

# LAW, ETHICS AND HIV/AIDS IN SOUTH ASIA

A study of the legal and social environment of the  
epidemic in Bangladesh, India, Nepal and Sri Lanka



United Nations Development Programme

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The research upon which this report is based was undertaken by The Institute of Law and Ethics in Medicine (TILEM), National Law School of India, Bangalore, India; Action Research Study on the Institutional Development of Human Rights in Bangladesh (IDHRB), Ministry of Law, Justice and Parliamentary Affairs and UNDP Bangladesh Country Office Joint Project, Dhaka, Bangladesh; Centre for Policy Alternatives (CPA), Colombo, Sri Lanka; and Forum for Women, Law and Development (FWLD), Kathmandu, Nepal, under the overall coordination and guidance of the UNDP Regional HIV and Development Programme for South and Southwest Asia.

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# Contents

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<b>FOREWORD</b>	<b>4</b>
<b>INTRODUCTION</b>	<b>6</b>
<b>THE STUDY</b>	<b>9</b>
<b>THE FINDINGS: LAW AND LEGAL POLICY</b>	<b>13</b>
<b>THE FINDINGS: THE SOCIAL ENVIRONMENT OF HIV/AIDS IN SOUTH ASIA</b>	<b>23</b>
<b>THE FINDINGS: SEXUALITY AND HIV/AIDS VULNERABILITY IN SOUTH ASIA</b>	<b>29</b>
<b>SOUTH ASIA IN PERSPECTIVE: THE EXPERIENCE IN CHINA</b>	<b>31</b>
<b>PRIORITIES FOR HIV/AIDS LAW AND POLICY IN SOUTH ASIA</b>	<b>35</b>
<b>ANNEXURE</b>	<b>41</b>

## Foreword

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**W**e know that in South Asia the HIV epidemic is spreading within an environment of stigma, discrimination and denial. People living with HIV/AIDS (PLWHA) face serious rights violations. Many are tested without consent and their confidentiality is often breached, leading to harassment and rejection by families and communities. HIV positive people have lost their livelihoods and homes and some have been subjected to violent attacks. Children have been prevented from attending school and many PLWHA have been denied access to basic and life saving medical care.

The rights violations against PLWHA and vulnerable groups are part of a broader environment of social and gender inequality, marginalisation and discrimination in South Asia, which is providing perfect conditions for the epidemic to spread. For example, the vast majority of South Asian women remain economically and socially dependent on men, with limited power to make decisions over their own lives or to protect themselves from HIV. Likewise, vulnerable groups, such as sex workers, Men who have Sex with Men (MSM) or Injecting Drug Users (IDU), are often stigmatised, rejected by families and communities, and harassed by law enforcement authorities, making them less able to access the support and information needed to protect themselves and others.

Moreover, in South Asia there are currently over 200 million<sup>1</sup> people on the move in search of livelihoods. Many of these migrants move with little

information and end up living in hostile and lonely environments, without access to support systems and separated from their families. In such circumstances, their vulnerability to HIV is greatly increased. There are also many girls and women whose journey in search of greater livelihood options ends in trafficking for commercial sexual exploitation, making them vulnerable to both severe human rights abuses and HIV.

Recognising these complex factors that fuel the epidemic, what is required in South Asia is a comprehensive - and above all rights based - response. A response that seeks to build an environment where the rights of all members of society, especially the most vulnerable, are protected; where social space is created to talk openly about HIV and related issues; and where PLWHA and vulnerable groups are empowered to play a central role in responses.

Creating such an enabling environment involves action at legislative, policy and community level. Policies and laws are needed to empower marginalised groups and create a supportive framework for action, as well as to provide protection against discrimination. Policy makers in each sector must examine how best to protect the rights of PLWHA and vulnerable groups, addressing their diverse needs - as employees, family members, service users and residents. However, good laws and policies alone are not enough, as for people to realise their rights there must also be a supportive social and ethical environment. This means challenging the attitudes, norms and practices that disempower people and increase their vulnerability to HIV.

This study on which this report is based was

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1 UNDP, 2002

commissioned to help enhance our understanding of the deep-rooted relationship between law, rights, the social and ethical environment, and HIV/AIDS vulnerability here in South Asia, as well as to provide actionable recommendations for legislative and policy reform. The findings have revealed a regional situation where significant human rights provisions exist, both in national constitutions and in ratified international conventions, but where there remains a serious disconnect between these provisions and people's experience at community level.

The findings of this study clearly demonstrate that both rights based policies and a shift in social

values and attitudes are urgently needed if we are to effectively address the epidemic in South Asia. With the development of new legislation and ground-breaking new rulings, as well as increasingly strong and vocal PLWHA and community groups, we are moving in the right direction. We hope that this report can serve as a tool for policy makers on this journey.



**Dr. Maxine Olson**  
*UNDP Resident Representative &  
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## Introduction

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In the complex socio-economic context of South Asia, the challenges of developing effective national responses to HIV/AIDS are immense. Global experience of the epidemic, over the last two decades, has demonstrated that many elements contribute to an effective national response. Central among these is an appropriate legal framework that supports the rights and needs of all those affected by the epidemic, and provides a policy environment in which measures to prevent the spread of HIV can have maximum effect. Experience has also shown that inappropriate laws and legal practices can unintentionally increase HIV infection risks, particularly among vulnerable and legally marginalised populations.

In most countries - including much of South Asia - the initial response to HIV/AIDS has occurred within a legal framework of public health laws aimed at dealing with highly infectious diseases, such as typhoid and tuberculosis. These laws typically contain a range of provisions requiring compulsory testing and quarantine, disease notification to authorities, and restrictions on the movement of infected people. The rationale behind such laws is that coercive measures against infected people are the best way of preventing the spread of infectious disease, and that the individual rights of those infected are of lesser importance.

However, there has been an increasing realization that HIV is different from the diseases previously targeted by public health laws, and that a legal framework focused on identifying and controlling the behavior of infected individuals will not work. Unlike most other infectious diseases, HIV is

spread primarily through behavior that occurs in private and is not easily controlled by coercive means. Reducing its spread requires behavior change by both the infected and the uninfected. Such change cannot occur without a fundamental shift in the norms, values and attitudes that shape individual and collective behavior, enabling communities to openly address taboo issues around sexuality, gender, social inequality and HIV/AIDS. A response that involves using coercive measures against a few has not been found to deter others from unsafe behavior, but in fact creates an environment in which those vulnerable to HIV are discouraged from acknowledging their risk, avoid testing, and do not access available health care, information and counseling services.

The other important lesson from the first two decades of the epidemic has been that many of the major factors influencing the spread of HIV go far beyond the behaviour of individuals, and relate to structural factors within society that pose barriers to effective HIV care and prevention. For example, it is now widely accepted that the most pressing and important priorities for an effective national response to the HIV epidemic include; overcoming obstacles, such as illiteracy and homelessness, to the effective dissemination of information about HIV; assisting vulnerable groups, such as women, sex workers and those living in poverty, to protect themselves from HIV infection; providing affordable access to condoms and HIV therapies to everyone regardless of socioeconomic status; and overcoming stigma and discrimination towards PLWHA, in order to enable effective HIV/AIDS care and prevention work.

It is for this reason that the human rights dimensions of the HIV/AIDS epidemic have come to be emphasized in national and international responses. It is increasingly recognized that HIV/AIDS poses great challenges to the protection and fulfillment of human rights, impacting people's civil and political rights, as well as their economic, social and cultural rights. HIV/AIDS is the root of many violations, and marginalized groups are most vulnerable to infection. Therefore, recognition and protection of the rights and needs of PLWHA and vulnerable groups are essential to the creation of an "enabling environment" - an environment that supports initiatives to contain the spread of HIV/AIDS and address its impact on individuals and communities. In this regard, human rights protection can be seen as a critically important public health measure. However for rights to be meaningful and accessible at community level there must also be a transformation within the social and normative environment. This means developing a comprehensive response to HIV/AIDS that includes medical and public health interventions, strong human rights based legislation and policy and social transformation within communities and institutions.

The international community has embraced this approach to HIV/AIDS policy by recognising the importance of strong protection for the rights of PLWHA and the urgent need to address the social and economic vulnerabilities of marginalised groups. The *Declaration of Commitment on HIV/AIDS*, passed by the United Nations General Assembly Special Session (UNGASS) 25 - 27 June, 2001, noted that "some negative ... legal factors were hampering awareness, education, prevention, care, treatment and support efforts." The Declaration called on all

called on countries to initiate suggested reforms by no later than 2003.

In the context of the *Declaration of Commitment* and the need to create a supportive policy environment, many countries have considered how the law and legislative reform can contribute to an effective national response to the epidemic. Moving away from relying on the punitive function of the law, there has been an increasing focus on exploring how the law can be used constructively to reinforce other policy initiatives. For example, it has been recognised that legal protection against discrimination on the grounds of HIV status, sexuality or gender can create a more open environment for raising awareness, as well as assist vulnerable groups in dealing with the impact of HIV/AIDS. It has also been acknowledged that laws stipulating that HIV testing should take place only with free and informed consent, and that a person's HIV status should be kept confidential, are of central importance in encouraging individuals to undergo voluntary HIV counselling and testing. In addition, there has been concern to ensure that laws criminalising activities such as drug use and sex work do not impede harm reduction strategies to protect drug users and sex workers from HIV infection, or measures to provide the necessary treatment and care for those who are infected.

The studies that form the basis of this report have demonstrated that much remains to be done in this regard in South Asia. Far from having an "enabling environment" for the response to HIV/AIDS, there is still widespread ignorance across the region about the epidemic. Moreover the limited development within South Asia - with large pools of poverty, serious social and gender inequities, conflict and population displacement - heightens the region's vulnera-

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