

Part III

Human rights and respect for human dignity policy

Based on civil society experience, one of the root causes of HIV transmission includes violence and sexual oppression. These occur due to gender inequality, unequal power structures within sexual relations, and a lack of respect for sexual and reproductive health rights. They take various forms including domestic violence, sex work and sexual exploitation. These three issues are closely linked to the occurrence of sexual violence in the context of HIV transmission and other related problems. Therefore, civil society has chosen to review certain relevant legal issues.

Following are applicable laws including the Domestic Violence Victim Protection Act B.E. 2550 (2007), the Anti-Trafficking in Persons Act B.E. 2551 (2008), and draft laws that will be enforced, including the Draft Reproductive Health Protection Act, the Draft Promotion of Gender Equality and Opportunity Act.

Domestic Violence Victim Protection Act B.E. 2550 (2007)

The Act is underpinned by the myth of the notion of “family” and the overwhelming emphasis on family values. This makes it difficult for victims of domestic violence, particularly women and children, to escape from the violence. Should they decide to report the cases against their own husbands or parents, they would be accused of disrespecting family “values”. As a result, instead of accessing solutions, the victims will simply be subject to criticism. In addition, such an approach paves the way for mediating attempts “essentially focused on upholding the family structure” regardless of how much pain the victims have to experience. And they may have to return to face the same domestic violence after going public in demanding justice.

It could be said that the Domestic Violence Victim Protection Act B.E. 2550 fails to protect the victims, but instead upholds the “family institution”. It fails to provide for the right to identity of women or victims of violence; the emphasis is merely on “making the family happy”.

Domestic violence can also contribute to the transmission of HIV, including the cases women who have no bargaining power when it comes to sexual relationships and cannot ask for safe sex.

The Foundation for Women has found examples of women who have been victims of violence inflicted on them by their HIV-positive husbands. As the women are not infected, they are subject to control and physical attacks, since the husbands fear they may leave them, though in reality, the wives usually do not consider leaving since they have children together. Upon learning about their husbands' HIV status, the wives also go for blood tests and though HIV-negative they do not receive any counseling as to how to arrange their lives without being infected by their husbands. No follow up has been made to help women who are at risk. Meanwhile, the husbands are often not aware of opportunities to participate in group activities with the PLHIVs and AIDS patients, facilitating an exchange and broadening their worldview as to how to continue their own lives.

It is possible that the violence perpetrated by husbands is caused by external pressure and feelings of desperation

given that they do not always find work. Yet their wives, apart from already being victims of domestic violence, are also made vulnerable to infection since they have no bargaining power and are expected to remain obedient.

Married women, regardless of their HIV status, risk becoming victims of domestic violence. Wives who are found to have HIV may be expelled from the family, looked down on and subject to both physical and mental abuse. Under these circumstances, legal protection for domestic violence victims alone is not enough. Other factors have to be incorporated in order to minimize the impact of violence and improve protection against violence, including the provision of quality counseling, helping victims identify solutions and choices, and so on. But all these options are not included in the protective measures listed in the Act.

Nevertheless, the notion of “family” can become an obstacle in the delivery of public health services. For example, in the attempt to persuade men to use condoms, if wives say their husbands refuse to do so, then that is the end of their options since they are unable to do anything else. Or if public health officers find out that wives are victims of violence perpetrated by their husbands, they cannot do much to help,

fearing that their intervention shall infringe upon the “sanctity of the family unit”. However, in cases where the Domestic Violence Victim Protection Act is applicable, those “competent officials” can intervene. As the name implies, these “competent officials” should also approach officials in other capacities relevant to victims of domestic violence, including public health, psychology and social work. This will happen when the competent officials no longer adopt the attitude that domestic violence is an individual matter. It will also help public health officials take on more in-depth roles, particularly in giving counseling, something which will lead to appropriate assistance and remedies in the longer term.

Given the aforementioned weaknesses, it could be claimed that the Domestic Violence Victim Protection Act, B.E. 2007 simply gives some guidelines as to how to address violence committed against individuals in the family and those closely related. However, since the law specifies clearly its intent for “the maintenance and protection of marital status and family unity” based on a rather conservative family concept, the Act is not effective enough to deal with all crimes arising from domestic violence that occurs due to male dominance. Therefore, the Act is simply a legal tool to address violence

in the family, but it cannot guarantee justice and gender equality. And without gender equality and the lack of protection for victims of domestic violence, the possibility to control the transmission of HIV/AIDS and the quality of care and treatment can also be compromised.

In sum, the constraints of the Act can be described as follows:

- The Act fails to provide effective protection to domestic violence victims, particularly;

In the context of victims of sexual violence committed by family members, since the emphasis is placed on upholding family unity, and when any sexual violence is committed within a family, it is supposed to be treated as a family matter or a matter between spouses.

Domestic violence in the context of parent-child relationships, where sexual violence is perpetrated against children or those under custodianship because it is regarded as a way to discipline or help the child.

In both cases, a legal process is generally not pursued, but mediation is often offered to uphold family unity. This tends

to ignore the fact that sexual violence stems from gender inequality, inequality inherent in power structures, and the disrespect of sexual rights. Such acts are in breach of the Yogyakarta Principles: (1) The Right to the Universal Enjoyment of Human Rights, (2) The Rights to Equality and Non - discrimination, including discrimination on the basis of sexual orientation or gender identity; (3) The Right to Recognition Before the Law; (5) The Right to Security of the Person; and (6) The Right to Privacy and the Declaration on Sexual Rights of Health, Empowerment, Rights, Accountability (HERA)¹ which affirms the right to live a sexual life without being subject to violence, discrimination and force based on the working guidelines of equality, respect and justice.

● The Act is found not to be sensitive to the issues of gender and sexuality, particularly regarding the respect of sexual rights. In the Act, only the right to prosecution is upheld. The focus is put on just the perpetrator and victim and universal

1. HERA (Health, Empowerment, Rights, Accountability) is an international group of well-known women's and human rights activists for which the International Women's Health Coalition (IWHC) served as the secretariat. The group worked to ensure implementation of the agreements reached at international conferences and compliance with international agreements with regard to sexual and reproductive health rights including the International Conference on Population and Development (ICPD) and the Beijing Declaration.

measures that do not consider gender differences and sexuality of the victim which may differ depending on each person.

- Enforcement of the Act lies initially at the discretion of law enforcement officers. Similar to other laws, enforcement is subject to the discretion and interpretation of the competent officials. But there are cases where certain officials are ignorant of and insensitive to issues of gender, sexuality and the respect for sexual rights. They tend to adhere to the notion of the family institution as the most important value, all of which may lead to discrimination within the law enforcement sector. In addition, the tendency to interpret and treat the matter as an private matter between spouses or parents and children may lead to attempts to mediate and compromise, letting perpetrators off the hook and thus allowing them to continue inflicting violence.

- Judiciary processes at the court level are no different from those occurring with the police, whereby parties involved are encouraged to reach a compromise. Essentially, the law tends to uphold the importance of the family institution at the expense of the protection of domestic violence victims. Although such

an approach could be viewed as a positive response since it avoids the use of punitive measures against the perpetrators of the violence and other measures including probation are used instead, in reality, it is found that post-trial period measures including proposed rehabilitation and the prevention of recurrence of the crime are not strictly implemented. As a result, violence continues to be committed, as reported widely in the media.

- There is a lack of safeguards against domestic violence. According to good practices and international standards, any law should include protective measures and safeguards, not just punitive measures. It needs to ensure and encourage campaigns for change and raise awareness about the available services. The Operational Center to Prevent Domestic Violence is mentioned in the Ministerial Regulation, but it does not clearly state the mandate and composition of the body, even though it should be given a vitally important role in awareness-raising at the community, provincial and national levels, in addition to mobilizing efforts within concerned sectors in society and community.

● Civil society emphasizes giving due respect to personal rights and liberty and states that they should be protected to make it possible for one to choose one's own gender and to be free from any violence and harm against the body and mind. Therefore, the rights should be upheld in a manner that fits the sexuality desired by individual sexual partners. Nobody, including family members, relatives or community members owns the rights to the body of another person. And such a body shall not be subject to exploitation, sale or servicing any debt. It shall be protected against discrimination, violence, arrest and detention. In addition, the government shall refrain from acting directly or indirectly to promote violence against sexual rights. Proposed amendments to the Act are made as follows:

● The law should be subject to revision including its purpose and enforcement procedures, from the level of initial complaints to the judiciary process, making it more sensitive to issues of gender, sexuality and the respect for sexual rights – with the primary aim to protect the victim from violence, rather than upholding the family institution at the expense of domestic violence. Reviewing sexual violence in families should

be based on a broader concept beyond male or female identities. It should be based on a concept of violence that may have been inflicted on people with diverse gender identities, violence committed by parents against their gay children, transvestites, transgenders, through verbal offence, contemptuous acts, labeling and physical abuse, or offences committed against a member of the family who chooses to have a different sexuality. Such violence has to be embraced by broader definitions and the law should be amended to encompass these meanings. Law enforcement officials and actors at the operational level should also be encouraged to embrace this concept of violence in order to ensure that all members in a family shall be protected against any violence. Also, people who have diverse gender and sexuality should be encouraged to have access to and be protected by the law.

- Safeguards must be put in place to prevent violence against any family member and closely related persons. In particular, they should lead to campaigning for change in the public sphere, encouraging the state to accept that violence committed against a family member and closely related person is no longer an individual matter, and the intervention

by community members to stop domestic violence from being committed. Concerned agencies should act to raise awareness and to mobilize cooperation within the community and civil society, including encouraging members to monitor any violence committed against any family member and closely related person in their own communities. Such a victim needs to be informed of her or his legal rights, the option to complain and access to solutions. Though the roles of community are not clearly specified in the Act, Sections 5 and 6 can be interpreted to support this attempt.

- An effective system should be put in place to review cooperation between various agencies to act in compliance with the Act. Such a monitoring system should be used to assess any violence committed against a family member or closely related person in order to gauge the level and pattern of the violence.

Anti-Trafcking in Persons Act B.E. 2551 (2008)

The Anti - Trafficking in Persons Act B.E. 2551 (2008) was first published in the Royal Thai Government Gazette on

6 February 2008 and came into force on 5 June 2008 and in effect led to the repealing of the Prevention and Suppression of Prostitution of Women and Children Act B.E. 2540 (1997). The former Act aims to enhance efforts to prevent and suppress human trafficking. It provides for the establishment of a fund for the prevention and suppression of human trafficking and the reform of assistance and rescue processes for victims of human trafficking, making them serve their best interest.

Based on civil society experience working to rescue human trafficking victims, several practical problems related to the enforcement of the Act have been reviewed, some of which may affect the transmission of HIV and impede access to care and treatment.

The Foundation for Women, for example, previously rescued a Laotian girl who used to work as a waitress in Nongkhai and was lured into sex work in Suphanburi. Though this girl's employer applied for her work permit, she was forced to provide sexual services and was indebted to him from the start of her work. After servicing all the debts she was resold to other brothels and found herself in another spiral of debts. This cycle occurred three times before the Foundation rescued her and discovered she was living with HIV/AIDS.

This is obviously the case of a victim of human trafficking, and the circumstances which she experienced made her vulnerable to HIV infection since she had no bargaining power. In addition, after becoming infected, her access to care and treatment was further impeded since she was deprived of liberties due to her illegal migrant status.

Another constraint of the Act with victims of human trafficking who have HIV/AIDS is that the law provides no measures to give them any protection or support. From the viewpoint of civil society, since the victims were infected with HIV while in Thailand, they effectively have no other choice; the Thai state should thus introduce processes to provide them with aid, care and treatment. And before the repatriation, efforts must be made to ensure that in the receiving country, social support and medical arrangements can be made to continue the treatment. The state needs to ensure that victims continue to receive ART through an effective referral system.

Meanwhile, the Act has caused concern among voluntary sex workers and they have had to endure many impacts since the Anti - Trafficking in Persons Act came into force. The law gives draconian power to enforcement officials. For example, any parlor can be raided without having to seek a court order².

This has led to instances of abuse of power by officials. They may threaten to charge sex workers with selling sex, or if they find migrant sex workers in the place, they will threaten to sue the employers on an anti - human trafficking offence, which carries severe penalties. Most female sex workers will then be arrested and repatriated as victims of human trafficking and/or illegal migrants. Such a treatment by officials simply forces sex workers to go underground. This makes it difficult for them to seek public health services.

Civil society has the following recommendations for the Act:

- Officials at the operational level should receive training emphasizing that the primary aim of the law is not to arrest, detain and punish survivors of human trafficking, particularly “those who have been forced into sex work”. They should focus

2. Section 27 For the purpose of prevention and suppression of trafficking in persons, the competent official shall have the following powers and duties: (1) to summon any person to give statements, or submit documents or evidence; (2) to search the body of any person, with his consent, where there is a reasonable ground to believe that such person is a trafficked person; in case such person is a woman, the searcher shall be another woman; (3) to search any conveyance with a reasonable ground to suspect that there is evidence or an individual who has been harmed in the context of human trafficking. therein; (4) to enter any dwelling place or a premise, to search, seize or attach, when there is a reasonable ground to believe that there is evidence of trafficking in persons, or to discover and rescue a trafficked person therein, and that by reason of delay in obtaining a search warrant, such evidence is likely to be removed, concealed or destroyed, or such person is likely to be assaulted, relocated or concealed.

their efforts on suppressing the commercial process and those reaping the most benefits from human trafficking.

- Law enforcement should not become an impediment for survivors of human trafficking – particularly “those who have been forced into sex work” – when accessing health services including HIV/AIDS care and treatment. In addition, “those who have been forced into sex work” should not be regarded as accomplices in order to help them gain access services for prevention, care and treatment.

- The law should provide for protection of survivors of human trafficking regardless of their gender and without considering only biological sex, i.e. just men and women.

- The laws mentioned above seem to provide for protection of rights. However, due to various reasons, some of them have failed to deliver, as far as the genuine protection of sexual rights is concerned. Nevertheless, it also seems the Thai state is endeavoring to change and revise the laws or issue new laws to make them suitable to the current situation and to make possible greater compliance with the Constitution and

other international obligations that Thailand has committed to and now has to practice in order to ensure that all rights are universally applied. As for sexual and reproductive health rights, two bills are being mulled including the Draft Reproductive Health Protection Act B.E.... and the Draft Promotion of Gender Equality and Opportunity Act B.E....

The Draft Reproductive Health Protection Act

Overall, the Bill looks fairly progressive with regard to the attempt to protect sexual and reproductive health rights . Broader definitions are given to sexual and reproductive health rights, and several terms are carefully used. It shows greater sensitivity than other laws including the use of the term “termination of pregnancy” to simply convey the essential meaning without attaching any judgmental labels. In another instance, the term “counselor” is defined as “a person knowledgeable and capable of giving counseling on reproductive health with the awareness of human rights”. Please note the annex “with the awareness of human rights”. Also, it could be the first time that the term “sexual rights” is clearly included in the text.

In addition, it emphasizes the importance of sexual health and embraces the existence of diverse ways to lead one's sex life while promoting diversified services to cater to the particular needs of each group as stipulated in various Sections, including Section 24, 25 and 26.

As for the promotion and support of sex education, the contents serve well the purpose of the aforementioned National Integrated Strategic Plan for Prevention and Resolution of HIV /AIDS. The sex education curriculum adopted by the Ministry of Education has been developed jointly with the Department of Health, MoPH, and features quite comprehensive content. It shall be used as the core curriculum. In addition, the Bill provides for many obligations of the state to ensure that people receive good services and help to address the current problems. Yet there are still many issues of concern which are missing, including

A lack of policy for women's termination of pregnancy, and the Bill still places an emphasis on control of one's body, and restricts women's sexual and reproductive health rights based primarily on a medical approach. For example, Section 38 states that "a termination of pregnancy can be performed only for reasons related to the physical or mental health of the

women or when the woman's pregnancy has been caused by a criminal act specified in Section 276, 277, 282, 283 or 284 and it has to be performed by a medical professional pursuant to rules and regulations and methods provided for by the Medical Council of Thailand Regulation Concerning the Practice of the Medical Termination of Pregnancy as per Section 305 of the Criminal Code B.E. 2548 (2005).

Though definitions given in the Bill encompass diverse forms of sexuality, when it comes to Sections concerning the provision of health services, an emphasis is still placed only on reproductive health for child delivery. It leaves out groups with diverse sexualities, hindering their access to reproductive health services, including individuals who have had sex changes or otherwise manipulated the sex organs. These people also deserve to have standard care and treatment like other groups, including hormone treatment, standard operations, etc. Yet the Draft Reproductive Health Protection Act still hinges on conventional views of sex which is underpinned by the notion that sex is meant for reproduction and that the protection of reproductive health is still primarily applicable for either women or men.

In addition, though the contents of the Bill deal with many other issues beyond health including sex life, culture and human rights, the MoPH alone is supposed to be the main enforcement unit; this makes it look less credible for the effective implementation. Indeed, the Bill should be developed as a collective platform of work among concerned agencies and aims to enhance cooperation to protect sexual and reproductive health rights.

Draft Promotion of Gender Equality and Opportunity Act B.E....

At present, the Bill has passed the third reading of the Council of State. A number of civil society organizations working on women's issues have many concerns to share. They would like to propose some revisions so that the Bill can help to effectively provide for gender equality and to make possible compliance with the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), to which Thailand is a state party.

In view of its intent, the Draft Promotion of Gender Equality and Opportunity Act could be cited as another sign

of progress in Thai law. It touches on issues concerning the equality of opportunity and gender equality, and specifies measures to promote equal opportunity while also criticizing gender-discriminatory approaches. It could set the standard for implementation to solve issues around gender inequality and to effectively promote sexual rights. Nevertheless, much of the explanation about sex still refers to biological sex including exclusively male and female aspects. As a result, perceptions of sexual violence and proposed resolutions were restricted to that limited framework. Instead, the perspective could have been broadened to cover more gender diversity.

As said, inequality and gender discrimination contribute to greater vulnerability to HIV transmission. Therefore, had the Bill embraced more gender diversity, rather than limit itself to the biological sex, it could have helped people with sexuality diverging from biological sex gain access to equal protection as well.

The two draft laws concerning sex are still found to be lacking as far as the gender equality of people with diverse sexuality (beyond male and female) is concerned. However, they signify some progress is being made by Thailand, and our more serious attention given to obligations concerning

women's rights. Still, these are lacking in terms of the inclusion of the rights of other genders; unlike the Yogyakarta Principles, which give importance to gender identity and sex life and consider them part of human rights.

The development of Thailand's laws concerning sexual rights, particularly the two aforementioned Bills, should be based on principles of human rights and sexual rights of/for all genders. Therefore, the drafts should be revised to become more comprehensive and reflect diverse sexual rights so they can be enforced, serve the best interest of all genders, and promote the sexual rights of everyone.

