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UNDP DISCUSSION PAPER

# MAKING THE LAW WORK FOR WOMEN AND GIRLS IN THE CONTEXT OF HIV

APRIL 2020





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*For more information, contact:* Kene Esom at [kenechukwu.esom@undp.org](mailto:kenechukwu.esom@undp.org).

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One United Nations Plaza, NEW YORK, NY10017, USA

## ACRONYMS AND ABBREVIATIONS

<b>AIDS</b>	acquired immunodeficiency syndrome
<b>HIV</b>	human immunodeficiency virus
<b>SDG</b>	Sustainable Development Goal
<b>UNAIDS</b>	Joint United Nations Programme on HIV/AIDS
<b>UNDP</b>	United Nations Development Programme
<b>UNFPA</b>	United Nations Population Fund
<b>UN Women</b>	United Nations Entity for Gender Equality and the Empowerment of Women



# EXECUTIVE SUMMARY

In September 2015, 193 United Nations Member States unanimously adopted the 2030 Agenda for Sustainable Development with its 17 Sustainable Development Goals (SDGs). The third sustainable development goal (SDG 3) commits the global community to ensure healthy lives and promote well-being for all at all ages with a target to end the epidemics of AIDS and tuberculosis and to combat hepatitis and other communicable diseases by 2030. SDG 5 commits United Nations Member States to gender equality and the empowerment of women and girls, with specific targets to: end harmful practices, such as child marriage and female genital mutilation; ensure access to sexual and reproductive health; and attain equal rights to economic resources, including property. The 2030 Agenda's commitment to reach those *furthest behind first* must acknowledge the intersecting vulnerabilities women and girls face, including women and girls living with HIV and those who belong to HIV key populations – transgender women, female and transgender sex workers, women who use drugs and women in prison.

The Global Commission on HIV and the Law, convened in 2010 with a mandate to generate evidence-informed recommendations to promote effective responses to the HIV epidemic, highlighted the links between enabling legal and policy environments and HIV vulnerability. The final 2012 report of the Global Commission on HIV and the Law, *HIV and the Law: Risks, Rights & Health*, found that persistent challenges in law presented considerable barriers to women's and girls' ability to access HIV and health services. Barriers included gender-biased inheritance and property laws that severely restricted women's access to and ownership of land thus increasing their economic dependence on men and their vulnerability to violence and HIV. Gender norms - the shared social expectations or informal rules as to how women and men should behave - disadvantage women in the HIV response by discouraging discussion about sexuality and HIV prevention by women; limiting independent decision-making of women and girls related to their sexual and reproductive health; restraining women's and girls' access to HIV testing and treatment; or by putting them at risk of discrimination and gender-based violence. Evidence shows that economic dependence on men increases women's and girls' vulnerability to HIV by constraining their ability to negotiate the conditions that shape the risk of infection, including sexual abstinence, condom use and multiple partners. The 2018 Supplement to the report of the Global Commission on HIV and the Law noted the continued vulnerability of women and girls to HIV. It highlighted barriers to sexual and reproductive health services for adolescent girls and young women and noted a disproportionate impact of HIV on this group.



Every day, an estimated 460 adolescent girls become infected with HIV and 50 die from AIDS-related illnesses. In sub-Saharan Africa, four of every five new infections among adolescents aged 15–19 are in girls. Laws that sanction violence against women, such as involuntary sterilization of women living with HIV and marital rape, perpetuate gender inequality and negatively affect the HIV response for women and girls. As do criminal laws on HIV non-disclosure, exposure and transmission, sexual orientation, gender identity and expression, choice of work, recreational activities and access to sexual and reproductive health services. Gender-biased and inconsistent laws in plural legal systems often legitimize and perpetuate discrimination, harmful traditional practices and violence which drive the HIV epidemic in women and girls. Similarly, disparity and incoherence of age of consent laws result in reduced access to sexual and reproductive health information, commodities and other services for adolescent girls.

As the countdown to achieving the 2030 Agenda's target to end the AIDS epidemic continues, governments and other stakeholders need to redouble efforts towards women's and girls' empowerment and gender equality. These efforts should include: guaranteeing women's equal rights to land, property and inheritance in law; reforming penal laws that increase women's vulnerability to HIV, such as laws on sex work, pre-marital sex, consensual same sex conduct and cross-dressing; and removing laws and policies that restrict access to sexual and reproductive health services. Governments must work to protect women's and girls' sexual and reproductive health and rights and provide comprehensive sexuality education for young women and adolescent girls. It is imperative that national laws and policies provide comprehensive protection from violence for all women and girls. Equally important, law and policy should effectively address the structural drivers of gender-based violence, including patriarchal social norms, gender inequalities and intergenerational violence.

UNDP has worked with governments, the Joint United Nations Programme on HIV/AIDS (UNAIDS) Secretariat, UNAIDS co-sponsors and civil society in 89 countries to advance the recommendations of the Global Commission on HIV and the Law and to promote enabling legal, policy and regulatory environments for rights-based HIV responses, including for women and girls. Ending the HIV epidemic is possible, but not without redoubling efforts and investments in creating enabling legal and policy environments, addressing the impact of laws and policies on women and girls and providing legal empowerment to women and girls living with and vulnerable to HIV.





# 1.

## BACKGROUND

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The 2030 Agenda for Sustainable Development and the 17 SDGs are founded on the principles of equality, non-discrimination and the dignity of the individual.<sup>1</sup> They represent a crucial commitment by 193 United Nations Member States, with the support of civil society, international institutions and the private sector, to leave no one behind and to reach those who are furthest behind first. SDG 3 commits the global community to ensuring healthy lives and promoting well-being for all at all ages. Target 3.3 establishes a commitment to end the epidemics of AIDS and tuberculosis and to combat hepatitis and other communicable diseases. The 2030 Agenda recognizes that gender equality and the empowerment of all women and girls is a necessary condition and a cross-cutting objective to achieving the SDGs – that is, if gender equality and women’s and girls’ rights and empowerment are not attained, neither can the other SDGs.<sup>2</sup> SDG 5 thus commits United Nations Member States to gender equality and empowerment for women and girls, with specific targets to end harmful practices, such as child marriage and female genital mutilation, ensure access to sexual and reproductive health and attain equal rights to economic resources, including property.

Gender inequality contributes significantly to the spread of HIV, leaving women and girls more vulnerable to its impact. Gender discriminatory laws, harmful traditional practices and gender-based violence reinforce unequal power dynamics between men and women, with adolescent girls and young women being particularly disadvantaged.<sup>3</sup> Gender inequality, discrimination and gender-based violence, which may be enabled or condoned by customary law and practices and formal laws, also increase the vulnerability of women and girls to HIV.<sup>4</sup> AIDS-related illnesses are the leading cause of death among women aged 15-49.<sup>5</sup> Every day, an estimated 460 adolescent girls become infected with HIV and 50 die from AIDS-related illnesses.<sup>6</sup> Young women in this age group are twice as likely to be living with HIV than men.<sup>7</sup> In sub-Saharan Africa, four of every five new infections among adolescents aged 15–19 are in girls.

In 2018, key populations and their sexual partners accounted for 54 percent of all new HIV infections, representing a 15 percent increase from 2017.<sup>8</sup> UNAIDS considers gay men and other men who have sex with men, sex workers, transgender people, people who inject drugs and prisoners and other incarcerated people as the five key population groups that are particularly vulnerable to HIV and who frequently lack adequate legal protections and access to services.<sup>9</sup>

The 2020 Report of the United Nations Secretary-General, *Women, the Girl Child and HIV and AIDS*<sup>10</sup> notes the multiple and intersecting forms of discrimination that women and girls are subject to such as adolescent girls and young women, women and girls in key populations, women with disabilities, older women or as migrant women predispose them to an even greater risk of HIV infection and barriers in accessing treatment and care. While women and girls also belong to key populations, however the dearth of data makes it difficult to better understand the unique, intersecting vulnerabilities faced by women and girls within specific key population groups. Epidemiological and other data collected on key populations should be disaggregated by gender and sex to better understand the HIV-related risks and vulnerability of females in these groups. Nonetheless, the data that is available, as seen below, clearly demonstrates that women who belong to key populations are at greater risk and are more vulnerable to HIV than their male counterparts.



## UNDP: HIV and Health

The UNDP Strategic Plan for 2018-2021 and the UNDP HIV, Health and Development Strategy 2016-2021: Connecting the Dots both affirm UNDP's commitment to the principles of universality, gender equality and leaving no one behind, while responding to a dynamic development landscape. Gender equality is central to UNDP support for countries so they might implement and achieve the 2030 Agenda for Sustainable Development and the Sustainable Development Goals, as well as other commitments agreed by Member States.

Health – an outcome, contributor and indicator of development – continues to be an important aspect of UNDP work, focusing on three interlinked areas: reducing inequalities and social exclusion that drive HIV and poor health; promoting effective and inclusive governance for health; and building resilient systems for health. UNDP, the World Health Organization and other United Nations partners support countries to achieve the health-related targets across the 2030 Agenda for Sustainable Development, including the commitment to leave no one behind.

Institutions and governance structures in many countries are under-resourced and require additional capacity to deliver HIV, tuberculosis and other health and related services. UNDP supports countries to strengthen their governance capacity to respond more effectively to health and related development challenges by supporting legal and policy reform, building human and institutional capacity and formulating rights-based investment approaches and programmes.

Under the UNAIDS Division of Labour, UNDP convenes work on human rights, stigma and discrimination which encompasses law and policy reforms, access to justice and rights and eliminating HIV-related discrimination in healthcare settings. UNDP co-convenes work on HIV prevention among key populations (with UNFPA). Through these mandates, UNDP leads the work to support countries in implementing the Global Commission on HIV and the Law's recommendations on removing punitive and discriminatory laws, policies and practices that impact women and to advance women's rights and empowerment in the context of the HIV response and the 2030 Agenda.

- The risk of acquiring HIV was 13 times higher for transgender women than other women between the ages of 15-49.<sup>11</sup>
- The risk of acquiring HIV was 13.5 times higher for female sex workers in 2017 than for other women between the ages of 15-49.<sup>12</sup>
- HIV prevalence among women who inject drugs was 13 percent compared to 9 percent among men who use drugs from the same 30 countries.<sup>13</sup>



The 2016 United Nations General Assembly Political Declaration on HIV and AIDS affirms the commitment of United Nations Member States to “create enabling legal, social and policy frameworks in each national context in order to eliminate stigma, discrimination and violence related to HIV ... [and provide] legal protections for people living with, at risk of and affected by HIV, including in relation to inheritance rights and respect for privacy and confidentiality, and promoting and protecting all human rights and fundamental freedoms.”<sup>14</sup>

The 2030 Agenda's commitment to reach those furthest behind first must acknowledge the intersecting vulnerabilities women and girls face, including those who belong to key populations most vulnerable to HIV – transgender women, female and transgender sex workers and women who use drugs. People are left behind when they experience exclusion, bias or mistreatment in laws, policies, access to public services and social practices due to their identity primarily relating to their gender, but also relating to their age, income, ethnicity, caste, religion, disability, sexual orientation and nationality, as well as their indigenous, refugee, displaced or migration status.<sup>15</sup>





## 2.

# LEGAL CHALLENGES FACING WOMEN IN THE CONTEXT OF HIV

Laws can either strengthen or hinder efforts to fight HIV and its coinfections. To better understand the role of the law in strengthening or undermining AIDS responses, UNDP, on behalf of UNAIDS, convened an independent Global Commission on HIV and the Law (the Commission) in 2010. The mandate of the Commission was to produce evidence-informed recommendations to promote effective responses to the HIV epidemic.<sup>16</sup> The Commission's final report, *HIV and the Law: Risks, Rights & Health*, published in July 2012, made important findings and recommendations covering the breadth of the AIDS response, with chapters focusing on women and girls and key populations.<sup>17</sup> In 2018, the Commission published a Supplement to the 2012 report that highlighted changes in the global landscape since 2012, including HIV-related scientific developments, the rise in migration, the shrinking of civic space, the growing epidemics of HIV coinfections (tuberculosis and viral hepatitis) and the new challenges these coinfections present for the HIV response. The 2018 Supplement highlighted the situation of adolescent girls and young women in the AIDS response, making additional recommendations for countries.<sup>18</sup> The Commission noted that despite some success in removing laws that increase women's and girls' vulnerability to HIV and ensuring women and girls living with HIV have access to testing, treatment, care and support services, persistent challenges in laws remained that present considerable barriers to women's and girls' ability to access HIV and health services.<sup>19</sup> Gender norms - the shared social expectations or informal rules as to how women and men should behave - disadvantage women in the HIV response by discouraging discussion about sexuality and HIV prevention by women; limiting independent decision-making of women and girls related to their sexual and reproductive health; restraining women's and girls' access to HIV testing and treatment; or by putting them at risk of discrimination and gender-based violence.<sup>20</sup>

This section highlights some of these persistent challenges and the ways they affect women's and girls' access to HIV and health services and their ability to protect themselves from acquiring HIV.

### A. GENDER-BASED VIOLENCE

In some settings, up to 45 percent of adolescent girls report that their first sexual experience was forced, which contributes to the risk of HIV in both direct and indirect ways.<sup>21</sup> Experiencing sexual violence can influence women's and girls' susceptibility to adopting sexually risky behaviours, including having multiple partners, engaging in unprotected sex and participating in transactional sex, thus exacerbating their risk of acquiring sexually-transmitted infections, including HIV.<sup>22</sup> Women and girls living with HIV are more likely to experience violence, including violations of their sexual and reproductive rights.<sup>23</sup> Relationship inequity and intimate partner violence also increase women's risk of acquiring HIV, whereby women who are subjected to intimate partner violence are 1.5 times more likely to acquire HIV.<sup>24</sup>

Violence against women is also associated with poor clinical outcomes for women on antiretroviral therapy and with weakened adherence to pre-exposure prophylaxis, post-exposure prophylaxis and HIV treatment, including for pregnant women.<sup>25</sup> Involuntary and coerced sterilization and forced abortion among women living with HIV has been reported in at least 14 countries.<sup>26</sup> In a participatory study of women living with HIV in 94 countries,

89 percent of the 480 respondents reported having experienced or feared violence, either before, since and/or because of their HIV diagnosis; gender-based violence reporting was higher after HIV diagnosis.<sup>27</sup> In high HIV prevalence settings, women experiencing intimate partner violence are 50 percent more likely to have acquired HIV than women who have not experienced such violence.<sup>28</sup>

The law is often inadequate to protect women and girls from sexual violence, including those living with and vulnerable to HIV.<sup>29</sup> Poor investigation and prosecution of sexual offences, lack of psychosocial support for survivors, especially during rape trials, and criminalization of populations most at risk of sexual violence – sex workers, women who use drugs, lesbian and bisexual women and transgender women exacerbate the risk of violence for women and girls. Globally, intimate partner violence is one of the most common forms of violence women face.<sup>30</sup> In 49 countries no specific laws exist against domestic violence, no legislation to address sexual harassment exists in 45 countries and 112 countries do not criminalize marital rape.<sup>31</sup> The combination of social norms that condone and justify violence against women and girls and the absence of protective laws against gender-based violence place women and girls in precarious situations that exacerbate their risk of acquiring HIV.

### B. PLURAL LEGAL SYSTEMS

Plural legal systems are jurisdictions in which both formal legal systems and alternative informal justice systems, such as customary, tribal, religious, personal and traditional law, operate in parallel. Although exact figures are difficult to obtain, evidence indicates that a significant number of women in the developing world access informal justice systems with up to 80 percent of disputes in some countries resolved through informal justice mechanisms.<sup>32</sup> A UNDP report notes that in some countries in Africa and Asia, well over half of all disputes are processed and resolved in customary or religious forums.<sup>33</sup> Social and economic issues significant to women's daily lives are frequently administrated and adjudicated at the informal justice level.<sup>34</sup> A challenge with plural legal systems is that incoherence in approaches to rights and obligations determined by both formal and informal laws often results in rights being denied rather than enhanced.<sup>35</sup> Plural legal systems present a challenge to the HIV response for women and girls as legal plurality often legitimizes and perpetuates discriminatory laws, harmful traditional practices, violence against women and unequal property and inheritance systems that drive the HIV epidemic in women and girls.<sup>36</sup>

Evidence shows that women's economic insecurity and dependence on men increases their vulnerability to HIV by constraining their ability to negotiate the conditions which shape their risk of infection, including sexual abstinence, condom use and multiple partnerships.<sup>37</sup> Gender inequalities in women's access to economic opportunities, inheritance law and land



rights are pervasive. In 90 countries, customary laws and practices inhibit women's access to land.<sup>38</sup> In 34 countries, daughters do not have the same inheritance rights as sons. And in 36 countries, widows do not have inheritance rights.<sup>39</sup> Women's access to land and other productive resources is integrally linked to the fight against the HIV epidemic and prevention of and responses to gender-based violence.<sup>40</sup> Limited access to productive resources and fear of violence leave many women trapped in relationships in which they are vulnerable to HIV infection and hampered in their ability to protect themselves. Additionally, economic insecurity makes it more difficult for women living with HIV to manage the disease.<sup>41</sup> Women have less access to land than men and when they do have access to land, their rights are often restricted to so-called secondary land rights, meaning that women hold these rights through male family members.<sup>42</sup> Women thus risk losing entitlements in the case of divorce, widowhood or their husband's migration.<sup>43</sup> Women's rights to inheritance of property are crucial for reducing women's vulnerability to violence and HIV, as well as empowering women to cope with the social and economic impacts of the HIV epidemic at the household level.<sup>44</sup>

Harmful practices and traditional customs tolerated by informal systems put women and girls at greater risk of HIV infection. These include practices such as child, early and forced marriage, female genital cutting, widow inheritance and widow cleansing.<sup>45</sup> In some cases, customary or religious laws restrict the use of contraceptives and other sexual and reproductive health services. Customary and religious systems may also tolerate violence against women, including domestic violence, marital rape or rape as punishment, further increasing women's risk of HIV infection.

## C. CRIMINALIZATION

Criminal law significantly affects women and girls living with HIV, often increasing their risk of intimate partner violence, sexual violence and physical abuse.<sup>46</sup> Women and girls are directly and indirectly impacted by criminal law provisions on sexuality, sexual orientation, gender identity and expression, choice of work, recreational activities, access to sexual and reproductive health services and confidentiality of HIV status.

### i. HIV criminalization

As of 2019, 75 countries criminalized HIV non-disclosure, exposure or transmission, including unintentional transmission.<sup>47</sup> Statutes allow the use of HIV status to enhance or aggravate criminal charges in some countries. These laws and the prosecutions stemming from them do not always rely on or defer to the best available scientific evidence on HIV-related risks and harms, resulting in unjust prosecutions and convictions.<sup>48</sup>

In contexts with HIV criminalization, women and girls living with HIV are at significant risk of prosecution

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49.<sup>54</sup> Seventy-seven countries outlaw sex work explicitly or criminalize some aspect of sex work, including penalizing the clients of sex workers or brothel operators while not criminalizing sex work *per se*.<sup>55</sup> Sex work and sex trafficking are not the same. Trafficking in persons for the purpose of commercial sexual exploitation is a denial of agency and violation of fundamental freedoms.<sup>56</sup> Some governments have broad anti-human trafficking laws that conflate voluntary and adult consensual exchange of sex for money with the exploitative, coerced, often violent trafficking of people, especially women and girls for sex.<sup>57</sup>

For sex workers, especially women, the threat of violence from clients and police is a perpetual reality. Criminalization and social stigma make sex workers' lives more unstable, less safe and far riskier in terms of acquiring HIV as no legal protection from discrimination and abuse exists when sex work is criminalized.<sup>58</sup> For example, police may refuse to register a report of sexual violence made by a sex worker. Sex workers are often reluctant to report violent incidents to the police for fear of police retribution or for fear of being prosecuted for engaging in sex work.<sup>59</sup> In some settings, carrying condoms is criminalized and used as evidence by police to harass or to prove involvement in sex work.<sup>60</sup> Enforcement of penal laws have, in some instances, resulted in violation of sex workers' rights to housing, security of person, equal protection of the law, privacy and health.<sup>61</sup>

In recent years, seven countries have adopted 'end demand' models of criminalization of sex work. This model makes it illegal to buy sex but not to use one's own body for such services, thus criminalizing the clients rather than the sex workers.<sup>62</sup> The model also makes it illegal to procure or operate a brothel. Whether the model deters or reduces sex work and HIV transmission is not clearly established, and this model may even do the opposite. A 2016 survey of about 600 sex workers in France, one year after France adopted the 'end demand' model, found that the new law had detrimental effects on the safety, health and overall living conditions of the sex workers. Of the sex workers surveyed, 38 percent said that the model negatively affected their ability to negotiate safer sex, 42 percent said they were more exposed to violence since the introduction of the law and 88 percent opposed the criminalization of sex workers' clients.<sup>63</sup> Findings from a 2020 socio-behavioural study of 7259 female sex workers across 10 sub-Saharan African countries between 2011–2018 suggest that only through full removal of laws targeting sex industry; access to safer work environments; and prevention of violence and harassment by police could law reform as a structural determinant avert violence and HIV infections.<sup>64</sup>

### iii. Consensual sex with same sex partners

Consensual same-sex conduct between women is criminalized in 45 countries.<sup>65</sup> Gender-based violence, including the so-called 'corrective rape' perpetuated against women perceived to be lesbians in some countries, makes lesbians and bisexual women uniquely vulnerable to HIV. The criminalization of consensual same-sex conduct presents practical challenges for reporting incidents of sexual violence against women with same sex partners to the police for risk of being arrested and charged under anti-homosexuality penal laws.<sup>66</sup> In the context of criminalization and homophobia, lesbians sometimes have no choice but to enter heterosexual marriages with little or no control over their sexual and reproductive choices, often becoming victims of marital rape.<sup>67</sup>

### iv. Transgender identity and expression

Across the world, transgender people experience high levels of stigma, discrimination, gender-based violence, marginalization and social exclusion. This makes them less likely or able to access services, negatively influences their health and wellbeing and puts them at higher risk of HIV.<sup>68</sup> Furthermore, a range of penal provisions are used to target transgender persons and limit their basic expression of self. Cross-