

# **Role Played by the Legal Environment in Facilitating or Hindering Universal Access to Prevention, Treatment, Care and Support and the Global Response to Date Rev -1**

Plenary speech at ICAAP 10 : J.V.R.Prasada Rao

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We are meeting in the midst of a continuing global crisis of HIV. After 30 years of its emergence as the most serious public health challenge, HIV has killed 30 m people around the world, left another 34 m infected, and continues to infect 2.6 m every year. There is no cure or vaccine in sight, and the treatment coverage is limited to 6 million with another 10 m out there fighting for survival. Prevention has not been able to catch up and for every 2 persons on treatment, 5 new infections are occurring.

In Asia and the Pacific we heard about the epidemic trends in the morning and I don't want to repeat them. We have a mix of success stories and serious concerns both on prevention and treatment in countries of this region.

One of the main reasons for the limited success of global efforts to control AIDS and mitigate its impact is that law itself is in crisis in responding to HIV. An adverse legal environment is a serious impediment to access to services to PLHAs and vulnerable groups of men, women and children. We now have evidence that supportive legal environments make HIV response more effective, efficient and sustainable. Law is now well established as an enabler and a social

determinant of health which can have a profound impact, both positive and negative on the lives of these groups and their ability to lead productive lives. We had witnessed positive steps decriminalizing same sex relations between consenting adults in Fiji, India and Nepal and recognizing the third gender in Nepal and Pakistan. Law can therefore be a very positive tool for empowering the socially disadvantaged sections.

Law ,both in books and in practice is meant to protect socially disadvantaged groups like sex workers, people who use drugs, men who have sex with men, transgenders, people living with HIV and also women and children affected by HIV from the powerful majority who constitute the mainstream society.

But the reality is that it emerges as an extreme negative influence on the lives of these people. In many countries criminal law has been used as a regulatory tool to enforce moral values. Evidence has shown that widespread use of criminal law to regulate sexual behavior and drug use had a profoundly negative impact on the epidemic and the social well being of these sections of society and consequently has a negative impact on societies as a whole. In short, the law which is a social determinant of health, itself has proven to be in crisis in terms of HIV.

Many laws impede successful prevention strategies eg criminal laws affecting the vulnerable communities. Most of the countries of Asia and the Pacific have laws that criminalise sex work, drug use and same sex relations between men. Many of these laws are from the pre independence times when the colonial masters wanted to impose their standards of morality on their 'subjects'. The drug laws which are a direct result of the two UN conventions on drug use conflate drug

trafficking and sale with actual drug use and impose the same severe penalty on both these groups. In the case of sex work and same sex relations, the law in practice is disproportionately more severe and causes serious impediment to reach out these populations with prevention tools like condoms, lubricants etc.

**Criminalisation of HIV transmission** is a serious threat to treatment access. A number of countries like Australia, Cambodia, China, Marshall Islands, Singapore and Vietnam have also enacted HIV-specific provisions that criminalise HIV exposure, transmission or non-disclosure. Willful transmission of HIV by an infected person can normally be addressed under ordinary criminal law of the country and there is no need to enact special laws for this purpose

**The WTO's TRIPS agreement** and its actual operation at country level have also become serious impediments to affordable treatment access. While Doha declaration has given the right to countries to use its flexibilities for public health needs, this right is being systematically undermined and bypassed by developed world. TRIPS+ provisions like data exclusivity, ever greening of patents are being included in Free Trade Agreements forced upon developing countries. Even emerging economies like India are being pressured to sign such bilateral trade agreements containing TRIPS+ provisions.

Added to this is the new slogan of anti counterfeiting which is the face of an IP enforcement agenda. There is an increasing trend to conflate and confuse generic drugs with counterfeit medicines of spurious quality.

What is the game behind all this? To rob countries the access to affordable generic drugs? On one side we say that millions of people

living with HIV need to be provided treatment and on the other side we throttle supplies of generic drugs to these persons? It is a classic case of narrow national economic interests taking precedence over a global commitment to save lives of PLHAs.

I must say most regretfully that law has completely failed women and children in the area of AIDS. More women got infected by HIV than men in the last decade. Law has failed to protect women against violence and disempowerment, failed to protect children from exploitation and denial of social protection.

Many **traditional practices**, which may be recognized in customary and religious laws, contribute to women's vulnerability to HIV, including patrilineal inheritance, polygamy, child brides and bride price.

Mandatory premarital HIV testing laws like in China and Malaysia, the practice of non-consensual abortions, and forced sterilisation of women living with HIV in countries like Viet Nam and Sri Lanka act against the rights of women to have control over their bodies and robs them of the right to choice on child birth.

**The age of legal capacity to consent** to testing and other medical interventions varies between jurisdictions. HIV testing is sometimes hidden such that testing of children occurs without their knowledge. Age of consent to testing and medical treatment is not settled and requires us to look at the evolving capacity of a child to consent.

In Nepal, children living with HIV are deprived of medication, expelled from school, disinherited from family property or evicted from their home. In 2009, the Supreme Court of Nepal ordered that a law for protection of children with HIV be introduced. But the law has not been enacted.

In India, while age for consent is 16 for heterosexual sex, sex involving a man under 18 is considered paedophilia and is punishable under Indian law. A significant proportion of community members actually in need of services are under the age of 18.

On the other hand, in areas where a strong legal framework is needed, law is absent –lack of anti discrimination laws, lack of laws protecting employment at work place, lack of laws guaranteeing continuous treatment access and social protection, lack of laws that protect women’s inheritance and property rights and rights over the integrity of their bodies and right of choice of life partners. There needs to be greater impetus to enact such protective laws in many countries of this region. In India a HIV Bill which was initially drafted in 2004 has not seen the light of the day until now. In countries like Papua New Guinea good law on HIV is rarely used.

Even in cases where there is a good law – for example, constitutional guarantees of equality, its implementation is poor that the intended benefits do not flow to the people. Abusive law enforcement practices drive people into riskier behaviors and away from health and social services and deprives people of the legal protection they are entitled to. In many countries in this region, police are given a free ride to harass, arrest, detain without trial, groups like sex workers and their clients, drug users, men who have sex with men and transgender people.

Some living examples of police excesses in this region are reported by the communities:

In Malaysia, raids conducted by police and religious enforcement hamper HIV/AIDS prevention work targeting transgender sex workers.

In the Philippines, the anti-trafficking law is used by police to justify raids and arrests of sex workers. Police use condoms as evidence for charges under trafficking and vagrancy laws.

In China, and Philippines, the MSM community complain about regular police harassment,

On the contrary, wherever the police adopt a helpful and positive attitude towards these communities, prevention and treatment programs are executed more efficiently like in a police initiative in Kolkata in India which provides needles and syringes and buprenorphine to injecting drug users.

Religious prejudices and traditional practices and myths further distort the law on books and law in action.

A community activist from Pacific , says that human rights can complement local cultures, including Christian values. Colonialism in the Pacific was so successful that most of what people hold as traditional cultures was actually put to them by the colonial leaders.

*Sharia* penalties for sex between men are severe, and include death (in certain districts of Pakistan), whipping or caning (Maldives, Malaysia, Brunei and parts of Pakistan), and imprisonment. The dual system of Sharia law and common law existing side by side complicates the situation even more.

Last year in a statement to the UN Economic and Social Council, the Vatican stated that it does not support criminalisation of homosexual sex. This message is yet to percolate from Europe to the rest of the Catholic Church.

While the programmatic response to HIV and AIDS has been quite positive in this region, legal reforms to support HIV responses have lagged behind. Most often the response of countries to this legal deficit is resistance to alter the status quo.

Most of the countries have not shown any positive inclination to amend the laws which are of colonial vintage relating to sex work, same sex relations between men. Emphasis is more on stricter implementation of these outdated legislations rather than looking at their relevance in emerging socio political environment in Asia and the Pacific.

More often, countries have invoked customary and religious laws to punish rather than protect these groups. The use of law as a means of enforcing moral values creates problems in diverse and evolving societies.

In 2009, a political party for sexual minorities in Philippines applied for accreditation on the party list. A secular body, the Commission on Elections, used the Bible and then Koran to justify refusing registration of the party.

Ironically wherever law reforms were initiated they proved to be more harmful and counterproductive to the interests of PLHAs, sexual minorities and people who use drugs.

In Thailand, the 2008 *Anti-trafficking Law* has created a new excuse for corrupt authorities to extort money from sex workers and employers

Laws in Cambodia, China, Indonesia, Laos, Myanmar, Thailand and Vietnam require drug users to be compulsorily detained at drug detention centres.

We also see this trend in many countries where a progressive approach adopted by the social sector ministries like health and social welfare is negated by a regulatory and traditional approach by regulatory ministries like internal security, drug control and police. Sometimes they work at cross purposes creating a confusing legal environment for the infected and affected people.

Unfortunately the measures adopted by international community have also proved to be counterproductive, even though the intentions may be good.

In the Palermo Protocol, the conflation of prostitution and trafficking under the legal rubric of exploitation has resulted in further criminalization of sex work. This has also resulted in anti trafficking laws being legislated in a number of Asian countries.

We have seen the result in Cambodia where hundreds of sex workers were arrested and detained without trial for long periods in 2009. India was about to enact a similar law but suspended further action in the face of stiff opposition from civil society groups.

The recent report of the Global Commission on Drug Policy has clearly stated that the global war on drugs has failed. Policy makers believed that harsh law enforcement action against those involved in drug production, distribution and use would lead to an ever diminishing market in drugs and the eventual achievement of a drug free world. In practice, the global scale of illegal drug markets largely controlled by

organised crime has grown dramatically over this period. In spite of increasing evidence that current policies are not achieving their objectives, most policy making bodies at national and international level have tended to avoid open scrutiny or debate on alternatives.

I have already touched upon the negative consequences of the TRIPS regime and its misuse to pressure developing countries to forego TRIPS flexibilities and increase excessive IP protection through FTAs and new agreements like ACTA. The multilateral institutions have done very little until now to reverse this trend.

UNAIDS and multilateral agencies like Global Fund, World Bank and bilateral donors have done commendable work in raising resources and bringing the countries together to fight the pandemic in an unprecedented manner. Perhaps no other public health issue attracted the type of international support like HIV and AIDS.

Yet the one area where the international community has not been able to make a strong impact is the legal environment and criminalization of the vulnerable communities.

No country has repealed or amended any law criminalizing HIV transmission.

Same sex between consenting adults was decriminalized by courts in countries like Nepal and India but we have not seen any attempt by other countries with similar legislations taking a cue and repealing these oppressive legislations.

Marginal changes made by some countries in their drug laws failed to have an impact because of faulty enforcement and the mind set of enforcement agencies.

But the biggest failure is reserved in the area of TRIPS regime which is becoming more and more oppressive and restrictive.

Ladies and gentlemen, over the last 30 years, HIV has exposed health and social inequities across the globe. It has also magnified weaknesses in rule of law, legal and human rights institutions, access to justice and governance which the world can no longer ignore. If the vision of Governments and international agencies and UN bodies is to promote inclusive and tolerant societies across the world, they should take measures to ensure that laws and legal practices guarantee equity and social justice and offer social protection to the most vulnerable sections of society.

It is therefore high time that Governments should proactively try to bring in legal reforms in these broad areas and act as change agents.

#### **DONT USE CRIMINAL LAWS TO ENFORCE MORAL JUDGEMENTS**

Criminal law should be reserved for offences which cause harm to other's life and property or disturb public order. It should not be used to promote moral values in diverse societies where there is no substantial moral agreement.

#### **GO BY EVIDENCE AND REPEAL ABUSIVE LAWS**

Criminalization of drug use, sex work and same sex relations, fail to achieve their purported welfare goals. Evidence has proved that these are counterproductive. This Lancet article says how critical enablers like law, policy and practice can have a synergistic effect on reducing HIV incidence at a low cost. Please repeal these laws which have no public health rationale.

## STOP CRIMINALISATION OF HIV TRANSMISSION –IT HAS FAILED

HIV specific criminal law and criminalization of HIV transmission has failed to achieve its objectives. It has only helped in enhancing stigma. It is also a myth that it protects women and girls. It does not address the deep rooted social, economic and political inequalities that are at the root of women's disproportionate vulnerability to HIV. Please repeal or amend provisions in your HIV laws criminalising HIV transmission.

## SEX WORK AND TRAFFICKING ARE TWO DIFFERENT THINGS-DON'T MIX THEM UP

Legal conflation of sex work and trafficking has undermined the efforts to address both genuine human trafficking and HIV in the context of commercial sex. It is essential to distinguish between the two. While trafficking is a punishable offence, it is necessary to decriminalize sex work so long as it remains an activity between two consenting adults.

## SWEDISH LAW – HOW CAN THIS BE A MODEL?

The Swedish law which is being promoted as a model by some of the countries in the region presumes that all sex work is exploitative and does not recognize the rights of women over their bodies. Please don't adopt it as a model.

## THE GLOBAL COMMISSION ON DRUG POLICY AND ITS BOLD STRATEGY

On drug use, please implement seriously the recommendations of the Global Commission on Drug Policy. The Commission has observed that the policy of harsh criminalization and punishment of drug users has been an expensive mistake. Governments should refocus their efforts

and resources to assist people who use drugs into health and social care services. Countries must stop forcible detention of drug users without trial for an offence and abolish all drug detention centres. Instead, harm reduction programmes should be taken up on a large scale to minimize drug related harm.

### COLONIAL SODOMY LAWS MUST GO

All laws that criminalise consensual sex between consenting adults must be repealed. Many of these laws from colonial days have outlived their utility. There are hardly any prosecutions under these laws but criminalization is hindering access to services to these communities.

### FTAs AND TRIPS PLUS – BACK DOOR ENTRY

The EU is negotiating a free trade agreement with India, and the Trans Pacific Partnership negotiations are going on right now – involving USA, Australia, Brunei, New Zealand, Malaysia, Vietnam and others. Please do not tie the developing countries to inflexible TRIPS+ provisions which are counterproductive to universal access to treatment of HIV+ people. Because, all the ingredients for the next treatment crisis are already in place and a realistic and hard assessment of TRIPS and the reality of so-called “flexibilities” is the need of the hour.

### GENERICS ARE NOT COUNTERFEITS

In some African countries like Kenya, the definition of counterfeits is so cleverly worded that it includes generic anti retrovirals. There should be organized pressure on these countries to delete such provisions from their national laws so that generics are freely available to patients in those countries. Countries of Asia and the Pacific should be watchful

about imposition of such conditions in their national laws and civil society should be equally watchful.

The UN and international community should take a relook at international agreements governing sex work, trafficking, drug use and access to medicines, specifically the following.

While it may not be practicable to renegotiate the Palermo Protocol, UN agencies should develop guidelines on its interpretation, especially on the conflation between sex work and trafficking and disseminate extensively among countries.

The recommendations of the Global Commission on Drug Policy are not for countries alone but for UN agencies like UNODC as well. Proactive measures should be taken for non application of the stiff provisions of the anti drug conventions to personal use and harm reduction measures.

It is essential that the flexibilities agreed upon in Doha are maintained for public health. In this region we have China and India the two Asian members of the powerful BRICS block of countries. UN should stimulate a BRICS led initiative to alter the status quo in favour of public health and availability of affordable medicines to developing countries.

The Global Commission on HIV and Law led by UNDP on behalf of UNAIDS family, is now addressing the legal crisis that has afflicted countries and societies around the world. It has decided to address the broad areas of enquiry that I have outlined in my presentation. The Commission wants to be bold and straightforward in its findings and recommendations and would like the UN system to monitor implementation of its recommendations by countries. I am sure the

report of the Commission will match the expectations of civil society groups and vulnerable communities who provided tremendous support to its work.

As the Member Secretary of the Commission, I derived a wealth of information obtained in its regional dialogues, from the eminent group of legal experts in the Technical Advisory Group advising the Commission and from the Commission's Secretariat. I would like to gratefully acknowledge their contributions to this presentation.

Ladies and gentlemen, we have waited long enough for HIV related legal reforms to take shape. As eloquently put by a Member of Parliament from Bangladesh "People are often so stigmatised that they do not seek the help of law, they are stigmatised even by themselves. It is the law which needs to go to their doorsteps". But we continue to see bad laws and their defective enforcement failing the people of this region and the world and failing our attempts to halt and reverse this terrible pandemic. The countries have set for themselves in June this year, ambitious targets of getting to zero in transmission of the virus and the stigma surrounding it, in 5 years. But without an enabling legal environment emerging through systematic legal reforms and effective implementation, this may remain only a dream. Let us face this inconvenient truth and take proactive steps to,

**WIPE OUT THIS LEGAL DEFICIT.**