesh the husband should provide maintenance during subsistence of marriage and during the iddat period.³⁸ This was perhaps, because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family.³⁹ A wife's maintenance is however, lost for certain conditions or the sharia provision of maintenance of the wife from her husband is conditional. The maintenance is only due to the wife, if she is under a valid marriage contract, if she allows her husband free access or *tamkeen* to herself at all lawful times and if she obeys his lawful commands in the duration of the marriage.⁴⁰ When the wife is working against the husband's

37 Monsoor, Taslima: "Maintenance to Muslim wives: The legal connotations". In Dhaka University Studies part- F, Vol. 9. No.1. June 1998, pp.63-86.

38 Fyzee Asaf A.A. : *Outlines of Muhammadan Law*. 4th ed. New Delhi 1974, p. 186; Diwan, Paras : *Muslim Law in modern India*. Allahabad 1985, p. 130.

39 Mahamood, Tahir : *Personal laws in crisis*. New Delhi 1986, p. 87.

40 See for details, Nasir, J.Jamal: *The status of women under Islamic Law*. London 1992, London, pp.60-65.

wishes she becomes a rebellious or disobedient or nashuza and is not entitled to maintenance from her husband. A wife is nashuza, as held in the case of Ahmed Ali v Sabha Khatun Bibi⁴¹ if without a valid excuse she disobeys his reasonable orders, refuses to cohabit in the house he has chosen, goes on hajj without his consent unless it is obligatory for her to go, takes employment outside the house without his consent, or is imprisoned so as to be inaccessible to him.

In relation to HIV/AIDS and the disobedient wife or nashuza there raises plenty of questions. Whether a woman can refuse to have sexual relations with her husband unless they practice safe sex? Is she a nashuza if she refuses herself from her husband and has the reason to believe from his activities that he may be at risk of contracting HIV infection? Whether she would be regarded as nashuza if she chooses to leave the house as her infected husband forces himself on her? Finally the query is whether the wife has the right to protect herself from the HIV infection without losing her right of maintenance? If she is nashuza the wife loses her right to be maintained. But, if she is not nashuza her husband is bound to maintain her. Thus, the court of law should consider the reasons of the wife's action and if it is a valid reason they should extend the law to provide her maintenance in these new circumstances.

When it is the wife who contracts HIV/AIDS, there is no excuse for the husband to refuse to provide maintenance unless the husband alleges that the wife has contracted the disease by adulterous relationship and can prove it as there are other ways of contracting the disease. A Muslim husband can not avoid responsibility on the excuse of zina or adulterous relationship without proper proof.

A Muslim woman is entitled to maintenance whether she has HIV/AIDS or not from her husband or her relatives or if her

41 PLD 1952, Dacca 385.

relatives are destitute from the state treasury or Bait-ul-Mal.⁴²

The situation is same for any Muslim person who has lost his source of income due to HIV/AIDS. He has a right to claim maintenance from his relative who is a male member of the family in the same order that they would have been entitled to inherit the estate of that relative had the issue been succession or inheritance and not maintenance.

iii) Custody of Children with Parents Effected by HIV/AIDS:

The cases of custody show that the judiciary in Bangladesh is deciding the issue on the paramount consideration of the welfare of the minor. But where one parent has HIV/AIDS, that fact may be used against him or her while deciding the custody of the child.

Islamic law recognises that a mother is of all persons most desirable to have the custody of her infant child, so that proper care is given to him or her.⁴³ Mother is considered fit to care for the child. But the difficulty is whether custody will be awarded to the mother when she is infected by HIV virus. The reality is that even if infected by the virus mother or anyone in care will be able to attend the child as long the disease doesn't become acute. If the disease is in its final stage it will be difficult to take proper care of the child and the child must be transferred to a person who is more able to take proper care and give utmost attention to the child.

Remedies to prevent the HIV/AIDS:

1. Prevention of sexual transmission diseases: Most HIV/AIDS accounts from sexual transmission. Education leading to changes in sexual behaviour is one

⁴² Siraj, Mehrun: (1993), p.47.

⁴³ See for explanation, Monsoor, Taslima: "Women's Rights under Muslim Family Law with particular reference to custody and guardianship" published in The Dhaka University Studies, part- F, Vol. 8 No.1, June 1997.

of the methods to prevent this disease. The judges of the courts of law should be provided with the sufficient information about HIV/AIDS to assist them while interpreting those cases. Stringent rules preventing trafficking, rape and kidnapping is not the only remedy. There must be attitudinal changes. Training should be given to the parents to help them handle children with HIV/AIDS or husbands or wife's if their spouse has the infection or the disease. Pre-marriage courses should be introduced including the rights of spouses to protect from the risk of HIV. Counselling units should be established to assist the people affected by HIV/AIDS. Amendments should be made to the legislation as suggested (see above).

2. Prevention of transmission through blood and blood products: Due to economic constraints, screening of blood before transfusion is inadequate in Bangladesh. Proper laws should be introduced ensuring such screening. Government is establishing 97 safe blood centres.
3. Prevention of transmission through used syringes and medical instruments: Use of sterile materials for injection must be introduced. The drug users should also be made aware of the problem that any piercing in the skin could cause HIV/AIDS if the material is not sterile. It can also be contagious through the razor or dental instruments used by the HIV/AIDS infected people if the object is not sterilised properly.
4. Non-discriminatory policy towards AIDS infected people: The individual rights of AIDS infected people doesn't insure that all people without any discrimination what-so-ever, have access to proper care, privacy, mobility, protection in workplace including sick benefits, medical aid, leave, insurance, indemnity, pension and retirement policy should be in line with existing laws

relating to other serious conditions and life – threatening diseases.

5. The public health law has to be reviewed to ensure that they adequately address the issues raised by AIDs. In this perspective the model of law is prescriptive and coercive laws are enforced. This contradicts with individual human right which includes protection against discrimination of the HIV/AIDS affected people and the protection of confidentiality of persons affected by HIV/AIDS.

In its instrumental model law focuses on combating subordination and seeks to change the values and patterns of social interaction. The HIV/AIDS is not an easy virus to contact its transmission is personal and hence the cultural and social values play an important part. In a patriarchal society like Bangladesh the problem is more acute as social conventions play a vital part as for instance talking about sex is a confidential and secret issue not to be discussed in public than how can you teach people about safe sex? Thus, there needs to be attitudinal and behavioural change to combat this pandemic virus. Mere cosmetic changes will not answer the problem.⁴⁴ Hence it is desirable to bring about a social change in a broader social context.

⁴⁴ Ayappa, geetha Devi : 'Women and HIV/AIDS : an Indian scenario.' In *Law, ETHICS & HIV*. Proceedings of the UNDP intercountry consultation, Phillipines, 1993 pp. 55-61. at p. 58.