

## Abstract

HIV/AIDS infection South Africa has reached epidemic proportions. Women, intravenous drug users, men who engage in sex with men, and commercial sex workers (CSWs) have all been repeatedly cited as vulnerable populations for contracting HIV. One reason that the spread of HIV continues to surge, especially among these vulnerable groups, is the violation of their human rights.

In South Africa, sex work is criminalized, and CSWs are subject to both HIV/AIDS and to human rights abuses.

Criminalizing sex work in South Africa is a human rights violation and should be abolished to uphold the principles of non-discrimination and equality, and in addition, to thwart the spread of HIV/AIDS in South Africa.



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### Additional Resources



[http://unaids.org/sites/default/files/country/documents//ce\\_ZA\\_Narrative\\_Report.pdf](http://unaids.org/sites/default/files/country/documents//ce_ZA_Narrative_Report.pdf)



## Criminalization of Sex Work in South Africa: A Modern Day Violation of Human Rights and a Threat to the Efforts to Reduce HIV/AIDS Infections

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## Objectives: South Africa, HIV, Women

### What is the HIV/AIDS Epidemic in South Africa? How does HIV/AIDS impact South African women?

It is estimated that 200,000 deaths were AIDS related in 2013. The 2014 mid-year estimate of the population is 54 million, but 6.3 million are estimated to be living with HIV. This is about 11.6% of the total South African population, but translates to 19.1% of those aged 15-49 years. An estimated 3.5 million women in South Africa age 15 and older have HIV, including 13.9% of women aged 15-24, and 21.1% of women aged 20-24. Women are 2 to 4 times more susceptible to HIV infection from heterosexual intercourse.

### What is a Commercial Sex Worker?

“Commercial Sex Worker” is the term used to refer to an individual involved in prostitution, the exchange of sex for monetary or material gain. Regardless of how a woman comes to be a sex worker or whether or not she is infected with HIV, once a woman enters that profession, CSWs are almost always thought of by the community as a carrier of the virus, which elicits a great deal of stigmatization and discrimination.

**The most punitive human rights violations occur within full or partial criminalization of commercial sex work by impeding CSWs ability to protect their health, safety and setting up a confrontational relationship with law enforcement.**

## Methodology: Human Rights and HIV

### What are Human Rights?

Human rights are widely accepted to be the innate, implied rights an individual possesses in society deemed essential for individual well-being, dignity, and fulfillment, and that reflect a common sense of justice, fairness, and decency. Human rights encompass the obligation of a society to create and enforce civil, cultural, economic, political and social rights for all its citizens that need not be earned but instead are implicit from the mere fact that one is a human being.

## Human Rights Documents

**Universal Declaration on Human Rights** (UDHR)

**International Covenant on Civil and Political Rights** (ICCPR)

**International Covenant on Economic, Social and Cultural Rights** (ICESCR)

**International Convention on the Elimination of All Forms of Racial Discrimination** (CERD)

**Convention on the Elimination of All Forms of Discrimination against Women** (CEDAW)

**A Human Rights approach to HIV/AIDS International Guidelines on HIV/AIDS and Human Rights** highlights the confluence of human rights and effective HIV/AIDS strategies, and focuses on preventing discrimination and stigma from HIV infection, and notes violations of human rights feeds discrimination against women and people in poverty.

**The Declaration of Commitment on HIV/AIDS** recognized that stigmatization and discrimination from HIV/AIDS is the ‘greatest barrier to preventing further infections.’

## Analysis through Legal Framework

**South African Constitution** – turning from the racial segregation of apartheid in 1990, South Africa approved a new Constitution in 1996 which specifically protects ‘democratic values, social justice and fundamental human rights,’ incorporates many tenants of the aforementioned international human rights treaties.

**Sexual Offenses Act of 1957** (“the Act”) – prohibits the sale of sex, of a person keeping a brothel, living off the earnings from prostitutes, and continues to criminalize sex work. Carnal intercourse is defined as “intercourse otherwise than between husband and wife” and has been very broadly applied to acts of those engaged in CSW. Since its enactment, it has always been interpreted to criminalize the person who engages in sex for reward - the sex worker, but assigning no penalty to the patron.

Section 20. Persons living on earnings of prostitution or committing or assisting in commission of indecent acts. (1) Any person who (a) knowingly lives wholly or in part on the earnings of prostitution; or (aA) has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or ... shall be guilty of an offence.

**S. vs. Jordan** – three women – a brothel owner, a brothel employee and a sex worker – were convicted on the (carnal intercourse for reward) prostitution provision and the brothel provision of Section 20(1)(aA). On appeal, the Pretoria High Court found the prostitution provision unconstitutional, but upheld the criminalization of the brothel provisions. The South African Constitutional Court, the highest court in the country, unanimously upheld the criminalization of the brothel provisions, but in a 6-5 decision, reversed the High Court and also criminalized the prostitution.

## Legal Analysis and Conclusions

### Analysis of Jordan

The majority in Jordan presented several points in support of its decision: (1) Section 20(1)(aA) is gender-neutral and thus, not directly discriminatory; (2) differences exist between a sex worker and a patron and thus, the Section is not indirectly discriminatory; (3) resulting stigma is a product of society, not the law, but the purpose of the law is of such great importance that it overpowers any discrimination.

### Counter Points to the Majority’s Argument

- (1) Specific gender terms are not needed to impinge on a woman's right of dignity, privacy and equality when there is a discriminatory effect from neutral language.
- (2) The Court referred to a CSW as a repeat offender and hence, a better target for judicial intervention without any empirical evidence on the frequency of a CSW's arrest and with no reference to frequency that a patron pays for sex (and remains untouched by the law). The law as written starts from the basis that the sex worker should be punished while the patron should not.
- (3) The lack of protections and employment options for women, the law's impact on creating or fueling stigma, and the isolation from CSW exacerbate the HIV problem, which becomes a societal problem.

### Human Rights Violations of Jordan

Jordan violates women's right to economic activity (under UDHR, CEDAW, ICESCR), to privacy and confidentiality (International Guidelines and UDHR), to health (ICESCR), to equality and freedom from discrimination (Constitution).

### Alternatives to Criminalization of Sex Work Decriminalization and Regulation