

HIV GOVERNANCE THROUGH LAW: ACHIEVEMENTS AND CHALLENGES OF CHINA'S LEGAL ENVIRONMENT

Jinmei Meng*

Beijing College of Political Science and Law, Beijing, China

email: mengjinmei@yahoo.co.uk

ABSTRACT

Over the last two decades, the law relating to HIV in the People's Republic of China (PRC) has transitioned from denial towards positive responses to HIV. In the 1980–90s, the law provided for mandatory HIV testing and quarantine of people living with HIV/AIDS (PLWHA). It also banned HIV positive foreigners from entering or living in China. However, these defensive laws were ineffective in keeping HIV out of China and containing domestic HIV spread. In the mid-1990s, the number of HIV infections sharply increased with more and more commercial blood donors being found to be infected with HIV. In the late 1990s, the government began to learn how to develop and implement effective HIV strategies and initiated pilot behavioural intervention programs such as condom promotion for sex workers and clean needle exchange for injecting drug users (IDUs). In 2004, China abandoned mandatory HIV testing and HIV quarantine. In 2006, the country legalised behavioural interventions. The ban on the immigration of HIV positive foreigners into China was lifted in 2010. However, China still has a long way to go before achieving good HIV governance by law. The anti-prostitution and anti-drug laws impede behavioural interventions. The laws against sex work and drug use and parts of HIV policy do not conform to international human rights standards. The weak anti-discrimination legal mechanism fails to prohibit HIV-based discrimination. There is a lack of an enabling legal environment for full community participation in all phases of HIV responses. In addition, the state secrets law creates barriers to promoting government transparency and accountability in the area of HIV.

Keywords: HIV/AIDS, governance, law, achievement, challenge, China

* Jinmei Meng is an associate professor at Beijing College of Political Science and Law. She has been a lawyer in China since 1993 and is currently a lawyer in Beijing Great Wall Law Firm. She received a bachelor degree in law in 1987 and a master degree in law in 1991. Her degree of PhD in sexuality, health and culture was awarded by the University of New South Wales, Australia in 2011. She also works at the National Centre in HIV Social Research, the University of New South Wales, as a coordinator of China-related international projects.

INTRODUCTION

The first HIV/AIDS case of China was reported in 1985. In 1985–2009, the accumulated number of reported HIV infections in China was 371,037 (China State Council AIDS Working Committee Office; U.N. Theme Group on AIDS in China, Bill & Melinda Gates Foundation China Office 2010; The Ministry of Health of the PRC 2010). The annually reported new HIV infections dramatically increased from less than 10 in 1985–88 to over 48,000 in 2009 (China State Council AIDS Working Committee Office; U.N. Theme Group on AIDS in China; Bill & Melinda Gates Foundation China Office 2010). The 2010 estimate of the number of people living with HIV/AIDS (PLWHA) was 740,000 (560,000–920,000). HIV prevalence among the population as a whole was 0.057% (0.042%–0.071%), with some key regions such as Sichuan, Yunnan and Guangxi experiencing high HIV prevalence. Overall, China has a low prevalence of HIV (The Ministry of Health of the PRC 2010).

Behavioural interventions have been widely conducted for groups vulnerable to HIV, including men who have sex with men (MSM), sex workers and injecting drug users (IDUs). These interventions focus on promotion of HIV awareness and condom use, clean needle exchange, and methadone treatment.

China has introduced considerable legislation for HIV prevention and treatment. Since 1985, China has enacted over one hundred pieces of specific legislation entitled with the acronym HIV/AIDS. They are made by various government agencies both at the central and local levels and cover all major aspects of HIV from HIV surveillance, testing and treatment to AIDS care. In March 2006, the State Council of China announced the Regulations on AIDS prevention and treatment (The State Council of the PRC 2006). Specific local HIV/AIDS legislation has been introduced in Yunnan, Shanxi, Hainan, Hunan, Juangsu, Zhejiang, Sichuan provinces, Guangxi Zhuang Autonomous Region, Xinjiang Uygur Autonomous Region and Shanghai.

It should be remarked that legislative authority in China is widely dispersed. The national legislative branch of China is the National People's Congress and its Standing Committee. Apart from this legislative instrument, administrative departments such as the State Council of the PRC and the administrative departments under the State Council have inherent authority to adopt administrative measures, to enact administrative rules and regulations and to make decisions and issue orders. Similarly, local people's congresses and local governments also enjoy inherent law-making power. Chinese law includes not only legislation formulated by people's congresses

but also regulations, measures, notices, decisions and explanations made by administrative departments.

1980–90S: CONTROL LEGISLATION TO STOP HIV TRANSMISSION

In 1985, an Argentine tourist from the United States of America died of AIDS in a Beijing hospital. It was the first reported HIV case in China. During the initial phase of HIV in 1985–88, less than ten HIV infected persons were reported annually and the majority of them were foreigners and Chinese who were infected by imported blood products or who had been infected while overseas.

The Chinese government responded promptly to the HIV threat. In 1986–91, legislation was quickly introduced to stop HIV from entering China, as shown in the following table.

Table 1: Major legislative documents related to HIV, 1985–91.

Year	Title	Main contents
1986	Circular on banning importing factor VIII and other blood product (The Ministry of Health of the PRC. The General Administration of Customs of the PRC 1986).	Banning the import of all blood products except for a small quantity of human serum albumen.
	Circular on enhancing HIV/AIDS surveillance of international students (The National Education Committee of the PRC. The Ministry of Health of the PRC 1986).	All applicants for international student visa must submit a health report including HIV test results. HIV positive applicants must not be granted a visa.
	Circular on enhancing HIV/AIDS monitoring and management (The State Council of the PRC 1986).	HIV positive people must be quarantined and treated in isolation.
	Frontier health and quarantine act of the People's Republic of China (The Standing Committee of the National People's Congress of the PRC 1986)	Strict frontier control of infectious diseases including infectious diseases for quarantine and for surveillance.
1987	Regulations on international visitors requirements for health certificate (The Ministry of Health of the PRC. The Ministry of Public Security of the PRC 1987).	HIV positive foreigners were prohibited from entering or living in China.
	Regulations on HIV/AIDS surveillance and management (The Ministry of Health of the PRC 1987).	Mandatory reporting of people living with HIV or of people suspected of HIV infection. Quarantine of people living with HIV.
1989	Law on prevention and treatment of infectious diseases (The Standing Committee of the National People's Congress of the PRC 1989).	Classification of HIV as an infectious disease. Mandatory HIV testing and quarantine.
1990	Decision on the prohibition of narcotic drugs (The Standing Committee of the National People's Congress of the PRC 1990).	Illegality of drug use. Punishment against drug crimes and drug use.
1991	Decision on the Prohibition of prostitution (The Standing Committee of the National People's Congress of the PRC 1991).	All detained sex workers and their clients were required to undertake mandatory testing of sexually transmitted infections including HIV.

However, these defensive legal responses to HIV failed to keep HIV out of China and prevent its local spread. It appears likely that the early controlling legislation drove high-risk groups away from HIV testing and forced them to conceal their HIV status, for fear of possible disclosure and harsh treatment (Wu et al. 2007). In October 1989, 146 HIV cases were reported among IDUs in Yunnan Province. Among the 171 new HIV infections in 1989, HIV positive Chinese outnumbered HIV positive foreigners found in China for the first time (Wang 2007). In 1992 and 1993, the number of annual reported HIV cases was 261 and 274 respectively (China State Council AIDS Working Committee Office; U.N. Theme Group on AIDS in China; Bill & Melinda Gates Foundation China Office 2010).

FROM MID-1990S: LEGAL TRANSITION FROM DENIAL TO BEHAVIOURAL INTERVENTION

The attitude of the Chinese government towards HIV started to shift beginning in the mid-1990s as a result of the rapid spread of HIV in China, scientific evidence of effective HIV prevention by behavioural intervention for high-risk groups and international pressure.

In the mid-1990s, the number of HIV infections sharply increased. In 1995, there were 1,567 reported new HIV infections, almost three times the figure of 531 in 1994 (State Council AIDS Working Committee Office in China; U.N. Theme Group on AIDS in China 2007). In the same period, HIV was discovered among commercial plasma donors in provinces of eastern and central China. To strengthen blood safety, the government issued the Regulations on the management of blood products (The State Council of the PRC 1996) and the Law on blood donation (The Standing Committee of the National People's Congress of PRC 1997). The two documents banned illegal blood donation and underground blood collection. By 1998, HIV cases were reported in all provinces, autonomous regions and municipalities directly under the central government (Wu et al. 2007). China could no longer ignore the rapid spread of HIV among the Chinese population.

China began to study effective international responses to HIV (Wu et al. 2007). Study tours were organised to visit countries such as Australia, Thailand and African countries. Workshops were held in China for key government agencies to study evidence-based HIV behavioural intervention strategies such as promotion of condom use and clean needle exchange.

Subsequently, the government initiated pilot behavioural intervention programs. In 1996–97, following the success of HIV-related behavioural

intervention in Thailand, China launched its first intervention projects to promote safe sex practices for female sex workers in Yunnan Province (Wu et al. 2007). These projects incorporated the promotion of HIV awareness and condom use. The successful experience from these projects resulted in the Medium- and long-term plan for HIV/AIDS prevention and control in China (1998–2010) (The Ministry of Health of the PRC et al. 1998). It mapped out ambitious goals, such as limiting the numbers of HIV infection to within 1.5 million by 2010, establishing a comprehensive HIV prevention system led by the government with the participation of all levels of society, promoting HIV awareness and conducting behavioural intervention for high-risk groups.

Following the Medium- and long-term plan, more behavioural intervention measures were introduced. In 1999, the first pilot needle-exchange programme was implemented in Yunnan Province and the Guangxi Zhuang Autonomous Region (Wu et al. 2007). In 1999–2001, the World AIDS Foundation supported a five-site trial of HIV-related behavioural interventions for sex workers (ibid.).

International organisations on combating HIV in China played an important role in developing Chinese HIV strategies. In 2002, the Joint United Nations Program on HIV/AIDS (UNAIDS) pointed out that laws and regulations based on fear and prejudice had contributed to fuelling the epidemic instead of curbing it; and that unless China adopted an effective HIV policy, the nation could have 10 million people living with HIV by 2010 (The U.N. Theme Group on HIV/AIDS in China 2002). This prediction had been repeatedly used in discussions about the future of HIV in China, which eventually made the government reconsider its controlling HIV law and policy and to adopt innovative strategies.

In 2003, China introduced the "Four Free and One Care" (*simian yiguanhuai*) HIV policy. This policy provides for free anti-HIV drugs, voluntary counseling and testing to AIDS patients in need of financial assistance living in either urban or rural areas, and free anti-HIV drugs to HIV infected pregnant women so as to prevent mother-to-child transmission. This policy also provides HIV testing of newborn babies, free schooling for children orphaned by AIDS, and medical care and economic assistance to the households of PLWHA.

In 2004, China made significant progress in its responses to HIV. It established the State Council AIDS Working Committee as the national committee for HIV/AIDS prevention, treatment and care. Pilot methadone maintenance treatment programmes were implemented in clinics in five

provinces (Wu et al. 2007). Special behavioural intervention working teams were set up in centres of disease control at all administrative levels, with a view to conducting nationwide behavioural interventions for high risk groups (The Ministry of Health of the PRC 2004a). In addition, China also revised the Law of prevention and control of infectious diseases (The Standing Committee of the National People's Congress of the PRC 2004). Mandatory HIV testing for those suspected of HIV infection and quarantine of people living with HIV/AIDS were revoked. Rules for voluntary HIV counseling and testing were formulated in the Administrative measures for free voluntary HIV counseling and testing (The Ministry of Health of the PRC 2004b).

However, behavioural interventions such as promotion of condom use among sex workers, clean needle exchange and methadone treatment for injecting drug users still remain controversial under the law (Meng 2011). Sex work and drug use are legal offences. Health workers were doubtful about the legal issues impacting behavioural interventions for sex workers and drug users (China National Centre for STI & HIV Prevention and Treatment 2007).

It was encouraging that in 2006 the Regulations on AIDS prevention and treatment legalised behavioural intervention measures such as promotion of condom use (Articles 28, 29, 61, 63) and methadone-maintenance treatment for IDUs (Article 63). These regulations have been hailed as the culmination of Chinese responses to HIV (Wu et al. 2007).

In a further positive act, in 2010 China revised the Rules for the implementation of the frontier health and quarantine law (The State Council of the PRC 2010a) and the Rules for the implementation of the law on border control of the exit and entry of aliens (The State Council of the PRC 2010b) and lifted the ban on the immigration of foreigners living with HIV.

China has emerged from a period of the denial of HIV and entered into a stage of pragmatic response to HIV. Behavioural intervention programmes have taken effect in order to contain HIV. Since 2005, the number of people newly infected with HIV has continued to decrease from 70,000 in 2005 to 50,000 in 2007 and 48,000 in 2009 (China State Council AIDS Working Committee Office; U.N. Theme Group on AIDS in China; Bill & Melinda Gates Foundation China Office 2010). The growth rate of newly reported HIV infection cases declined from 9.0% in 2006 to 5.8% in 2009 (*ibid.*).

Despite the progress that China has made in using law to contain HIV, it still is some distance from good HIV governance by law, which requires not only good public health law on HIV, but also fostering an enabling legal environment in which to protect the human rights of groups

vulnerable to HIV, to prohibit HIV-based discrimination, to encourage full community participation in all phases of HIV responses and to promote transparency and accountability in HIV responses (The U.N. Theme Group on HIV/AIDS in China 2002). However, a number of challenges to achieving such good governance in China remain.

CHALLENGE ONE: BEHAVIOURAL INTERVENTION REGULATIONS VS. LAWS AGAINST DRUG USE AND PROSTITUTION

China has promulgated prohibitive laws against sex work and drug use. Homosexual behaviour is not illegal in China. It is neither a crime nor an administrative offence. However, sex workers and drug users face severe legal punishment. Prostitution and drug use are administrative offences, not crimes. Major administrative sanctions against sex workers include a fine of up to 5,000 Yuan, detention of up to 15 days, custody and education (shourong jiaoyu) and re-education through labour (laodong jiaoyang). Activities relating to prostitution such as pandering, organising and housing prostitution are crimes. The police may put into compulsory detoxification centres drug users who refuse community-based detoxification, who fail to abstain from drugs or fail to fulfill their obligations while servicing community-based detoxification, or continue to use drugs after the completion of community-based or compulsory detoxification.

Enforcement of the anti-prostitution law often hinders behavioural interventions for sex workers. Condom promotion is a key mode of behavioural intervention. The Regulations on AIDS prevention and treatment requires that condoms and/or condom vending machines must be provided in specific public places such as hotels and recreational establishments. However, anti-prostitution actions by police often threaten the promotion of condom use (Meng 2011). In practice, police often question sex worker suspects about their reasons for carrying condoms. In this way they pressure suspects so as to make them confess to being sex workers. It discourages sex workers from carrying and using condoms. In addition, crackdowns on prostitution drive the sex industry underground and present obstacles to behavioural intervention (ibid). Health workers have to stop conducting behavioural interventions for sex workers during crackdowns. After crackdowns, health workers often cannot locate sex workers and sex worker peer educators who were trained for HIV

prevention because they may have been detained by the police or have migrated elsewhere (*ibid*).

Enforcement of anti-drug law creates barriers to effective harm reduction services for IDUs. Clean needle exchange is affected by the anti-drug law and police actions against drugs and drug abuse. Since 1999, clean needle exchange as a mode of behavioural intervention has been carried out in China. However, due to the legal controversy surrounding needle exchange, the Regulations on AIDS prevention and treatment failed to legalise this highly effective kind of behavioural intervention. Rules of evidence in law state that needles are certainly the tools for injecting drug use. Health workers at clean needle exchange sites specially approved by government may distribute clean needles to IDUs without legal risks. Persons other than health workers may face the legal risk of being seen to encourage drug abuse offences if they hand out clean needles to IDUs. Similarly, police targeting of methadone clinics to crackdown on drug crimes or to investigate drug offences poses a threat to methadone services (Yin et al. 2010).

China has adopted mandatory registration and mandatory urine testing of drug users. Enforcement of these two anti-drug regulations may prevent potential IDUs from accessing clean needles and methadone services because they fear being registered, then harassed by the police (Yin et al. 2010). More effective training is necessary for the police to better understand behavioural interventions and to support such interventions.

Where there are conflicts between the prohibitive laws against prostitution and drug use on the one hand and the specific legislation on HIV prevention on the other, the former always takes priority because it has a more powerful legal effect. In China, the descending order of legal effect of different legislation begins with constitutional law, followed by laws made by the National People's Congress and its Standing Committee, then administrative regulations introduced by the State Council of the PRC and local regulations formulated by local congresses, and finally rules of departments and rules of local government (The National People's Congress of the PRC 2000).

The top specific legislation on HIV is the Regulations on AIDS prevention and treatment, an administrative regulation issued by the State Council. The majority of specific legislation on HIV is formulated by administrative departments such as the Ministry of Health. In contrast, the key pieces of anti-prostitution and anti-drug legislation are made by the National People's Congress (NPC) or its Standing Committee, such as Criminal law (The National People's Congress of the PRC 1997), Public order administrative punishment law (The Standing Committee of the

National People's Congress 2005) and the Law on the prohibition of drugs (The Standing Committee of the National People's Congress of the PRC 2007). The hierarchical order of China's law making bodies (from high to low: NPC→State Council→Ministry of Health and local bodies) has predetermined the weak effectiveness of regulations issued by the bodies ranked lower in the hierarchy, especially when these contradict laws promulgated by bodies ranked higher. In other words, the legal effect of this legislative arrangement determines that the enforcement of anti-prostitution and anti-drug laws takes priority over the enforcement of HIV-related public health law, a ranking which undermines the efficacy of responses to HIV.

CHALLENGE TWO: THE INTERNATIONAL HUMAN RIGHTS REGIME VS. PUNITIVE MEASURES AGAINST VULNERABLE GROUPS

The protection of human rights is essential in the safeguarding of human dignity in the context of HIV and in ensuring an effective, rights-based response to HIV (UNAIDS 2006). An effective response requires the implementation of all human rights in accordance with existing human rights standards.

The United Nations has developed the International guidelines on HIV/AIDS and human rights (UNAIDS 2006). The Guidelines stress State responsibility to translate international human rights norms into its own laws, policies and practices in the context of HIV. With regard to groups vulnerable to HIV, guideline four addresses a State's responsibility to review and reform criminal law and correctional systems so as 'to ensure these laws are consistent with international human rights obligations and are not misused in the context of HIV or targeted against vulnerable groups' (17).

The Universal declaration of human rights (UDHR) specifies that everyone has the right to liberty and security of person (The United Nations 1948). The International covenant on civil and political rights (ICCPR) explicitly prohibits arbitrary arrest or detention (The United Nations 1966). China signed the ICCPR in 1998 and has an obligation not to defeat the object and purpose of the ICCPR.

However, Chinese law fails to meet international human rights standards on the protection of personal freedom and security. Chinese law on administrative detention permits non-judicial departments to deprive or restrict the freedom of a person without trial. Punitive administrative

detention in the absence of crime is in the nature of arbitrary deprivation of personal freedom and is incompatible with international human rights standards. China has suppressive laws against groups vulnerable to HIV. Homosexual behaviour is not illegal in China; however, MSM (men who have sex with men) often face police crackdowns and arbitrary detention for engaging in 'immoral' acts; sex workers and drug users in turn face severe legal punishment. They are subjected to lengthy punitive administrative detention without charge. Administrative Custody and Education (shourong jiaoyu) was introduced especially to punish participants in the sex industry, such as sex workers and their clients. The term of Custody and Education is from six months to two years. The time limit for compulsory detoxification is from one year to three years. By the end of 2009, there were 1.335 million registered drug users and 179 compulsory detoxification centers (Office of China National Narcotics Control Commission 2010). In 2009, approximately 173,000 drug users were put into compulsory detoxification centers (Office of China National Narcotics Control Commission 2010).

Additionally, Chinese HIV policy of mandatory HIV testing is incompatible with international human rights standards. Although in 2004 China removed mandatory HIV testing and quarantine of PLWHA from the Law of prevention and treatment of infectious diseases, it has not fully abandoned mandatory HIV testing. According to the 2004 Notice on thorough HIV screening of detainees in prisons, centres of re-education through labour and centres of custody and education (The Ministry of Health of the PRC 2004c), between November 2004 and March 2005 mandatory HIV testing was conducted in all prisons and detention centres. In 2005, two ministries jointly issued the Provisional work plan on HIV testing of detainees in prisons and all incarceration establishments (The Ministry of Health of the PRC; The Ministry of Public Security of the PRC 2005). This work plan required that from 2006 onward monthly mandatory HIV testing must be administered to newly-admitted detainees.

Mandatory HIV testing in prisons and detention centres does not measure up to international human rights standards. Loss of liberty does not mean loss of human rights, including the right to health (UNAIDS 1999). Mandatory HIV testing violates human rights and stigmatises HIV-positive prisoners (UNAIDS 1999).

CHALLENGE THREE: ANTI-DISCRIMINATION LAW VS. WEAK LAW ENFORCEMENT

Non-discrimination is an important component of an effective response to HIV. HIV-related discrimination makes people reluctant to undergo HIV testing, prevents them from accessing information about HIV, discourages them from disclosing their HIV status even to family members and sexual partners, makes them much less likely to access prevention and receive HIV care and support and may eventually lead to a higher risk of HIV transmission (UNAIDS 2005).

HIV-based discrimination violates the human rights of PLWHA and affects their well-being. It should be prohibited. International human rights instruments such as UDHR and ICCPR state that all human beings have the right to equal protection before the law and freedom from discrimination on any grounds such as race, colour, sex, language, religion, political or other opinions, national or social origin, property, birth or other status. HIV is one of the 'other statuses' referred to in the general non-discrimination clauses of international human rights instruments. United Nations agencies have adopted a series of resolutions on HIV-related human rights, such as the Protocol for the identification of discrimination against people living with HIV (UNAIDS 2000) and the Protection of human rights in the context of HIV and AIDS (Office of the High Commissioner for Human Rights of the United Nations 2001). It has been stated that the term 'other status' used in the general non-discrimination clauses of international human rights instruments should be interpreted to cover health status, such as HIV/AIDS (Office of the High Commissioner for Human Rights of the United Nations 2001). PLWHA have the right to be free from discrimination.

HIV-related discrimination can be instigated by direct acts or by omission (UNAIDS 2000). Discrimination by direct acts could include compulsory HIV testing, the prohibition of HIV infected people from some occupations or the isolation of HIV infected persons, while discrimination through omission may be the withholding of medical treatment, the failure to protect the confidentiality of HIV status and the failure to redress PLWHA. Such discrimination may occur in family, community and institutional settings. It may also be institutionalised in national laws and policies (UNAIDS 2000).

Guideline five of the International guidelines on HIV/AIDS and human rights (UNAIDS 2006) states that "States should enact or strengthen anti-discrimination and other protective laws to protect vulnerable groups,

people living with HIV and people with disabilities from discrimination in both public and private sectors."

Chinese law specific to HIV has provided for the principle of non-discrimination against HIV. Article 3 of the Regulations on AIDS prevention and treatment and decrees of the State Council states that PLWHA and their family members must not be discriminated against and that they have rights equal to other people. Non-discrimination against HIV has also been provided in the HIV-related legislation made by local governments.

However, the enforceability of the legal provisions on the prohibition of HIV-related discrimination is questionable. These provisions are highly abstract, resembling political declarations. They cannot be applied to individual discrimination cases. Victims of HIV discrimination have to seek protection from other laws such as employment law or public health law and often find that there are insufficient concrete provisions on available legal remedies for them. The legal responsibilities of hospitals that refuse to admit PLWHA are unclear in public health law. Similarly, in employment law, HIV-related discrimination victims who are denied employment opportunities cannot claim compensation from potential employers who refuse to employ them because no employment contract has yet been established between them.

HIV-related discrimination is widespread in China and results in considerable adversity for those who are discriminated against. One 2009 investigation showed that of 2,096 people living with HIV/AIDS, 41.7% had experienced HIV-based discrimination (The Centre for Social Development in the Party School of the Central Committee of the Communist Party of China 2009). Among these victims, 12.1% had at least one experience of being denied medical treatment; 277 were denied employment; 305 were forced to change jobs; and 70 were denied promotion. Many victims of HIV-related discrimination do not trust the law. Among the 2,096 people, only 110 tried to seek legal remedies for discrimination. Of the 110, only 19.8% said they had received proper remedies. 68.3% stated their cases were unresolved (The Centre for Social Development in the Central School of the Communist Party of China 2009).

The Chinese anti-discrimination legal mechanism is rather weak and does not specify a clear legal definition of discrimination. There is no specific government agency dealing with non-discrimination and equal opportunity (Meng 2010). To establish an effective anti-discrimination legal system would be one condition enabling the prohibition of HIV-related discrimination.

CHALLENGE FOUR: DEMAND FOR CIVIL SOCIETY PARTICIPATION VS. RESTRICTIVE LEGAL FRAMEWORK

A rights-based approach to HIV calls for the full participation of groups vulnerable to HIV in all phases of response to HIV, from policy or program design to implementation and evaluation (UNAIDS 2006). The contribution of community-based organisations, non-governmental organisations (NGOs) and AIDS organisations is invaluable because their demand for effective responses to AIDS arises from knowledge and experience (UNAIDS 2006).

The Chinese government has reportedly acknowledged that the involvement of civil society, broader in its scope and depth, has become an important and indispensable force in the national responses to HIV. The number of community-based groups in the area of HIV increased to over 400 by 2007 (State Council AIDS Working Committee Office in China; U.N. Theme Group on AIDS in China 2007). However, it is also reported that the involvement of civil society organisations is limited; there are major shortcomings in their capacity; and experience is unsatisfactory (State Council AIDS Working Committee Office in China; U.N. Theme Group on AIDS in China 2007).

This paper argues that the weak capacity of Chinese communities for dealing with issues such as AIDS is a result of China's unsupportive legal system vis-à-vis civil society. To maintain the leadership of the Communist Party of China, the government has adopted a highly constraining strategy to control the development of civil society. Chinese law reflects the political exigencies of the government.

Chinese law provides three types of not-for-profit NGOs: social organisations (*shehui tuanti*), civil non-enterprise entities (*minban feiqiye danwei*) and foundations (*jijin hui*). Three administrative regulations have been promulgated to regulate these NGOs, including Administrative regulations on registration of social organisations (The State Council of the PRC 1998a), Provisional measures for registration of civil non-enterprises entities (The State Council of the PRC 1998b), and Administrative regulations for foundations (The State Council of the PRC 2004).

According to these regulations, all applicants for NGO registration must have an official organisation as their sponsor. Sponsors must promise in writing that they will supervise the sponsored NGOs and take legal responsibilities for them if necessary. In practice, very few official organisations are willing to be sponsors of NGOs due to the high legal risks.

Applicants must meet other strict requirements, such as the minimum funding of 100,000 Yuan for a nationwide social organisation and 30,000 Yuan for a regional one. Activities of NGOs are highly controlled. All NGOs must abide by Chinese laws and policies. They must not endanger the national unity, ethnic unity and national security; nor should they harm the national interest or the interests of other organisations and citizens. In addition, NGOs must not contravene the norms of socialist morality.

Such a harsh legal environment surrounding NGOs has adversely affected the development of civil society. It is rather difficult to register as an NGO. The majority of NGOs in the HIV area are unregistered working teams or loose associations. Unregistered grassroots NGOs are not legal entities under the law and do not have their own bank accounts. This makes it difficult to receive donations. In China, registered NGOs are exempt from business taxes and value-added tax. However, unregistered NGOs and NGOs which have to be registered as companies are not entitled to such tax exemptions. Instead, they have to pay high taxes, the payment of which is potentially detrimental to the viability of their operations.

Full participation of high-risk groups in HIV campaigns demands the empowerment of their own communities. In China, there are no meaningful political or legal mechanisms empowering civil society, let alone empowering communities of controversial groups vulnerable to HIV such as sex workers and drug users. The lack of an enabling legal system for civil society can reduce the efficacy of responses to HIV. China must foster a tolerant legal environment within which civil society possesses the power to prevent HIV transmission.

CHALLENGE FIVE: LACK OF TRANSPARENCY AND ACCOUNTABILITY

Accountability requires that institutions and individuals be answerable to their commitments and responsibilities. Transparency demands full information disclosure to the public in a comprehensive, accessible and timely manner. Greater transparency helps to achieve better accountability, but it does not necessarily result in accountability. Accountability requires bearing the responsibility for unfulfilled commitments.

In terms of HIV, accountability relates to many parties such as governments, NGOs, donors to HIV projects and other stakeholders. Given the great imbalance between the powerful Chinese government and the

weak groups vulnerable to HIV, the need for governmental transparency and accountability must be stressed.

Chinese law on state secrecy has negative implications for promoting government transparency and accountability. The Law of the People's Republic of China on guarding state secrets (The Standing Committee of the National People's Congress of PRC 1988) stipulates that state secrets are matters related to state security and national interests only to be known by specific people within a specific time; that state secrets not only involve national defense and security, but also include secret matters related to national economic and social development. This vague definition allows for a broad range of economic and social development information to be encompassed within the coverage of state secrets and thus kept from public view.

In the context of HIV, the law of state secrets has been used by the Chinese authorities to restrict unwanted investigation of the HIV epidemic. According to the Regulations on state secrets and the specific scope of each level of secrets in public health work (The Ministry of Health of the PRC. The State Secrecy Administration of the PRC 1996), the number of HIV infections is a state secret which should be kept confidential until disclosure is authorised. Monthly, quarterly and annual analysis of infectious diseases including HIV also belongs to state secrets. They are prohibited from any unauthorised disclosure.

A typical case relates to the blood scandal in Henan province. In the 1990s, the Henan government developed a blood economy and encouraged villagers to sell their blood. The blood of villagers was collected and pooled, and the lucrative plasma was separated from the pooled blood. The remaining pooled blood was re-injected into the donors to prevent anemia. Thousands of villagers in Henan contracted HIV through contaminated pooled blood (Human Rights Watch 2003). To date, there have been no prosecutions of officials for the blood scandal. Conversely, Yanhai Wai, an AIDS activist, was detained for being suspected of leaking state secrets by making public a government report on the HIV epidemic in Hennan and by posting it on the Internet (Human Rights in China 2007). Due to international pressure, Wan was later released without being charged. In recent years, detention for leaking HIV-related state secrets has rarely occurred. However, if it is needed, authorities can still use the law as a deterrent to warn off or punish individuals who demand government transparency and accountability for HIV-related misconduct.

In 2007, China issued the Regulations on government information transparency (The State Council of the PRC 2007) to promote government transparency. It states that government should actively disclose public health-related information. It may be an indication of greater transparency in government. However, it also requires the censorship of information before disclosure in accordance with the state secrets law, which suggests that this regulation is secondary to the state secrets law. The law on state secrets creates barriers to transparency in government. The state secrets law should be revised to promote government transparency and accountability. Information on public health is not a state secret. It should be unconditionally available to the public.

CONCLUSION

By legalising behavioural interventions for HIV prevention, China has made progress in the governance of HIV by law. However, it is still far from achieving effective HIV governance by law due to the lack of an enabling legal environment for rights-based responses to HIV. There are suppressive laws, such as the prohibitive laws against sex work and drug use, the restrictive legislation on civil society, the weak anti-discrimination law, and the controlling state secret law. These laws not only conflict with international human rights standards, but also undermine the work of HIV prevention, treatment and care. Law reform is needed for China to effectively respond to HIV.

REFERENCES

- China State Council AIDS Working Committee Office, U.N. Theme Group on AIDS in China and Bill & Melinda Gates Foundation China Office. 2010. *Eye on China: Responses and Challenges in HIV/AIDS*. A report presented at the XVIII International AIDS Conference, Vienna, Austria, 18–23 July.
- China National Centre for STI & HIV Prevention and Treatment. 2007. *Collection of Reports and Typical Cases on HIV Transmission through Sex and High-Risk Behavioural Interventions in China*. Beijing.
- Human Rights in China. 2007. *State Secrets: China's Legal Labyrinth*.
- Human Rights Watch. 2003. *Locked Doors: The Human Rights of People Living with HIV/AIDS in China*.
- Meng, J. 2010. *Can Chinese Law Effectively Prohibit HIV-related Discrimination?* Paper presented at the XVIII International AIDS Conference, Vienna, Austria, 18–23 July.

- _____. 2011. *HIV, Sex Work and the Law in China: Decriminalization of Sex Work as a Public Health and Human Rights Strategy*. PhD thesis, The University of New South Wales.
- Office of China National Narcotics Control Commission. 2010. *China Drug Report 2010*. Beijing.
- Office of the High Commissioner for the Human Rights of the United Nations. 2001. *The Protection of Human Rights in the Context of HIV and AIDS*. Geneva.
- State Council AIDS Working Committee Office in China. U.N. Theme Group on AIDS in China. 2007. *A Joint Assessment of HIV/AIDS Prevention, Treatment and Care in China*. Beijing.
- The Centre for Social Development in the Central School of the Communist Party of China. 2009. *Report on HIV-based Discrimination in China*. Beijing.
- The Ministry of Health of the PRC. 1986. *The General Administration of Customs of the PRC. 1986. Circular on Banning Importing Factor VIII and Other Blood Products*. Beijing.
- _____. 1987a. *Regulations on HIV/AIDS Surveillance and Management*. Beijing.
- _____. 1987b. *Regulations on International Visitors' Requirements for Health Certificates*. Beijing.
- _____. 2004a. *Announcement of the Establishment of Working Teams of Behavior Intervention for High-risk Groups in CDCs at all Levels*. Beijing.
- _____. 2004b. *Administrative Measures for Free Voluntary HIV Counseling and Testing*. Beijing.
- _____. 2004c. *Notice on through HIV Screening of Detainees in Prisons, Centres of Re-education through Labour and Centres of Custody and Education*. Beijing.
- _____. 2010. *China 2010 UNGASS Country Progress Report (2008–2009)*. Beijing.
- The Ministry of Health of the PRC and The Ministry of Public Security of the PRC. 2005. *Provisional Work Plan on HIV Testing of Detainees in Prisons and All Incarceration Establishments*. Beijing.
- The Ministry of Health of the PRC, The National Population and Family Planning Commission of the PRC, The Ministry of Science and Technology of the PRC and The Ministry of finance of the PRC. 1998. *The Medium- and Long-term Plan for HIV/AIDS Prevention and Control in China (1998–2010)*. Beijing.
- The Ministry of Health of the PRC and The State Secrecy Administration of the PRC. 1996. *Regulations on State Secrets and the Specific Scope of Each Level of Secrets in Public Health Work*. Beijing.
- The National Education Committee of the PRC and The Ministry of Health of the PRC. 1986. *Circular on Enhancing HIV/AIDS Surveillance of International Students*. Beijing.

- The National People's Congress of the PRC. 1997. *Criminal Law of the People's Republic of China*. Beijing.
- _____. 2000. *Legislation Law of the People's Republic of China*. Beijing.
- The Standing Committee of the National People's Congress of the PRC. 1986. *Frontier Health and Quarantine Act of the People's Republic of China*. Beijing.
- _____. 1988. *Law on Guarding State Secrets*. Beijing.
- _____. 1990. *Decision of the Standing Committee of the National People's Congress on the Prohibition of Narcotic Drugs*. Beijing.
- _____. 1991. *Decision of the Standing Committee of the People's Congress on the Prohibition of Prostitution*. Beijing.
- _____. 1997. *The Law of Blood Donation of the People's Republic of China*. Beijing.
- _____. 2004. *Law of Prevention and Treatment of Infectious Diseases*. Beijing.
- _____. 2005. *Public Order Administrative Punishment Law of the PRC*. Beijing.
- _____. 2007. *The Law on Prohibition of Drugs*. Beijing.
- The State Council of the PRC. 1986. *Circular on Enhancing HIV/AIDS Monitoring and Management*. Beijing.
- _____. 1996. *Regulations on the Management of Blood Products*. Beijing.
- _____. 1998a. *Administrative Regulations on Registration of Social Organizations*. Beijing.
- _____. 1998b. *Provisional Measures for Registration of Private Non-enterprise Entities*. Beijing.
- _____. 2004. *Administrative Regulations for Foundations*. Beijing.
- _____. 2006. *Regulations on AIDS Prevention and Treatment*. Beijing.
- _____. 2007. *Regulations on Government Information Transparency*. Beijing.
- _____. 2010a. *Rules for the Implementation of the Frontier Health and Quarantine Law*. Beijing.
- _____. 2010b. *Rules for Implementing the Law on Border Control of the Exit and Entry of Aliens*. Beijing.
- The United Nations. 1948. *Universal Declaration of Human Rights*. Geneva.
- _____. 1966. *International Covenant on Civil and Political Rights*. Geneva.
- The U.N. Theme Group on HIV/AIDS in China. 2002. *HIV/AIDS: China's Titanic Peril - 2001 Update of the AIDS Situation and Needs Assessment Report*. Beijing.
- UNAIDS. 1999. *Handbook for Legislators on HIV/AIDS, Law and Human Rights*. Geneva.
- _____. 2000. *Protocol for the Identification of Discrimination against People Living with HIV*. Geneva.
- _____. 2005. *HIV-related Stigma, Discrimination and Human Rights Violations: Case Studies of Successful Programs*. Geneva.
- _____. 2006. *International Guidelines on HIV/AIDS and Human Rights - 2006 Consolidated Version*. Geneva.

- Wang, L. 2007. Overview of the HIV/AIDS Epidemic, Scientific Research and Government Responses in China. *AIDS* 21(Suppl 8): S3–S7.
- Wu, Z., Sullivan, S. G., Wang, Y., Rotheram-Borus, M. J. and Detels, R. (2007). Evolution of China's Response to HIV/AIDS. *The Lancet* 369(9562): 679–690.
- Yin, W. et al. 2010. Scaling up the National Methadone Maintenance Treatment Program in China: Achievements and Challenges. *International Journal of Epidemiology* 39(Suppl 2): ii29–37.