CHAPTER-8
CONCLUSION AND SUGGESTIONS

The difficulty States, communities and individuals face in confronting the HIV/AIDS epidemic lies in the fundamental but difficult issues it raises; issues of sex, sexuality, diversity, ‘nonconformist’ behaviour and inequality of all kinds in all spheres (gender, relationships, access to goods and services, employment and wealth). These are the issues which society has been uncomfortable in dealing with and discussing for a long time. The reactions to the epidemic as well as towards the people infected and affected by it are characterized by exceptionally high levels of stigma, discrimination and denial. The victimization of PLHAs is viewed as a result of their association with behaviours that are considered immoral, illicit or otherwise disapproved by the society. The stigma and prejudice attached to the epidemic entrenches human insecurity and lead to loss of dignity which increases the vulnerability to HIV/AIDS. The HIV/AIDS related stigma and discrimination has silenced open discussion on both its cause and appropriate responses. This situation has created a new segment of ‘undesireables’ i.e HIV/AIDS victims.

This non-enabling social and legal environment promotes violations of human rights of HIV/AIDS victims, encapsulated in discrimination, particularly of the vulnerable populations as discussed in Chapter-2 of the study. For example, women’s vulnerability to HIV infection is enhanced where they do not have socio-economic and legal empowerment to make choices in their lives; or where children cannot realize their rights to education and information. Further, lack of access to appropriate HIV prevention and AIDS care services increases the vulnerability of other marginalized groups like sex workers, MSM, IDUs, prisoners etc. Visibility and openness about HIV/AIDS are pre-requisites for the successful mobilization of government, community and individual response to the epidemic. The successful battle against the epidemic demands that a victim-centered inclusive approach which promotes the human rights issues in a spirit of universality and equality should be adopted. Otherwise the victimization of HIV/AIDS victims would continue and they cannot be assured of right to live with dignity without any discrimination.
The empirical study conducted by the researcher has revealed that the stigmatization and discrimination frequently occurred in context and settings not regulated by legislation, such as within families and everyday social encounters. Therefore an urgent action is needed in these environments to combat its occurrence. Although the legal and policy reform have an important role to play in changing social values and in setting standards, both of which may lead to reduction of stigma and discrimination in community and institutional settings. But it is also true that these tools have limited impact in changing the real attitude of the members of the general communities towards HIV/AIDS victims. Therefore a human rights approach should occupy the centre of the global struggle against HIV/AIDS epidemic. The intimate connection between stigma, discrimination and human rights violations of HIV/AIDS victims requires a multi-pronged and sustained action based on human rights approach. In order to create an environment in which human rights violations of HIV/AIDS victims are no longer tolerated or practiced, the implementation of programmes needs to be proactive in addressing stigma before it is manifested or enacted in various kinds of discriminatory actions, rather than merely responding to it after it has occurred. Under the human rights regime states are responsible and accountable, not only for violations of human rights but also for ensuring that individuals can realize their rights as fully as possible. The International Guidelines on HIV/AIDS and Human Rights which are discussed in Chapter-4 of the study clarify the obligations of the states to protect and promote the rights of individuals in context of HIV/AIDS.

Several years of experience in addressing the HIV/AIDS related issues have confirmed that protection and promotion of human rights is necessary for protection of inherent dignity of persons, the achievement of the public health goals for reducing vulnerability to infection, lessening the adverse impact of HIV/AIDS on those affected and empowering individuals and communities to respond effectively to HIV/AIDS. Since the creation of the WHO Global Programme on AIDS in 1980, a number of international human rights standards require the states to protect the fundamental human rights of adults as well as children having linkage to the epidemic. These rights have been briefly discussed in Chapter-4 which deals with the international human rights standards in context of HIV/AIDS.
The right to health is not disputable and relationship between health and human rights is acknowledged not only in the public health sphere but also in legal arena. As global incidences of HIV infection continues to rise and remains a stigmatized condition, it has become the global norm or at least the ‘best practice’ to institute both local and global anti-discrimination mechanisms to protect the rights of the PLHAs and control the epidemic at the behest of the United Nations. The human rights framework in context of HIV/AIDS simply does not mean a good public health practice, but rather a way to achieve social equity, justice and health for all. In Indian situation, a human rights based approach to address the epidemic is one which examines the vulnerabilities of the individuals. The circle of vulnerability to marginality and the impact of marginality on their vulnerabilities needs a contextual understanding. The fact that marginalized groups are more vulnerable to HIV/AIDS reveals clearly the extent to which inequalities fuel this epidemic. Inequality and discrimination in society whether on basis of gender, class, caste or sexuality disproportionately increase the vulnerabilities of the marginalized communities. The barriers posed by inequality and discrimination limit people’s access to information and appropriate harm reduction measures. To remove these barriers a two fold tactic is required, one which targets stigma and discrimination and another that encourages structural transformation (at societal as well as institutional level).

By formulating policies and legal strategies, using an anti-discrimination framework would provide solutions to a number of dilemmas raised by the epidemic. But when it comes to HIV/AIDS, it is very clear that legal interventions are a small part of what is essentially a social, political and economic movement for protection of HIV/AIDS victims. The legal framework, however is critical in holding the state accountable for ensuring the creation of conditions conducive to the enjoyment and exercise of basic human rights related to the epidemic. The connection between legislative framework in India and the HIV/AIDS epidemic highlights and heightens most particularly the conflicts between human rights, health and state power. The epidemic has revealed critical weaknesses in laws and the health infrastructure in India, in a way no other illness, disease or condition has done. Existing laws and policies reveal deeply rooted biases and inherent contradictions, which make it difficult for people infected and affected by HIV/AIDS and other vulnerable people to
access services. Prime examples are the criminalization of sexual activity between men, soliciting for sex work or injecting drug use, resulting in the isolation of these communities, and in the negation of their rights. In health care setting, the lack of adequate resources pits the rights of people living with HIV/AIDS (to treatment) against the rights of doctors and health care workers (to universal precautions) making everybody vulnerable and exacerbating discrimination.

Although the Indian government’s National AIDS Prevention and Control Programme supports an approach that ensures the protection of rights as a key element in programmes dealing with HIV/AIDS. This element does not have the sanction of law, it is neither binding nor enforceable in courts. Widespread violations of rights of those infected, affected and most vulnerable to the epidemic occur, most often, with the sanction of law. The reasons for this are many. First, bane of the Indian legal system particularly in the context of HIV/AIDS, are the large gaps in law that remain to be filled up in order to ensure the rights of those infected and affected by the epidemic. Second, extremely poor record of enforcement of existing laws. For instance, various legal issues that arise in the context of HIV/AIDS, including informed consent, confidentiality or mandatory HIV testing are mostly governed by common law. This allows for the personal predilections of judges to impact cases of HIV and AIDS, an approach that lends itself to inconsistency and to rulings that are sometimes in opposition to the existing government policies. Third, for the most vulnerable populations to HIV/AIDS many a times marginality is created, enforced and deepened by criminal laws. Fourth, despite constitutional promise of equality, stigma and fear of the epidemic has led to widespread discrimination in various spheres. While the state can be held accountable for its actions, there is no legal protection against discriminatory practices carried out in the ‘private’ sphere, be it in healthcare, employment, education etc.

Apart from fulfilling India’s obligations under the United Nation’s Declaration of Commitment on HIV/AIDS the presence of a nationally applicable rights-based law would serve several purposes. It would provide

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1. For example, in order to protect and save girl child. The PNDT Act was adopted. But it has failed on this front as there are a very few convictions under the act. Female foeticide is rampant, particularly in North India.
consistency and clarity for courts to effectively pass judgment in HIV/AIDS cases; it would provide certainty for people to seek redressal from a strong, reliable legal system; and it would enshrine ethical, equitable and just practices that become harbingers for change in various spheres of law. The preparation of the draft HIV/AIDS Bill in 2006\(^2\) is a positive step in direction of adoption of a comprehensive approach to tackle the HIV/AIDS epidemic. The HIV/AIDS Bill embodies principles of human rights and seeks to establish a humane and egalitarian legal regime to support India’s prevention, treatment, care and support services for HIV/AIDS victims. Due to changes made by the Law Ministry the revised Bill has been criticized on various grounds. The diluted version of the Bill deleted chapters on strategies of risk reduction and access to free treatment. It ignores issues like special needs of women and children and emergency medical care to HIV/AIDS patients. It also limited the definition of discrimination. A new chapter has been added which proposes an isolationist approach and works against creating an ‘enabling environment’ for sex workers, MSM and IDUs. The litany of woes related to HIV/AIDS continue unabated in India. The framework of legislation is too limited and cannot be transposed to adequately cover HIV/AIDS related issues. This necessitates to adopt a specific socio-legal framework based on human rights approach to protect HIV/AIDS victims and curtail the epidemic. While the law cannot by itself halt or reduce human rights abuses related to HIV/AIDS epidemic, it can play a very important role in the overall strategy adopted to combat the spread of HIV/AIDS.

Fortunately our national strategy has moved away from the isolationist and discriminatory response that characterized it in the initial days of the epidemic in India. Harm reduction strategies, including condom promotion amongst sex workers and MSM and needle exchange programmes amongst IDUs are now the norm. Not only do these strategies have to be strengthened but they have to be protected and supported by the law in order to ensure that the fight against the spread of HIV/AIDS is not derailed. Indian judiciary has shown a fair degree of sensivity towards HIV/AIDS related issues. Through various techniques like Public Interest Litigation, giving expansive

\(^2\) The Bill has been critically evaluated in Chapter-5.
interpretation to right to life, dignity and liberty, protecting minorities rights, promoting gender justice, creating new kind of compensatory jurisprudence, holding executive responsible for avoiding public duty and requiring transparency and probity in conduct of public affairs, the judiciary in India has attempted to strike the balance. It is a hard reality that legal or judicial developments does not automatically translate into human rights development. A link between law and human lives must be created through sensitization of the civil society. Such sensitization should be in tune with our constitutional philosophy which guarantee equality, dignity and justice for all. Justice Micheal Kirby of Australian High Court has perhaps most eloquently articulated the principle: “To protect community at large from the epidemic, first protect and respect the rights of those already infected and those at the most risk of acquiring infection.” The legal reforms and public health measures have stabilized the epidemic in most of the developed countries. But this is true of only some of the countries. Many of them are rather experiencing exponential growth of HIV/AIDS epidemic.

Suggestions
On the basis of the problems and gaps identified by the study, the researcher hereby suggests some measures to protect and promote the rights of HIV/AIDS victims.

Need For Antidiscrimination Legislation
Adoption of an antidiscrimination legislation and protective laws is the most vital part in protecting and promoting the human rights of HIV/AIDS victims. The most effective legal remedy would be the enactment of general antidiscrimination legislation prohibiting unfair and irrelevant distinctions being made on HIV/AIDS status. Such laws exist in Australia, Canada, Hong Kong, New Zealand, South Africa, the USA and Western Europe (eg. France and the United Kingdom)

The focus of antidiscrimination law should be educative rather than punitive. It should endeavour to protect HIV/AIDS victims from stigma and discrimination not only by public authorities, but also by the private sector and private individuals in public activities. Although purely private acts, such as
friendships cannot be covered, such law can provide an environment to sensitize public opinion, expose stereotypes, and change attitude and behaviour of the community at large towards HIV/AIDS victims.

The coverage of such legislation should be as wide as possible to cover PLHAs, those suspected or presumed to be infected, such as members of vulnerable populations, and their associates and family members etc. The widest possible areas to be covered including: health care; employment; welfare and social security benefits; education and training; sport; associations and clubs; accommodation; trade unions and qualifying bodies; access to transport; superannuation and insurance; and provision of goods and services. Such a law should target both direct and indirect discrimination.3

Another innovative feature of antidiscrimination legislation should be enabling “affirmative action”. Effective administrative procedures for lodging complaints are essential. There should be independent, informal and quick avenues for redress of HIV/AIDS related stigma and discrimination, such as Human Rights Commissions specifically for HIV/AIDS victims, which have special procedures for fast-tracking cases where the complainant is terminally ill as otherwise respondents can seek to delay proceedings until the complainant dies. Special protections should exist to allow representative complaints, so that the case does not lapse when the complainant dies, and also to enable community groups or unions to lodge complaints on behalf of their constituents. Broader investigative powers for the agency administering the legislation, like a national or state level human rights institution or commission, for people infected as well as affected by HIV/AIDS would be necessary to address these wider issues. Such proceedings should be held in camera in order to protect the privacy of HIV/AIDS victims as well as the sensitivities attached to the epidemic.

Protection of HIV/AIDS victims in Employment Sector- National and State anti-discrimination legislation should be adopted to prohibit discrimination

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3. Direct discrimination occurs when a person treats another person less favorably than a third person would have been treated in comparable circumstances, or attributes characteristics which are thought to relate generally or be generally imputed to people of a particular status, i.e. stereotypes. Indirect discrimination occurs where unreasonable conditions or requirements, such as mandatory HIV testing, are applied which a substantially higher proportion of persons of a different status must be able to comply with than persons of the same status as the person claiming to have been discriminated against. See Watchers H, HIV/AIDS Discrimination and Privacy- The Need for Legislative Protection, in D.C. Jayasuriya (Ed.) HIV Law Ethics and Human Rights, UNDP Regional Project on HIV and Development, New Delhi, 1995.
againt HIV/AIDS victims in relation to work. This should include prohibition of pre-employment HIV testing, routine health checkups with mandatory HIV testing, reasonable accommodation, HIV friendly sickness schemes, entitlements, regulation on subsidised treatment costs and compassionate employment.

The government should adopt potential measures to train and sensitise both employers/corporate leaders and employees/workers at formal and informal work places, and expand the awareness programmes to the surrounding communities, on the issues of HIV/AIDS, stigma and discrimination. Such guidelines/regulations could be developed on the lines of ILO Work Policy Guidelines on HIV/AIDS, 2001.

Law enforcement authorities should also be provided training with design to reduce stigma and promote awareness programmes. Awareness about the existing Confederation of Indian Industries\(^4\) policy on HIV/AIDS and training in legal literacy related to both HIV/AIDS in the workplace as well as other work place regulations in force must be raised. However, lack of information and confusion about CII Policy on HIV/AIDS is noted as a persistent problem.

Affirmative action in the form of insurance and health care benefits like medical insurance schemes to cover HIV/AIDS infected employees should also be designed and implemented. Focus on workplaces with special vulnerabilities should be increased by the interventions, training and sensitisation programmes. Laws, regulations and collective agreements should be enacted or reached so as to guarantee the following workplace rights for protection of PLHAs: adoption of a national policy on HIV/AIDS and the workplace; freedom from HIV screening for employment, promotion, training or benefits; confidentiality regarding all medical information, including HIV/AIDS status; employment security for workers living with HIV until they are no longer able to work, including reasonable alternative working arrangements; social security and other benefits for workers living with HIV, including life insurance, pension, health insurance, termination and death benefits; adequate health care accessible in or near the workplace; adequate supplies of free condoms to workers at the

\(^4\) Hereinafter to be referred as CII.
workplace; workers' participation in decision-making on workplace issues related to HIV/AIDS; access to information and education programmes on HIV/AIDS, as well as to relevant counselling and appropriate referral; protection from stigmatization and discrimination by colleagues, unions, employers and clients and appropriate inclusion in workers' compensation legislation of the occupational transmission of HIV (e.g. needle-syringe injuries).

**Measures to Tackle Feminization of HIV/AIDS:** Due to increased feminization of the HIV/AIDS epidemic protective laws should be enacted to reduce human rights violations against women. In particular, laws should be reviewed and reformed to ensure equality of women regarding property and marital relations and access to employment and economic opportunity, so that discriminatory limitations are removed on rights to own and inherit property, enter into contracts and marriage, obtain credit and finance, initiate separation or divorce, equitably share assets upon divorce or separation, and retain custody of children. Laws should also be enacted to ensure women’s reproductive and sexual rights, including the right of independent access to reproductive and other health information and services and means of birth control, including safe and legal abortion and the freedom to choose among these, the right to determine number and spacing of children, the right to demand safer sex practices and the right to legal protection from sexual violence, outside and inside marriage, including legal provisions for marital rape. The exemption for marital rape in section 375 of IPC must be repealed. Such laws have been adopted successfully in many countries. For example in Peru after adoption of female friendly legislation the human rights violations against women in context of HIV/AIDS have reduced considerably\(^5\). The age of consent of sex and marriage should be consistent for males and females and the right of women and girls to refuse marriage and sexual relations should be protected by law. The HIV status of a parent or child should not be treated any differently from other analogous medical condition in making decisions regarding custody, fostering or adoption. All pregnant women should be provided an opportunity to have an HIV test, since vertical transmission of HIV can be effectively stopped.

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by the use of low cost drugs in HIV pregnant women and these women must be offered such treatment. Alternate media communication programmes to reach out to as many groups of women as possible should be started on the issue of empowerment of girls and women and elimination of misconceptions, myths and stereotyping related to male and female sexuality. Such programmes should be undertaken by the government in collaboration with the National Commission for Women, NGOs and other stakeholders. The programmes should be directed at informing and involving men in the response to HIV/AIDS by opening up discussion on sexuality and gender differences challenging cultures of shame and blame. Accurate message on HIV transmission should be available to different categories of women including female sex workers, but also to single women, those living on the streets, married young women, school and college students, female migrant workers, women survivors of sexual abuse and rape etc, because they live in vulnerable environments. There should be discussions on the issues of poverty, sexual abuse, neglect of the girl child and forced marriages which generally results in girls being trafficked into prostitution. Further, police harassment, denial of health care and other services add to women's vulnerabilities. While HIV/AIDS is seen as a multi-sectoral issue, it has thrown up areas of conflict over rights such as informed consent, confidentiality and partner notification, which work differently for men and women. The gender dimensions in these areas need further investigation and understanding in order to protect the dignity and human rights of women in context of HIV/AIDS epidemic.

Children’s Access to Health Care, Legal and other Social Services: There is a need to change law and strategy of intervention in such a way that children and young people are seen as people capable of exercising their rights. The CRC recognises the right to information of children, but there is a low awareness of the existence and contents of the CRC amongst government officials and policy makers. It should be ensured that the response to children and young people in the context of HIV/AIDS is shaped and driven by their rights guaranteed under the CRC and also their overall health needs as well as health education

6. The CRC (UN, 1989) defines children as ‘all persons upto the age of 18 years. WHO defines ‘adolescents’ as between the age 10-19 and ‘young people’ as between the ages 10-24. As per GOI youth in India are defined to be between 15-35 years. In this document adolescents, children and young people have been used interchangeably.
requirements. Training should be provided to government officials, policy
makers and health care providers to fully familiarize them with the contents of
CRC. Also appropriate steps should be taken to create innovative mechanisms
to inform children and youth on safe sex and other health issues and ensure that
such information is related to their cultural context and age groups. There is
need for subsidisation of such information and advocacy by the government.
Mass media and education system should be extensively used to disseminate
relevant information related to the epidemic.

In this context the right to information should be linked with the right
to education. The strategy to realise the right to information, especially in the
context of HIV/AIDS should address the many different contexts in which
children live, such as streets, villages, urban centres, schools, children involved
in labour etc. On information dissemination, some suggested modes include
telephone-counselling services, actual counselling, programmes like street
shows, talk shows etc. It is also recognized that social constraints hamper actual
access to sensitive information, such as when children/youth watch TV together
with other family members who might influence the information flow. A
carefully structured strategy could ensure that social constraints do not come in
the way of children accessing information and services related to HIV/AIDS.

The Indian children in various circumstances need access to a range of
friendly services, including health care, sexual health services, night shelters,
counselling, etc. There is a need to have structures in place to provide support
systems for children. Presently, health care services are not suited to access by
children, especially with respect to sexual health. There is a need for a co-
ordinated response to children's health needs, especially in situations such as
child sexual abuse. In this context the paediatric wings should have special
facilities to deal with child sexual abuse that would make single point services
such as counseling, health care, legal assistance etc., available to the child.

Apart from health issues, it is important to discuss other legal issues
connected to children and HIV/AIDS, mainly the Juvenile Justice Act (JJA)
along with its limitations. The Juvenile Justice System presently focuses on the
institutionalisation of neglected children. This strategy has been seen to be
ineffective and has given rise to the perception amongst children that the State
is an enemy. It is felt that the JJA is sorely inadequate and needs to be re-

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conceptualised and amended in order to facilitate the shift to alternate methods of providing care (non-custodial care) and empowerment for children. Recently, The Protection of Children Against Sexual Offences Bill, 2011 was passed which exclusively deals with sexual offences against children is a positive step in empowerment of children. Along with the new law, systems must be put in place to provide rehabilitation and other support and services related to HIV/AIDS epidemic. The needs and concerns of street children, children in confinement, children involved in hazardous work/industry, children orphaned by HIV/AIDS, children of sex workers should be appropriately addressed by adopting guidelines and protocols based on international standards.

Reform and Review of Criminal Laws

Laws relating to criminal transmission must be used judiciously so as to criminalize only the willful transmission of HIV and not the positive status of the person. Criminal prosecutions should not be viewed as a part of public health strategy to stop the spread of HIV. Criminal prosecution should be reserved for only the most egregious cases—those involving intentional or reckless conduct that deserves punishment as it creates a genuine risk of HIV transmission. Indian criminal laws should be amended to provide the consideration of consent of the alleged victim in HIV transmission by making consent an element of offences under sections 269 and 270 of IPC or recognizing consent as a defence to charges under sections 269 and 270. Sections 90 and 91 of IPC should also be amended to include explanations to this effect. The State should also review and reform criminal laws and correctional systems to ensure that they are consistent with international human rights obligations and are not misused in the context of HIV/AIDS or targeted against vulnerable groups like sex workers, IDUs or MSM.

On the other hand, criminal penalties for making false blood-donor declarations do not have the same negative policy implications as private behaviour where transmission may occur. This is because the right to health is clearly violated by the use of contaminated blood and there is no countervailing or legitimate public interest in donating infected blood. In situations where person got infected with HIV through contaminated blood, the European

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7. This Bill was passed by the Cabinet on 3 March 2011. It aims to protect children against sexual assault, sexual harassment as well as pornography.
countries has created a “no fault compensation scheme” for such persons under the directions of the European Court of Human Rights. The court has ruled that unreasonable delay in proceedings where complainant is suffering from HIV/AIDS is violation of right to fair trial. Such rulings should be given importance in a legal system like our’s in order to protect rights of HIV/AIDS victims. Also, MTCT are not usually offences because of the overwhelming countervailing interest in childbirth. The risk of MTCT can be greatly reduced by proper medication. This scientific evidence about the actual risk transmission should be seriously considered by states which routinely force HIV positive women to have forced/non-consensual sterilizations and abortions violating the human right to found a family.

With regard to IDUs, laws should be introduced to reflect the concerns that have arisen with the prevalence of HIV/AIDS among IDUs. This should include recognizing and stipulating the rights of drug users whereby they are not looked upon as criminals but as individuals who need to be empowered with guarantees of access to information, health care services, protection from harassment and other excesses by law enforcement and de-addiction schemes. The criminal laws should be reviewed to consider the authorization or legalization and promotion of needle and syringe exchange programmes. The laws criminalizing the possession, distribution and dispensing of needles and syringes should be adequately repealed. The sensitivity in debate surrounding the introduction of such programmes relates to the continued illegal status of the drugs which are being injected in sterile equipment, and whether criminal acts are implicitly condoned or encouraged by the existence of such programmes. Evaluations of such programmes have shown that they have increased the demand for drug treatment, decreased the number of unsafely disposed of used equipment and helped to curtail the epidemic. This has also been recognized by the Indian government’s NAPCP. For HIV/AIDS interventions among drug users especially IDUs, stronger legal and political support for innovative harm

8. See case of A and Others v/s Denmark (1) of 22 January 1996.
9. A study in North America, Europe, Asia and the South Pacific of 29 cities with NEP found a decline in incidence of HIV by 5.8 percent, while 52 cities without NEP had an increase of 5.9 percent. One successful example is the NEP established by an NGO in Nepal in 1992 which has curtailed HIV prevalence at under 2 percent while neighbouring countries prevalence has soared to about 70 percent among IDUs (Yunnan Province in China and Manipur State in India). See Hurley S.F, Jolley D; How NEP Works for Prevention of HIV Infection, Lancet, 9, 349, p1797-1800.
10. See Paragraph 5.10 NAPCP.
reduction programmes of needle exchange as well as condom distribution is necessary. Therefore to more successfully prevent and manage HIV/AIDS situation among drug users, a revision of NDPS Act is strongly recommended in the light of aforementioned concerns.

Criminal laws prohibiting specific sexual activity between consenting adults in private, also impede the provision of HIV prevention and care programmes. Many jurisdictions have repealed these laws because they are ineffective and out-of-date, and more recently and urgently, on public health grounds.\textsuperscript{11} Criminalizing legal environment makes access to HIV/AIDS related educational and information programmes more difficult. These laws place health workers and educators at risk of aiding and abetting offences, as they can be accused of promoting or encouraging these criminalized sexual acts when in fact, they are merely advising how to carry out safely. Such a situation tends to create suspicion and hostility between health workers, communities and authorities.

Regarding Indian situation primary step in this context would be repeal of section 377 of IPC (decriminalization), which certainly will help greatly in reducing vulnerability to exploitation, violence and HIV/AIDS. This view has even been espoused by government bodies such as the National Human Rights Commission of India\textsuperscript{12} and the Law Commission of India\textsuperscript{13} and most recently by the Delhi High Court in Naz Foundation case.\textsuperscript{14} The UNAIDS has also remarked that section-377 of IPC which criminalizes homosexuality is undermining the fight of HIV/AIDS and violates human rights of MSM.\textsuperscript{15} In terms of preventing HIV/AIDS among MSM, it would be most useful to make section 377 of IPC obsolete and instead review the legislation and endeavour to

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\item \textsuperscript{11} One example is the Russian Federation where a law criminalizing homosexuality (enacted over seventy years ago) was repealed in 1992. Protection of human rights of privacy and equality also support repealing this legislation. In Toonen v/s Australia, the Human Rights Committee found that right to privacy was breached by laws which criminalize private homosexual acts between consenting adults, noting that: “the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS, by driving underground many of the people at risk of infection it would appear to run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention”. Communication No.488/1991. Official records of General Assembly, Forty-ninth session. Supplement No.40(A/49/40).
\item \textsuperscript{12} See: Report of the National Conference on Human Rights and HIV/AIDS. New Delhi, 23-25, November 2000, organized by the NHRC in partnership with NACO, Lawyer’s Collective Unit of HIV/AIDS, UNAIDS and UNICEF.
\item \textsuperscript{13} See the 172\textsuperscript{nd} Report of the Law Commission of India 2000.
\item \textsuperscript{14} See Naz Foundation v/s Government of NCT Delhi and Others WP© NO.7455/2001. The court held that Section-377 of IPC insofar criminalizes sex between consenting adults in private is violative of Articles 21, 14 and 15 of the Constitution.
\item \textsuperscript{15} Statement of Denis Brown, UNAIDS India Coordinator, 1 December,2006. Reuters U.K Reports.
\end{itemize}
define more clearly the age of sexual consent.\textsuperscript{16} It is suggested to introduce law reform that creates redressal mechanisms to counter the abuse and illegalities perpetrated by the society and law enforcement on sexual minorities. Laws should be enacted that protect the dissemination of sexual health education, decreases the stigmatization of sexual minorities and increases sensitivity towards them and provide a constitutional guarantee against discrimination on the basis of sexual orientation.

With regard to adult sex work that involves no victimization, criminal law should be reviewed with the aim to decriminalize, then legally regulate occupational health and safety conditions to protect sex workers and their clients. Impact of illegality on sex workers call for the reform of criminal laws especially sections 7, 8 and 20 of ITPA and the use of labour and occupational safety and health regulations to reduce workplace hazards for sex workers. The powers and immunity afforded to the police vis-à-vis search and rescue procedures under sections 14, 15 and 16 of ITPA needs to be reviewed. The government should ensure that rights of ‘trafficked’ persons including their volition to discontinue or remain in sex work is respected at all times. The government should make provisions for voluntary health examinations for sex workers rather than mandatory health examination including testing for STDs and HIV, and also provide accessible, good quality basic health care services as well as option for periodical HIV and STDs testing and treatment.

By recognizing the industry through a regulation, some of the stigma associated with sex work would be removed. Criminal law should ensure that children and adult sex workers who have been trafficked or otherwise coerced into sex work are protected from participation in the sex industry and are not prosecuted for such participation but rather are removed from sex work industry and provided with medical and psycho-social support services, including those related to HIV. The government should facilitate formation of self-regulatory boards comprised of sex workers to oversee charges/rates, condom use, health check-ups and prevention of minors into sex work.

Similarly with regard to the correctional systems particularly the prisons, prison authorities should take all necessary measures, including adequate

staffing, effective surveillance and appropriate disciplinary measures, to protect prisoners from rape, sexual violence and coercion. Prisoners are condemned to imprisonment for their crimes, but they are not condemned to HIV transmission, and prison authorities have a legal duty of care to ensure that infection does not occur. Loss of liberty does not entail loss of human rights, including health. The often overcrowded, violent and unsafe environment in prisons creates a special responsibility for prison authorities to protect the health of prisoners. The prison authorities should also provide prisoners (and prison staff, as appropriate), with access to HIV related prevention information, education, voluntary testing and counselling, means of prevention (condoms, bleach and clean injection equipments), treatment and care and voluntary participation in HIV related clinical trials, as well as should ensure confidentiality, and should prohibit mandatory testing, segregation and denial of access to prison facilities, privileges and release programmes for HIV positive prisoners. Compassionate early release of prisoners with AIDS should be considered. This has been recommended by ECHR in a number of cases to various countries (e.g. Poland, France, U.K, Denmark, Russia, Italy and Argentina), on the basis that it should be treated like other life-threatening illnesses.

**Review and Reform of Public Health Legislation in context of HIV/AIDS**

The government should review and reform existing public health legislation to ensure that they adequately address issues raised by HIV/AIDS and are consistent with international human rights obligations. The government should fund and empower public health authorities to provide a comprehensive range of services for the prevention and treatment of HIV/AIDS including relevant information and education, access to voluntary testing and counselling, STD and sexual and reproductive health services for men and women, condoms and drug treatment services.

*I informed Consent*: Laws should require specific informed consent before HIV testing is done; otherwise a person’s liberty and privacy are at risk of being violated. All staff of testing centres and hospitals, both in public and private

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17. Statement by the UNAIDS to UN Commission on Human Rights on 14 April 1996, “Prisoners are the community. They come from the community, they return to it. Protection of prisoners is protection of our communities.”


sector should be trained and sensitised, on the added value of the right of any person to make an informed decision about consenting to test for HIV. This right to self-autonomy must be combined with the provision of the best possible services of pre-test and post-test counselling.

Persons detected at routine HIV screening at blood banks, should be referred to counselling centres at nearby health care facilities, without violating their right to privacy. Official ethical guidelines and a comprehensive protocol on informed consent should be developed to protect the rights of the people who according to current legislation, or the practice of diminished authority, may not have legal, or social autonomy to provide or withhold give their consent. This should include inter alia children, mentally disadvantaged persons, prisoners, refugees, and special ethnic groups. The consent must be voluntarily obtained and the authorities should provide full information and explain the matter in a language that the person giving consent easily understands.

At the same time the right of a person to refuse testing or counselling must be respected. Also the availability and/or accessibility to voluntary testing and counseling facilities needs to be increased throughout India, rural/remote areas, in a phased manner within previously defined and agreed timelines either by the NACO or other support systems connected to the epidemic. Also the guidelines for written consent procedure in the case of HIV/AIDS need to be explored and developed keeping in mind the sensitivities connected to the epidemic.

The HIV test results should be given in person to the individual who has been tested, to insure confidentiality. Mechanisms to prevent misuse of the test results, such as by employers or insurers, should be covered under appropriate legislation. Lingering paternalism of the medical profession in some countries has enabled wide-spread mandatory testing under the guise of general consent to medical services.

**Maintenance of Confidentiality:** Apart from informed consent, the maintenance of confidentiality of an individual's health status is one of the corner stones of a rights based legal responses to HIV/AIDS. Not only does the principle rest on human rights norms of autonomy and respect for privacy, but it has also been viewed as crucial in encouraging those most at risk to come forward for HIV testing, counselling and clinical attention. A law that attempts to address the
issue of confidentiality must deter and cover the breaches that continue to occur in all these circumstances. Data protection mechanism should be provided in all settings to ensure the maintenance of confidential information. Efforts should be made to train and sensitise all staff in testing settings, blood banks, and care and support setting, both in public and private sector, on the right of privacy and decide with whom medical records are to be shared. Innovative and practical ways to implement confidentiality in different settings like the location for disclosure of diagnosis, specific procedures for the handling of medical journals and correspondence, reporting procedures, and confidential disclosure of status without the presence and pressure of family members, which is particularly relevant to infected woman should be explored. The legal framework, administrative procedures and professional norms should be revised to ensure enabling environment, which foster and respect confidentiality. Therefore both at national and state level guidelines/regulations for beneficial disclosure of testing results should be developed. Disclosure without consent should only be permitted in exceptional circumstances defined by law.  

Protection of HIV/AIDS Victims in Health care and Legal Settings: It should also be ensured that people are not subjected to coercive measures such as isolation, detention or quarantine on the basis of their HIV/AIDS status. Where the liberty of HIV/AIDS victims is restricted due to their illegal behaviour, due process protections, for example adequate notice of proceedings; urgent right of review/appeal to a higher tribunal or court; right to legal representation; explaining the nature of relevant orders and obligations and rights of review/appeal should be granted. Also, the legal proceedings should ordinarily be held in camera (in private, as opposed to public), because of the great stigma associated with HIV/AIDS, and the social and economic consequences which may flow from unauthorized publication of an individual’s HIV status. The legislation regulating blood donations, screening and transfusions should be adequately enforced. It should ensure that the blood/tissue/organ supply is free

20. Disclosure of HIV-positive status may be permissible in very specific circumstances:
- When the person concerned gives informed and written consent for disclosure of her/his status.
- When such disclosure is in the best interests and welfare of the patient's treatment.
- When HIV-positive status is required to be revealed to a court for the administration of justice.
- When disclosure is necessary to protect another identifiable person who is in imminent risk of being infected.
- When disclosure of HIV-positive status outweighs the public interest to maintain confidentiality.
- When disclosure is required by statute.
of HIV and other blood borne pathogens in order to fully protect the right to health. The law on public health should require the implementation of universal infection control precautions in health care and other settings involving exposure to blood and other bodily fluids, persons working in these settings must be provided with appropriate training to implement such precautions. Health care providers and patients should be trained and sensitised on their respective rights in the context of HIV/AIDS, and combine it with training on universal precautions and with the supply of means of protection including post exposure prophylaxis (PEP) and essential drugs for all health care settings. Information on HIV/AIDS should be available at all health care institutions for the public as well as for the staff, and should be most user-friendly. Stigma reduction programmes and campaigns among health care professionals that prohibit isolation of HIV/AIDS patients and provide appropriately prescribed treatment of opportunistic infections, and offer standard procedure for the protection of confidentiality should be implemented effectively in health care settings. A multi-sectoral consultative body on HIV/AIDS to provide advice and dissemination of information to health care workers should be established, that makes both public and private sectors accountable.

**Easy Access to Treatment, Medicines etc for PLHAs**

For people living with or affected by HIV/AIDS, the key issues of concern is the right to treatment (which arises out of the right to life), the right to information and the right to legal remedy which is based on right to non-discrimination. In terms of the right to treatment, the main concern should be the easy access to medicines at affordable prices. Access to appropriate health care is a concern, not only for HIV/AIDS victims, but also for others. It is therefore suggested to undertake both long term and short term recommendations with reference to HIV/AIDS. These recommendations not only pertain to the immediate concerns of the PLHAs, but also to the concern of preventing and managing HIV/AIDS. The short-term steps provide that the cost

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21. The blood supply is protected by legislation in countries such as Algeria, Austria, Chile, Cambodia, Denmark, Germany, Greece, Hungary, Italy, Luxemburg, Mauritius, Norway, Spain, Switzerland, Turkey and Vietnam—See: WHO Directory of Legal Instruments Dealing with HIV/AIDS. In India, the Supreme Court ordered the creation of a National Council for Blood Transfusion, the licensing of blood banks and eventual end of professional sale of blood following a petition by an NGO against government agencies responsible for blood safety.
of drugs should be reduced and drugs should be made affordable by a waiver of all taxes/duties; CD4 testing which is available only in few places needs to be increased commensurate with need; the number of voluntary testing centres should be increased; Also quality control measures should be strengthened; Technical and HIV/AIDS training for technicians is needed; Training of private physicians should be undertaken in collaboration with IMA; and Workshops on WTO/TRIPS with special reference to availability and access to HIV/AIDS related drugs should be organised at regular intervals.

In the long-term steps the government should build up State capacity for manufacturing drugs for HIV (Public Sector Undertaking) because this will result in easy access to HIV drugs at affordable prices. At the international level the Office of the High Commissioner for Human Rights and UN agencies could be approached for proactively informing and impacting drug trade negotiations. Also the governments should take steps to promote inter-country research developments in field of HIV/AIDS. The IEC should be reviewed to make it more positive, enabling it to reduce stigma with the purpose of preventing HIV/AIDS transmission. The role of Doordarshan and other public broadcasting companies should be examined time and again keeping in mind the place and character of the epidemic. For example presently the epidemic is rapidly feminizing, therefore keeping in view the present scenario female friendly programmes on HIV prevention and support services should be broadcasted for IEC purposes. The State should negotiate public broadcasting on HIV/AIDS by private channels by introducing tax relief. Including HIV/AIDS aspects in the Right to Information Bill would also be an innovative feature in accessing information. While expanding access to ARVs, existing schemes such as the Employee State Insurance Scheme must be effectively utilized. Health insurance, which can help cover the costs of treatment should be made available to PLHAs. In order to ensure availability, affordability and accessibility of medicines, pharmaceutical public sector undertakings should be adequately revived. Further the Drug Price Control Order (DPCO) needs to be immediately revised to ensure that essential medicines are included in the list. Also the working of National Pharmaceutical Pricing Authority (NPPA) should be made more transparent and accountable.
Access to Legal Remedies for HIV/AIDS Victims

For enhanced availability and access to legal remedies by PLHAs, proactive action is recommended. The State should introduce legal aid cells which are well versed in tackling issues of human rights violations of HIV/AIDS victims and spread legal education. The State should strictly guarantee anonymity in case of HIV positive status. However the State must take necessary steps to review all legislation impeding effective HIV interventions; examine anti-discrimination, health legislation and disability legislation; and introduce affirmative action (positive discrimination) of PLHA for example medical insurance facilities, exclusive employment for PLHAs, provision compassionate bail for positive prisoners etc. Laws and regulations that provide for restrictions on the movement or association of members of vulnerable groups in the context of HIV/AIDS should be removed in both law and law enforcement.

Law reform alone cannot achieve realization of human rights, helping individuals to enforce their rights in practice is critical. There are many examples of successful legal services in HIV/AIDS area. Many are privately, rather than governmentally funded in both developing and developed countries.22 It is the duty of the states in context of HIV/AIDS to provide legal support services that educate HIV/AIDS victims about their rights, develop expertise on HIV related legal issues and utilize means of protection in addition to the courts, such as offices of Ministries of Justice, ombudspersons, procurator health complaint units and human rights commissions.23 The States should enact legal aid systems specializing in HIV/AIDS casework, possibly by involving community legal aid centers or NGOs. State support or inducements (e.g. tax reduction) to private sector law firms in order to provide free legal services to PLHAs in areas such as antidiscrimination and disability, health care rights (informed consent and confidentiality), property (wills, inheritance) and employment law could be a beneficial step. State should also support programmes to educate, raise awareness and build self-esteem among HIV/AIDS victims concerning their rights and to empower them draft and disseminate their own charters/declarations of legal and human rights; State should also provide support for production and dissemination of HIV/AIDS

22. For example, The Citizens Action Against AIDS (Venezuela), the Lawyers Collective, India, National Lawyers Guild, USA, Terrence Higgins Trust (THT), United Kingdom and many more.
legal rights brochures, resource personnel directories, handbooks, practice manuals and newsletters to encourage information on HIV/AIDS related human rights. In order to achieve this, there should exist an effective national framework, through which HIV/AIDS policies and programmes are integrated across the executive, legislative and judicial branches of the government. Only such an approach can clarify respective roles and ensure that human rights are adequately considered across portfolio responsibilities. In order to avoid overlapping responsibilities, an interministerial committee should be formed to ensure integrated development and high level coordination of national action plans to monitor and implement the HIV/AIDS strategies. Each ministry should ensure that HIV/AIDS and human rights are integrated into all its relevant plans and activities like education, law and justice including police and corrective services, science and research, employment and public service, welfare, social security and housing, immigration, indigenous populations, foreign affairs, health, treasury and finance and defence, including armed services. Advisory bodies to assist the Government on legal and ethical issues, such as a legal and ethical sub-committee should be formed. Representation should consist of professional (public health, legal and educational, scientific, biomedical and social), religious and community groups, employers and workers organizations, NGO’s and ASO’s, nominees/experts and people living with HIV/AIDS. Similarly sensitization of the judiciary, in ways consistent with judicial independence, on the legal, ethical and human rights issues related to HIV/AIDS through judicial education and development of judicial material is important in the context of HIV/AIDS related discrimination cases. Ongoing interaction of government branches with United Nations Theme Groups on HIV/AIDS and other concerned international actors to ensure that governmental responses to the HIV/AIDS epidemic should continue to make the best use of assistance available from international community. Such interaction should inter alia, reinforce cooperation and assistance to areas related to HIV/AIDS and human rights.

**Involving Legislators in Prevention Programmes**

The legislators can play a vital role in establishing appropriate legal standards with regard to HIV/AIDS epidemic. They can advance HIV/AIDS and human
rights issues generally at local and regional levels. Legislators and government policy-makers are ultimately responsible for designing and implementing HIV/AIDS policies which are mentioned in the International Guidelines on HIV/AIDS and Human Rights in several of their roles: as political leaders they can influence public opinion, and can increase public knowledge of relevant issues; as legislators, they note on the acts of the parliament and can ensure that legislation protects human rights, and advances effective prevention and care programmes; as advocates, they can mobilize the involvement of government, private sector and civil society to discharge their societal responsibilities in responding appropriately to the epidemic and finally as resource mobilizers, they can allocate financial resources to support and enhance effective HIV/AIDS programmes that are consistent with human rights principles.

It is important for legislators to be knowledgeable about HIV/AIDS and to be key partners in developing policies, programmes and legislation that advance effective prevention and care for PLHAs. It should also be ensured that HIV/AIDS is kept on the political agenda through parliamentary debates and questions and meetings with the ministers. The parliamentarians should actively participate in consultative review and reform of the law, by drafting either government sponsored or private member’s bill.

Processes are needed to ensure that all branches of government follow a human rights-based response to the epidemic, including the legislature. Democratically elected parliamentarians are in a unique position to influence public opinion and lead their constituents towards attitudes supportive of an effective national response to the epidemic.

A framework should be established in which legislators/parliamentarians and states are obliged to send periodic reports to United Nations monitoring bodies on HIV/AIDS related concerns. Such framework could be the Commission on Human Rights of HIV/AIDS victims, which should request UNAIDS, its co-sponsors and other relevant United Nations bodies and agencies to integrate the promotion and protection of human rights of HIV/AIDS victims through generic legislation. Such mechanisms should be mobilized at grass-root level through exchange programmes and training among

24. Like the National Commission on Women or the Schedule Castes or Tribes Commission.
different communities. States should support translation of rights adopted with regard to HIV/AIDS victims and the international guidelines into national and minority languages. This strategy will be helpful in publicizing the human rights abuses in the context of HIV/AIDS and will create a widely accessible mechanism for communication and coordination for sharing information on treatment, care and prevention.

Acknowledging the Role of Religious Institutions and Faith Leaders in context of HIV/AIDS Related Issues

The war against HIV/AIDS cannot be won by a medical or legal response alone. It needs a multi-dimensional effort involving all sections of the society. In this response, there is a strong need for an enhanced level of engagement by religious institutions. Religion plays a crucial role in sanctifying the social order. Therefore messaging through prayer, liturgy and preaching are ways in which religious institutions can challenge the stigmatizing elements of society. If religious institutions are to engage effectively with local, regional and international responses to the HIV/AIDS epidemic, then issues of stigma and discrimination have to be confronted through the message of compassion. India is not only the largest democracy in the world, but arguably the country with the highest number of religions, sub-sects and faith leaders. This is an enormous and unparalleled resource that can play a crucial role in the fight against HIV/AIDS. The State should advocate the religious and traditional leaders take up HIV/AIDS related human rights concerns. Specially faith based leaders can play a role of paramount importance in the following areas like by developing policies and structures (such as HIV/AIDS focal persons) in each religious community to deal with the HIV/AIDS epidemic, as well as to support those members who are infected and affected with HIV/AIDS, and to use these structures to strengthen public and legal advocacy. This will provide an opportunity of inclusiveness for HIV/AIDS victims within the communities which further helps to reduce stigma. Spiritual care can really improve the quality of lives of infected as well as affected persons as religious leaders have skills in counseling. The different religious institutions have hospitals and health centers in very far and remote areas where no other health facilities exist. The reach of these institutions is tremendous, and the opportunity to educate
communities and care for people living with HIV/AIDS in these areas is extremely important. Therefore the State should provide assistance to them for increasing their involvement in HIV/AIDS related issues.

All religious institutions as well as faith leaders need to join the battle for prevention and control of HIV/AIDS. Also the research and academic institutions like universities and colleges can play a vital role in order to provide the basis for non-discrimination and mainstreaming the human rights perspective in HIV/AIDS related programmes, activities and national mechanisms. These institutions can provide policy related feedbacks to the State in order to shape the policy making, to understand academic and policy studies on the state of rights of HIV/AIDS victims from ethical and juristic aspects, and provide their findings to the Parliament and other relevant authorities like NACO or National Human Rights Commission. Regular training and seminars on the international human rights standards should be conducted. The judicial officers, practicing lawyers as well as students should be made to study the developed countries precedents on vulnerable communities rights (MSM, sex workers, IDUs) to ensure utmost implementation of international standards in context of HIV/AIDS.

25. The former U.S. President Bush’s worldwide Emergency Plan for AIDS Relief encourages the involvement of faith based groups in the responds to HIV/AIDS, including here in India. US Government programs in India support many religious organizations in the battle against HIV/AIDS. USAID was pleased to support the development of the recently launched HIV/AIDS policy of the Catholic Bishop’s Conference of India, a first for a religious organization in India.