



EXECUTIVE SUMMARY

GLOBAL COMMISSION ON
HIV and the LAW

RISKS, RIGHTS & HEALTH

JULY 2012

ABOUT THE GLOBAL COMMISSION ON HIV AND THE LAW

The Global Commission on HIV and the Law consisted of fourteen distinguished individuals who advocate on issues of HIV, public health, law and development. Fernando Henrique Cardoso, former president of Brazil, chaired the Commission.

The Commission's unique convening power allowed it to focus on high-impact issues of HIV and the law, which have important ramifications for global health and development. The Commission advocated for evidence and human rights based legal environments for effective and efficient HIV responses.

The life experiences of the Commissioners gave them a formidable ability to access a wide cross-section of society. This means they are well placed to influence change on complex issues that require the engagement of multiple stakeholders across a range of sectors.



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ABOUT THE COMMISSION'S REPORT

"HIV and the Law: Risks, Rights & Health" is the Commission's flagship publication. Released in July 2012, the report presents public health, human rights and legal analysis and makes recommendations for law and policy makers, civil society, development partners and private sector actors involved in crafting a sustainable global response to HIV.

PREFACE

The end of the global AIDS epidemic is within our reach. This will only be possible if science and action are accompanied by a tangible commitment to respecting human dignity and ending injustice.

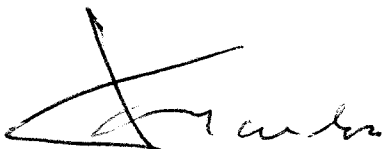
Law prohibits or permits specific behaviours, and in so doing, it shapes politics, economics and society. The law can be a human good that makes a material difference in people's lives. It is therefore not surprising that law has the power to bridge the gap between vulnerability and resilience to HIV.

We came together as a group of individuals from diverse backgrounds, experiences and continents to examine the role of the law in effective HIV responses. What we share is our abiding commitment to public health and social justice. We have listened with humility to hundreds of accounts describing the effects of law on HIV. In many instances, we have been overwhelmed by how archaic, insensitive laws are violating human rights, challenging rational public health responses and eroding social fabric. At other times, we have been moved by those who demonstrate courage and conviction to protect those most vulnerable in our societies.

Many would say that the law can be complex and challenging and is best left alone. Our experience during this Commission has shown us a very different perspective. We have been encouraged by how frank and constructive dialogue on controversial issues can sometimes quickly lead to progressive law reform, the effective defence of legislation or better enforcement of existing laws. Even in environments where formal legal change is a slow and arduous process, we have witnessed countries taking action to strengthen access to justice and challenge stigma and discrimination.

As we listened and learned over the past eighteen months, many of us found our perspectives and opinions changing on a range of complex issues. Ultimately, we chose to be guided in our final recommendations by the courage and humanity of those who have died of AIDS and the thirty four million strong who live on with HIV.

This report presents persuasive evidence and recommendations that can save lives, save money and help end the AIDS epidemic. The recommendations appeal to what is common to all our cultures and communities—the innate humanity of recognising and respecting the inherent worth and dignity of all individuals. This report may make a great many people uncomfortable—hopefully uncomfortable enough to take action. Undoubtedly, different countries will prioritise different recommendations. Each country needs to develop its own road map for reform, depending on its legal and political environment. Nevertheless, we are confident that all of the recommendations are relevant in every country of the world, given that the drivers of the HIV epidemic exist all over the world. The time has come to act on these recommendations. We cannot continue to let people suffer and die because of inequality, ignorance, intolerance and indifference. The cost of inaction is simply too high.



Fernando Henrique Cardoso

Chair, Global Commission on HIV and the Law

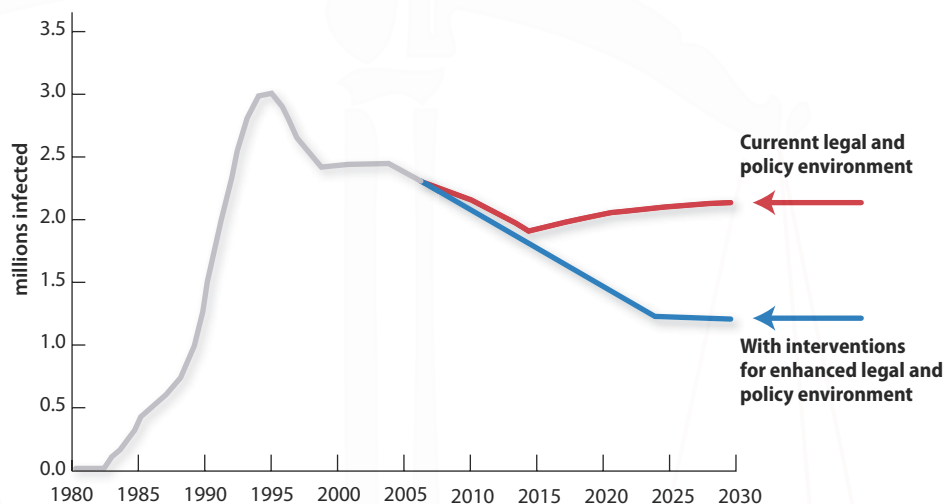
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WHY THE LAW MATTERS

Annual number of new HIV infections among adults aged 15–49

- historical trend
- current trend
- structural change*

* change to legal and policy environment



Source: Results for Development Institute, Costs & Choices: Financing the Long-Term Fight Against AIDS, An aids2031 Project, 2010.

In just three decades, over 30 million people have died of AIDS, and 34 million more have been infected with HIV. The HIV epidemic has become one of the greatest public health challenges of our time. It is also a crisis of law, human rights and social justice. The good news is that we now have all the evidence and tools we need to radically slow new HIV infections and stop HIV-related deaths. Paradoxically, this comes at a time when bad laws and other political obstacles are standing in the way of success.

34 million people are living with HIV, 7,400 are newly infected daily and 1.8 million died in 2010 alone. The legal environment—laws, enforcement and justice systems—has immense potential to better the lives of HIV-positive people and to help turn the crisis around. International law and treaties that protect equality of access to health care and prohibit discrimination—including that based on health or legal status—underpin the salutary power of national laws.

But nations have squandered the potential of the legal system. Worse, punitive laws, discriminatory and brutal policing and denial of access to justice for people with and at risk of acquiring

HIV are fueling the epidemic. These legal practices create and punish vulnerability. They promote risky behaviour, hinder people from accessing prevention tools and treatment, and exacerbate the stigma and social inequalities that make people more vulnerable to HIV infection and illness. HIV-positive people—be they parents or spouses, sex workers or health workers, lovers or assailants—interact intimately with others, who in turn interact with others in ever-larger circles, from the community to the globe. From public health to national wealth, social solidarity to equality and justice, HIV affects everyone. The prevention, treatment and care of HIV—and the protection and promotion of the human rights of those who live with it—are everyone's responsibility.

The Global Commission on HIV and the Law undertook 18 months of extensive research, consultation, analysis and deliberation. Its sources included the testimony of more than 700 people most affected by HIV-related legal environments from 140 countries, in addition to expert submissions and the large body of scholarship on HIV, health and the law.

The Commission's findings offer cause for both distress and hope for people living with or at risk for HIV. In June 2011, 192 countries committed to reviewing legislation and creating enabling legal and social environments that support effective and efficient HIV responses. The Commission's recommendations offer guidance to governments and international bodies in shaping laws and legal practices that are science based, pragmatic, humane and just. The findings and recommendations also offer advocacy tools for people living with HIV, civil society, and communities affected by HIV. The recommendations take into account the fact that many laws exist for purposes beyond public health, such as the maintenance of order, public safety and the regulation of trade. But they place the highest priority on creating legal environments that defend and promote internationally recognised human rights and legal norms.

Among the Commission's findings:

- 123 countries have legislation to outlaw discrimination based on HIV; 112 legally protect at least some populations based on their vulnerability to HIV. But these laws are often ignored, laxly enforced or aggressively flouted.
- In over 60 countries it is a crime to expose another person to HIV or to transmit it, especially through sex. At least 600 individuals living with HIV in 24 countries have been convicted under HIV-specific or general criminal laws (due to underreporting, these estimates are conservative). Such laws do not increase safer sex practices. Instead, they discourage people from getting tested or treated, in fear of being prosecuted for passing HIV to lovers or children.
- Women and girls make up half of the global population of people living with HIV. Laws and legally condoned customs—from genital mutilation to denial of property rights—produce profound gender inequality; domestic violence also robs women and girls of personal power. These factors undermine women's and girls' ability to protect themselves from HIV infection and cope with its consequences.
- Where sex education, harm reduction and comprehensive reproductive and HIV services are accessible to youth, young people's rates of HIV and other sexually transmitted infections (STIs) drop. These interventions are rare, however, and in both developed and developing nations, the denial of the realities of young people's lives is reflected in the high physical, emotional and social toll of HIV among the young.
- In many countries, the law (either on the books or on the streets) dehumanises many of those at highest risk for HIV: sex workers, transgender people, men who have sex with men (MSM), people who use drugs, prisoners and migrants. Rather than providing protection, the law renders these "key populations" all the more vulnerable to HIV. Contradictory to international human rights standards, 78 countries—particularly governments influenced by conservative interpretations of religion—make same-sex activity a criminal offence, with penalties ranging from whipping to execution. Similarly, laws prohibiting—or interpreted by police or courts as prohibiting—gender nonconformity, defined vaguely and broadly, are often cruelly enforced. The criminalisation of sex work, drug use and harm reduction measures create climates in which civilian and police violence is rife and legal redress for victims impossible. Fear of arrest drives key populations underground, away from HIV and harm reduction programmes. Incarceration and compulsory detention exposes detainees to sexual assault and unsafe injection practices, while condoms are contraband and harm reduction measures (including antiretroviral medicines) are denied.
- A growing body of international trade law and the over-reach of intellectual property (IP) protections are impeding the production and distribution of low-cost generic drugs. IP protection is supposed to provide an incentive for innovation but experience has shown that the current laws are failing to promote innovation that serves the medical needs of the poor. The fallout from these regulations—in particular the TRIPS

framework—has exposed the central role of excessive IP protections in exacerbating the lack of access to HIV treatment and other essential medicines. The situation is most dire in low- and middle-income countries but reverberates through high-income countries as well. Provisions allowing some low- and middle-income countries exceptions to and relaxations of these rules could help alleviate the crisis, but pressure against their use is substantial. A small number of countries have been able to take advantage of the few international legal flexibilities that exist.

The Commission has found reason for hope. There are instances where legal and justice systems have played constructive roles in responding to HIV, by respecting, protecting and fulfilling human rights. To some such an approach may seem a paradox—the AIDS paradox.^a But compelling evidence shows that it is the way to reduce the toll of HIV.

- Where the police cooperate with community workers, condom use can increase and violence and HIV infection among sex workers can decrease. Where governments promulgate harm reduction, such as clean needle distribution programmes and safe injection sites, HIV infection rates among people who use drugs can drop significantly.
- Effective legal aid can make justice and equality a reality for people living with HIV, and this can contribute to better health outcomes. Advocates can creatively use traditional law in progressive ways to promote women's rights and health. Court actions and legislative initiatives, informed by fairness and pragmatism, can help nations shrug off the yoke of misconceived criminalisation,

introduce gender-sensitive sexual assault law and recognise the sexual autonomy of young people.

- Despite international pressures to prioritise trade over public health, some governments and civil society groups are using the law to ensure access to affordable medicines, while exploring new incentives for medical research and development.

These successes can be—and need to be—expanded. It will take money and will. Donors, whose giving has flagged, must step up and reverse this trend, especially if the latest advances in science and in prevention programming are to benefit those in need. Countries must honour international human rights and national legal obligations. Where laws do not enhance human well-being and where laws do not respond to contemporary realities, they must be repealed and replaced by those that do. For justice and dignity, human rights and human life, the world can afford no less.

To ensure an effective, sustainable response to HIV that is consistent with human rights obligations, the Commission forcefully calls for governments, civil society and international bodies to:

- Outlaw all forms of discrimination and violence directed against those who are vulnerable to or living with HIV or are perceived to be HIV-positive. Ensure that existing human rights commitments and constitutional guarantees are enforced.
- Repeal punitive laws and enact laws that facilitate and enable effective responses to HIV prevention, care and treatment services for all who need them. Enact no laws that

^a According to The Hon. Michael Kirby, the AIDS paradox can be described as follows: "It is a paradox, one of the most effective laws we can offer to combat the spread of HIV is the protection of persons living with HIV, and those about them, from discrimination. This is a paradox because the community expects laws to protect the uninfected from the infected. Yet, at least at this stage of this epidemic, we must protect the infected too. We must do so because of reasons of basic human rights. But if they do not convince, we must do so for the sake of the whole community which has a common cause in the containment of the spread of HIV."

explicitly criminalise HIV transmission, exposure or non-disclosure of HIV status, which are counterproductive.

- Work with the guardians of customary and religious law to promote traditions and religious practice that promote rights and acceptance of diversity and that protect privacy.
- Decriminalise private and consensual adult sexual behaviours, including same-sex sexual acts and voluntary sex work.
- Prosecute the perpetrators of sexual violence, including marital rape and rape related to conflict, whether perpetrated against females, males, or transgender people.
- Abolish all mandatory HIV-related registration, testing, and forced treatment regimens. Facilitate access to sexual and reproductive health services and stop forced abortion and coerced sterilisation of HIV-positive women and girls.
- Reform approaches towards drug use. Rather than punishing people who use drugs but do no harm to others, governments must offer them access to effective HIV and health services, including harm reduction programmes and voluntary, evidence-based treatment for drug dependence.
- Enforce laws against all forms of child sexual abuse and sexual exploitation, clearly differentiating such crimes from consensual adult sex work.
- Ensure that the enforcement of laws against human trafficking is carefully targeted to punish those who use force, dishonesty or coercion to procure people into commercial sex, or who abuse migrant sex workers through

debt bondage, violence or deprivation of liberty. Laws against human trafficking must be used to prohibit sexual exploitation, but they must not be used against adults involved in consensual sex work.

- In matters relating to HIV and the law, offer the same standard of protection to migrants, visitors and residents who are not citizens as is extended to citizens. Restrictions that prohibit people living with HIV from entering a country and/or regulations that mandate HIV tests for foreigners within a country should be repealed.
- Enforce a legal framework that ensures social protection for children living with and affected by HIV and AIDS. Laws must protect guardianship, property and inheritance rights, and access to age-appropriate, comprehensive sex education, health and reproductive services.
- Develop an effective IP regime for pharmaceutical products. Such a regime must be consistent with international human rights law and public health needs, while safeguarding the justifiable rights of inventors.

The Commission forcefully calls for a renewed and vigorous international collaboration in response to HIV.

It calls on donors, civil society and the UN to hold governments accountable to their human rights commitments. It urges groups outside government to develop and implement humane, workable HIV-related policies and practices and to fund action on law reform, law enforcement and access to justice. Such efforts should include educating people about their rights and the law, preventing violence as well as challenging the stigma and discrimination within families, communities and workplaces that continue to feed a worldwide epidemic that should have ended long ago.

THE FULL COMMISSION REPORT IS AVAILABLE AT:
WWW.HIVLAWCOMMISSION.ORG

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