

REGIONAL LEGAL REFERENCE RESOURCE

Protective Laws related to HIV, Men who have Sex with Men
and Transgender People in South Asia

Promoting a legal enabling environment and
strengthening the legal response to HIV

January 2013



International Development Law Organization
Organisation Internationale de Droit du Développement



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Resilient nations.*

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ACRONYMS

ACJ: Advisory Council of Jurists (Asia Pacific Forum)

AIDS: Acquired Immune Deficiency Syndrome

APCOM: The Asia Pacific Coalition on Male Sexual Health

ART: Anti-Retroviral Therapy

CNICs: Computerized National Identity Cards (Pakistan)

ERA: Equal Remuneration Act (India)

ESCAP: The Economic and Social Commission for Asia and the Pacific

HIV: Human Immunodeficiency Virus

HRC: Human Rights Committee

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

IDLO: International Development Law Organization

LGBT: Lesbian, Gay, Bisexual, Transgender

MSM: Men who have Sex with Men

NAC: National AIDS Committee

NADRA: National Database and Registration Authority (Pakistan)

NAP: National Action Plan

NCASC: National Center for AIDS and STI Control (Nepal)

PLHIV: People Living with HIV

SAARCLAW: South Asian Association for Regional Co-operation Legal Apex Body

STD: Sexually Transmissible Diseases

STI: Sexually Transmissible Infections

UDHR: Universal Declaration of Human Rights

UNAIDS: Joint United Nations Programme on HIV/AIDS

UNDP: United Nations Development Programme

I. BACKGROUND

This Regional Legal Reference Resource - Protective Laws related to HIV, MSM and Transgender People in South Asia (Reference Resource) is an output of the South Asian Roundtable on Legal and Policy Barriers to HIV held in Kathmandu in November 2011 (South Asian Roundtable).

This Reference Resource documents key protective laws focused on HIV, men who have sex with men (MSM) and transgender people in five countries in South Asia. The two primary objectives of the Reference Resource are to:

1. build the capacity of legal professionals to analyze protective laws (focusing on people living with HIV, MSM and transgender people);¹ and
2. develop a resource to support legislative drafting, law reform and advocacy initiatives.

The South Asian Roundtable was a joint initiative of SAARCLAW, the International Development Law Organization (IDLO), the United Nations Development Programme (UNDP), the Joint United Nations Programme on HIV/AIDS (UNAIDS) and the World Bank; under an overarching goal to promote a legal enabling environment and strengthen the legal response to HIV in South Asia. The Roundtable built upon the momentum of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law (February 2011).

The Roundtable was designed to build an informed and engaged group of legal professionals and advocates committed to leading the legal response to HIV. In pursuance of this aim, the Roundtable created a forum for the examination and evaluation of legal and policy barriers to the HIV response in South Asia.

Roundtable delegates identified the following key legal and policy barriers to the HIV response:

1. the criminalization of behaviors of key populations at higher risk of HIV (key populations);
2. punitive law enforcement policy and practices;
3. a broad lack of sensitivity, knowledge and awareness of HIV by law and justice sector stakeholders;
4. the gap between black letter law and practice; and
5. a lack of coordination and collaboration within the law and justice sector (in the HIV response).

Delegates developed recommendations linked to these issues and agreed on the critical role of policy, advocacy and broader law and justice sector mechanisms in strengthening the enabling legal environment, whilst long-term law reform efforts are in progress.²

The Roundtable supported the commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under Resolution 66/10 which underscores the need “to ground universal access in human rights and undertake measures to address stigma and discrimination, as well as policy and legal barriers to effective HIV responses, in particular with regard to key populations.” The Roundtable further supported commitments in the Resolution to advance human rights to reduce stigma, discrimination and violence related to HIV; as well as the region-specific commitments contained in ESCAP resolutions 66/10 and 67/9.

II. NATIONAL LEGAL REFERENCE RESOURCES

This Reference Resource is a compilation of national reports detailing protective laws focused on HIV, MSM and transgender people in five countries in South Asia: Bangladesh, India, Nepal, Pakistan and Sri Lanka.³

¹ This objective was advanced in the process of researching and drafting national legal reference resources.

² <http://www.idlo.int/english/WhatWeDo/Programs/Health/Pages/Details.aspx?ItemsID=344>

³ <http://www.idlo.int/english/WhatWeDo/Programs/Health/Pages/default.aspx>

III. HIV IN SOUTH ASIA

South Asian countries experience concentrated HIV epidemics which impact disproportionately on MSM and transgender people. For example the HIV prevalence of MSM is reported to be 7.3 percent in India and 3.8 percent in Nepal; many times higher than the general population in these countries.

“Since the beginning of the HIV epidemic, public health experts and practitioners have known that stigma, discrimination, and gender inequality play an enormous role in furthering the spread of HIV. The response to these social drivers, however, remains inadequate to the scale and intensity of the challenges they pose.”⁴

A diverse range of structural factors and socio-cultural issues amplify the vulnerability of MSM and transgender people to HIV, including poverty and inequality; stigma and discrimination; cultural impediments to sex education and sexual discourse; marginalization, violence and social exclusion. Stigma and discrimination against MSM and transgender people across South Asia leads to their exclusion from mainstream health programmes and services. This drives MSM and transgender people underground and makes it difficult to reach them with HIV information and services, enhancing their vulnerability to HIV.

IV. THE ROLE OF LAW AND POLICY IN THE RESPONSE TO HIV

MSM and transgender people experience frequent violations of their rights and widespread violence, perpetrated by state actors, community and family members. Socio-cultural issues and structural factors are exacerbated by punitive and discriminatory legal frameworks and law enforcement practices. Criminalization of sex between men tends to enhance stigma, discrimination and related violence and is used as an exploitative tool by law enforcement agencies against MSM and transgender people to extort money, threaten, harass, and perpetrate violence.

To the extent that stigma and discrimination occur in areas which are subject to legal regulation (e.g. employment, rental accommodation, education, health care and access to other goods and services), the law has a role to play in the response to HIV.

The law can set normative standards which make HIV-related discrimination unacceptable. Legal education and interventions can help people living with HIV and key populations to assert their rights, while social mobilization and publicity can deter discrimination against others.

Even in countries where mechanisms for legal action are weak, a government commitment expressed in law about the importance of addressing discrimination is an important component of the national response.

The UN General Assembly Special Session on HIV/AIDS in 2001, and the Political Declarations of 2006 and 2011, emphasized the role of the law in the response to HIV, including law reform, community education and enforcement mechanisms.

“Commit to intensify national efforts to create enabling legal, social and policy frameworks in each national context in order to eliminate stigma, discrimination and violence related to HIV and promote access to HIV prevention, treatment, care and support and non-discriminatory access to education, health care, employment and social services, provide legal protections for people affected by HIV, including inheritance rights and respect for privacy and confidentiality, and promote and protect all human rights and fundamental freedoms with particular attention to all people vulnerable to and affected by HIV.”⁵

⁴ *Tackling HIV-related Stigma and Discrimination in South Asia*, 2010, World Bank

⁵ *Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS*, 2011

In September 2008, UNAIDS published a technical guidance note on the role of the law in response to HIV ('Addressing HIV-related Law at National Level'). While acknowledging the importance of law reform, UNAIDS suggests that we should also focus on community empowerment to access law, and appropriate law enforcement.

V. MAPPING AND RESOURCES

Each national Legal Reference Resource researcher was instructed to conduct a brief mapping exercise and identify related strategies and research on protective laws, people living with HIV, and sexual minority populations prior to commencing their research.

Researchers did not identify any recent studies specifically focused on protective laws, people living with HIV, MSM, transgender people or sexual minority populations in South Asia.

Researchers identified the following key strategies, reports, commitments and initiatives as primary resources on the issue of HIV, law and rights. As such, this Reference Resource builds upon these strategies, reports, commitments and initiatives:

- HIV and the Law: Risks, Rights & Health, 2012, Global Commission on HIV and the Law.⁶
- Sex Work and the Law in Asia and the Pacific, 2012, UNDP and UNFPA.
- Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region, 2012, UNDP and APTN.
- HIV and men who have sex with men: Country snapshots, 2012, UNDP, UNAIDS, APCOM and HIV & AIDS Data Hub.
- PLHIV Stigma Index Reports - Bangladesh, India, Pakistan, Sri Lanka, India, Tamil Nadu and Nepal, 2009-2012, IPPF, UNAIDS, GNP+ and ICW.
- Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law, 2011 (convened by UNDP, ESCAP and UNAIDS).
- United Nations Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS, 2011.
- The Global HIV Epidemics Among Men Who Have Sex with Men, 2011, World Bank South Asia Multi Country Global Fund Grant on HIV among men who have sex with men and transgender persons.
- ESCAP Resolution 67/9 Asia-Pacific regional review of the progress achieved in realizing the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS, 2011.
- ESCAP Resolution 66/10 Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific, 2010.
- Analysis of key human rights programmes in Global Fund-supported HIV programmes, 2010, UNDP, UNAIDS and GFATM.
- ACJ Report: Human Rights, Sexual Orientation and Gender Identity, Asia Pacific Forum, 2010.
- Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for Action, 2010, UNDP and APCOM.
- Tacking HIV-related Stigma and Discrimination in South Asia, 2010, World Bank.
- The Global Fund Strategy in Relation to Sexual Orientation and Gender Identities, 2009.
- Guidance Note: Addressing HIV-related Law at National Level, UNAIDS, 2008.

⁶ The Report of the Global Commission on HIV and the Law is available at <http://www.hivlawcommission.org>.

- The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2005.

Further reports and research, including national level initiatives and strategies (with weblinks) are attached at **Annex A**.

VI. INTERNATIONAL LAWS, CONVENTIONS AND PRINCIPLES

The Yogyakarta Principles

In 2006, recognizing the fact that the international response to human rights violations based on sexual orientation and gender identity was fragmented and inconsistent, the International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity. These principles, the Yogyakarta Principles, were designed to bring greater clarity and coherence to States' human rights obligations.

From 6-9 November 2006, distinguished experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law convened in Yogyakarta, Indonesia and unanimously adopted the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity.

The Yogyakarta Principles, comprised of 29 principles, affirm binding international legal standards with which all States must comply and reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity.

International Covenants

The Yogyakarta Principles draw upon the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Bangladesh, India, Nepal, Pakistan and Sri Lanka are members of the United Nations and have ratified the UDHR, the ICCPR and the ICESCR.⁷

The UDHR stipulates that “all humans are born free and equal in dignity and rights” (Article 1). It also puts forward the principles of equality before the law without discrimination (Article 7) and the right to life, liberty and security (Article 3) as well as the right to privacy (Article 12). Article 25 of UDHR provides for the right to the highest attainable standards of physical and mental health.⁸ The rights of non-discrimination, privacy and health are expanded upon in the ICCPR and ICESCR.

The ICCPR recognizes the inherent dignity and the equal and inalienable rights of all members of the human family; and provides for non-discrimination and privacy. The Committee on Economic, Social and Cultural Rights (CESCR) has made specific comment upon non-discrimination in relation to the right to health.

- Article 26 Non-Discrimination: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

⁷ Pakistan voiced reservations on the ICCPR Article 3 (equal right of men and women), Article 6 (right to inherent life and death penalty abolition), Article 7 (capital punishment and torture), Article 12 (freedom of movement and no force expulsion), Article 13 (no forced expulsion of an alien of the citizen except national security concerns), Article 18 (freedom of choice of religion and no coercion), Article 19 (freedom of expression), and Article 25 (equal rights to all citizens in public services and affairs and the right to vote).

⁸ Article 25 of UDHR- (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The Human Rights Committee (HRC), has in a general comment looked at this article and suggested that discrimination should be understood to imply “any distinction, exclusion, restriction or preference [...] which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”⁹

However, the HRC has also clearly articulated that “not every distinction amounts to prohibited discrimination under the Covenant, as long as it is based on reasonable and objective criteria.”¹⁰

In General Comments No 14 of 2000, the CESCR held that the ICESCR “proscribes any discrimination in access to health care [...] on the basis of, inter-alia, sex and sexual orientation [...] which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health.”¹¹

Flaherty and Fischer argue “the CESCR has consistently based this prohibition on the terms of the Covenant’s anti-discrimination provision, Article 2.2, which lists invidious categories of discrimination as including ‘sex’ and ‘other status’. Presumably, since the CESCR distinguishes ‘sex’ and ‘sexual orientation’ in its General Comments, it locates sexual orientation within the rubric of ‘other status’. The CESCR, in the General Comments, also invokes the article addressing equal rights of men and women, Article 3, as a basis for its prohibition of sexual orientation-related discrimination.”¹²

- Article 17 Right to Privacy: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...”

The HRC has stipulated that, “competent public authorities should only be able to call for such information relating to an individual’s private life the knowledge of which is essential in the interests of society...”

This provision may be called on to protect the right of non-disclosure (to third parties) of a person’s HIV status or HIV test results and has direct bearing on healthcare and employment practices.

The ICESCR enshrines the right to health.

- Article 12 Right to Health: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...] (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.”

This right has been interpreted as “an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.”¹³

The CESCR has stipulated that the right to health includes certain freedoms and entitlements some of which are legally enforceable such as the provision on non-discrimination (as noted above). The following specific issues, addressed by the Committee, are particularly relevant to people living with HIV, MSM and transgender people.

9 Human Rights Committee, CCPR General Comment number 18, at <http://www.unhchr.ch/tbs/doc.nsf/0/3888b0541f8501c9c12563ed004b8d0e?Opendocument>

10 Human Rights Law Review 8:2(2008), 207-248; Flaherty and Fischer ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ at 216; which references *Young v Australia* (941/2000), CCPR/C/78/D/941/2000 (2003) at Paragraph. 10.4.

11 Committee on Economic, Social and Cultural Rights, The Right to the Highest Attainable Standard of Health : 08/11/2000. Paragraph 18, E/C.12/2000/4. (General Comments)

12 Human Rights Law Review 8:2(2008), 207-248; Flaherty and Fischer ‘Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles’ at 215

13 <http://www.ohchr.org/EN/Issues/Health/Pages/SRRightHealthIndex.aspx>

- › The right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups.¹⁴ This is defined as a core obligation of states.¹⁵
- › The CESCR has further observed that the obligation on states regarding treatment, prevention and control of diseases “requires the establishment of prevention and education programs for behavior-related health concerns such as sexually transmitted diseases, in particular HIV/AIDS, and those adversely affecting sexual and reproductive health.”¹⁶ This includes the provision of adequate information including on sexual and reproductive health which would allow people, especially young people, to make informed decisions with regard to their sexual behavior and to keeping themselves and their partners safe.
- › The right to be free from non-consensual medical treatment and the right to have personal medical data remain confidential is also deemed to be a part of the right to health.¹⁷ These are considered to be cornerstones of a public health response with regard to protecting the rights of people living with HIV and their families and enhancing prevention efforts by encouraging people to voluntarily test themselves.

International Covenants in Practice

Bangladesh, India, Pakistan and Sri Lanka follow dualist model legal systems, as such, international laws must be enacted in domestic legislation in order to be enforceable.

In Nepal, Article 156 of the Interim Constitution of Nepal provides that the ratification of, accession to, acceptance of, or approval of treaties or agreements that Nepal is to become party, shall be determined by law.¹⁸ The *Nepal Treaty Act, 1990*, states that, upon a treaty, convention or agreement being ratified, acceded to or approved as stated above, the provisions of such a treaty, convention or agreement shall be the law of the land and at par with the existing domestic law.¹⁹ To the extent any provision of such a treaty, convention or agreement conflicts with the provision of the existing domestic law, the provision of the treaty, convention or agreement shall prevail.

There are examples of international laws being enacted in domestic legislation amongst the countries studied.

In some cases, even where laws have not been transformed into domestic legislation, South Asian Courts have referred to and used state obligations under international covenants in their judgments. For example, in India the Courts have called upon international law in a number of cases when discussing fundamental rights. The Supreme Court of India has explicitly stated that “any international convention not inconsistent with the fundamental rights [of the Constitution] and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”²⁰ Equally, the provisions of international human rights instruments have been used time and again by the Supreme Court of Nepal to safeguard the various human rights provisions contained therein.²¹

14 Committee on Economic, Social and Cultural Rights, The Right to the Highest Attainable Standard of Health: 08/11/2000. Paragraph 18, E/C.12/2000/4. (General Comments)

15 In General Comment No. 3, the Committee confirms that States parties have a core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights enunciated in the Covenant

16 ICESCR, Article 12.2 and interpretation in general comment at note 5, Paragraph 16

17 Committee on Economic, Social and Cultural Rights, The Right to the Highest Attainable Standard of Health: 08/11/2000. Paragraph 8 and Paragraph 12 (b) (General Comments)

18 As at June 2012, the time set to draft the Constitution of Nepal had expired (27 May 2012) and there are some doubts as to the constitutionality of the Interim Constitution.

The Interim Constitution further provides: It further provides that ratification of, accession to, acceptance of or approval of treaties or agreements on (a) peace and friendship, (b) security and strategic alliance, (c) boundaries of Nepal, and (d) natural resources and distribution of their uses, shall require consent of 2/3rd majority of the total number of the members of the legislature-parliament existing. In all other cases the ratification of, accession to, acceptance of or approval of treaties or agreements may be done at a meeting of the legislature-parliament by a simple majority of the members present.

19 Section 9(1) *Nepal Treaty Act 1990*. Section 9(2) of Treaty Act further provides that in the event Nepal is a signatory to a treaty/convention/ agreement but the same has not been ratified, acceded to or approved in the manner provided above and the provisions of such treaty/convention/agreement imposes additional obligations for enforcement of which new law may need to be enacted, then the Nepal government shall, as soon as expedient, enact such law.

20 *Vishaka v. State of Rajasthan* (1997) 6 SCC 241

21 Please refer to Ananda Mohan Bhattarai, ed. *The Landmark Decisions of the Supreme Court, Nepal on Gender Justice* (Nepal: National Judicial

VII. CONSTITUTIONAL PROTECTION

The Constitutions of Bangladesh, India, Nepal, Pakistan and Sri Lanka enshrine the principles of equality and non-discrimination.

Bangladesh

Article 11 of the Constitution of Bangladesh 1972 guarantees fundamental human rights and freedoms, providing: “The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.”²²

Significantly, Article 102 of the Constitution of Bangladesh gives power to the High Court Division, upon application, to give directions or orders for the enforcement of any of the fundamental rights under Part III of the Constitution.²³ This creates space for a claim in respect of a number of key rights including, but not limited to: the right to life and liberty, freedom of thought and association, safeguards against arrest and detention and discrimination.²⁴

Article 27 of the Constitution of Bangladesh provides “all citizens are equal before law and are entitled to equal protection of law.”²⁵ Article 28(1) of the Constitution of Bangladesh provides the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. This protection is broadened slightly at Article 28(3) which states “No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution.”

Under these articles of the Constitution of Bangladesh, people seeking redress on the basis of discrimination are protected in limited circumstances; that is:

- where the state is the perpetrator of the discrimination;
- where the discrimination is related to access to a public place; or
- where the discrimination is on the basis of religion, race, caste, sex or place of birth.

Gender identity and sexual orientation are not specifically included and research failed to find a Court interpretation of the word ‘sex’ in Bangladesh. It is possible that MSM and transgender people could utilize these Constitutional protections (in the above limited circumstances). Equally, it is possible that the conservative social and political context in Bangladesh would result in a narrow interpretation of the word ‘sex’, if tested in Court.

Article 18 of the Constitution of Bangladesh states that it is the primary duty of the State to improve public health: “The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties [...]” This article may be interpreted as an obligation to take measure to provide HIV-related prevention, treatment, care and support services.

Article 15 of the Constitution of Bangladesh states that it is the responsibility of the State to secure for its citizens, inter alia, “the basic necessities of life, including food, clothing, shelter, education and medical care”²⁶ and

Academy/ UNIFEM, 2010).

22 Constitution of Bangladesh Article 11 - Democracy and human rights: The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured.

23 Constitution of Bangladesh Article 102 (1) - The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any the fundamental rights conferred by Part III of this Constitution.

24 Notably, the Constitution of Bangladesh also sets limitations on fundamental rights; see Articles 26 and 47.

25 Constitution of Bangladesh, Article 27.

26 Constitution of Bangladesh Article 15 (a).

further “the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement.”²⁷

Recognizing the challenges faced by the transgender community, a multi-sectoral government team has established a programme which works to progress this constitutional responsibility. The 2011 ‘Integration of the Transgender (*hijra*) Population into Mainstream Society’ programme aims to ready 30 transgender people for employment through skill development and to establish a trust for the welfare of the transgender community.²⁸

Article 43 of the Constitution of Bangladesh provides for a limited right to privacy relating to correspondence and communications. It provides: “Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health - to be secured in his home against entry, search and seizure; and to the privacy of his correspondence and other means of communication.” This article may provide protection in the event of disclosure of a person’s HIV status. This is subject to the Court’s interpretation of the words “correspondence and other means of communication.” MSM and transgender people may be excluded from such protection if diverse sexuality is interpreted to be contrary to the interests of public morality.

India

The Constitution of India provides for rights under two separate parts; fundamental rights are covered under Part III, these include the right to equality, the right of non-discrimination, freedom of religion and certain other freedoms.²⁹ Part IV of the Constitution is titled Directive Principles of State Policy and includes: the right to work, the right to health and certain other social and cultural rights.

1. Fundamental Rights – Part III of the Constitution of India

Article 14 of the Constitution of India 1949 guarantees equality for all people “before the law or equal protection of the laws within the territory of India.” This principle is further extended in Article 15 (1) which provides “the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” Article 15(2) goes on to state “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition [...]”

Article 21 of the Constitution of India recognizes every individual’s right to life and liberty, which the Supreme Court has held includes the right to health.³⁰ The rights to privacy and personal autonomy are also enshrined in Article 21; these have been interpreted to include rights against mandatory testing for HIV.³¹

2. Duties of the State – Part IV of the Constitution of India

Significantly, economic, social and cultural rights are largely confined to the Directive Principles of State Policy (Part IV of the Constitution, Articles 37-51). Rights contained under the Directive Principles cannot be claimed in Court. This limitation is set out under Article 37 of the Constitution of India, which states: “this Part [Part IV] shall not be enforceable by any Court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”³²

Article 47 of the Constitution of India provides for the state’s duty to improve public health (limited by Article 37). Article 47 stipulates that “The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.”

²⁷ Constitution of Bangladesh Article 15 (d).

²⁸ <http://www.thedailystar.net/magazine/2011/10/03/special.htm> accessed on July 17, 2012.

²⁹ Constitution of India Part III

³⁰ In 1991, in *CESC Ltd. v. Subash Chandra Bose*, the Supreme Court relied on international instruments and concluded that the Right to health is a fundamental right and that Article 21 forms the basis of this right.

³¹ Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 (2.1.1 and 5.2)

³² Article 37 states that “The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws”

Article 38(1) of the Constitution of India (limited by Article 37) provides that the “State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Article 38(2) provides “the State shall, in particular, strive to minimize the inequalities in income, and endeavor to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.”

Nepal

Article 13(1) of the Interim Constitution of Nepal 2007 provides that all citizens are equal before the law. Article 13(2) states that “no discrimination shall be made against any citizen in the application of law on the grounds of religion, color, sex, caste, tribe, origin, language or ideological conviction or any of these.” Article 13(3) places an additional requirement upon the State, in stipulating that “the State shall not discriminate against any citizen on the grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these.”³³

The right of non-discrimination under the Interim Constitution of Nepal does not expressly include ‘gender identity’ or ‘sexual orientation’. The 2007 Supreme Court decision in the case of *Sunil Babu Pant v. Government of Nepal* interpreted the right of non-discrimination broadly; this is discussed in further detail below.

Article 32 of the Interim Constitution of Nepal provides for constitutional remedy under Article 107 in case of violation of fundamental rights (covered by Part 3 of the Interim Constitution of Nepal).³⁴ Under Article 107 any citizen can file a petition in the Supreme Court to have a law or any part thereof void on the grounds that it violates or imposes restrictions on the enjoyment of the fundamental rights conferred by the Constitution. The Supreme Court has the authority to declare the law void *ab initio* or from the date of the decision if it finds such law to be inconsistent with the Constitution. Further, the Supreme Court has the right to issue appropriate writs, including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto*, for the enforcement of fundamental rights conferred by the Constitution.³⁵

The Interim Constitution of Nepal provides, at Article 16 (2) “Every citizen shall have the right to get basic health service free of cost from the State as provided for in the law.”

Article 28 of the Interim Constitution of Nepal defines the right to privacy as a fundamental right. Article 28 states that “Except in circumstances provided by law, privacy in relation to the person and to their residence, property, documents, records, statistics and correspondence, and their reputation are inviolable.” The Supreme Court of Nepal has interpreted the right to privacy to protect MSM and transgender people. This is detailed further below.

33 Article 13- (1) All citizens shall be equal before the law. No person shall be denied the equal protection of the laws. (2) No discrimination shall be made against any citizen in the application of general laws on grounds of religion, color, sex, caste, tribe, origin, language or ideological conviction or any of these. (3) The State shall not discriminate against citizens among citizens on grounds of religion, race, caste, tribe, sex, origin, language or ideological conviction or any of these. Provided that nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, Dalits, indigenous peoples (Adibasi, Janajati), Madhesi or farmers, workers, economically, socially or culturally backward classes or children, the aged and the disabled or those who are physically or mentally incapacitated. (4) No discrimination in regard to remuneration social security shall be made between men and women for the same work.

34 Article 32 Interim Constitution of Nepal - Right to constitutional remedies: The right to proceed in the manner set forth in Article 107 for the enforcement of the rights conferred by this Part (Part 3: Fundamental Rights) is guaranteed.

35 Article 107 Interim Constitution of Nepal - Jurisdiction of the Supreme Court: (1) Any citizen of Nepal may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground; and the Supreme Court shall have extra-ordinary power to declare that law to be void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with this Constitution.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution or for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such right or settle such dispute. For these purposes, the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including the writs of *habeas corpus*, *mandamus*, *certiorari*, prohibition and *quo warranto*.

Provided that, except on the ground of absence of jurisdiction, the Supreme Court shall not under this Clause interfere with any proceedings and decisions of the Legislature-Parliament concerning violation of its privileges and penalties imposed therefore.

The right to privacy is important in protecting the rights of persons against disclosure of their HIV test results,³⁶ sexual orientation or gender identity.

Article 27 of the Interim Constitution of Nepal recognizes the right to information as a fundamental right and states that every citizen shall have the right to demand or obtain information on any matters of concern to him/her or to the public so long as the right of privacy contained in the Constitution or any other law is not violated.³⁷

Pakistan

Article 25 (1) of the Constitution of Islamic Republic of Pakistan 1973 (Constitution of Pakistan) provides that “all citizens are equal before law and are entitled to equal protection of law.”

Article 25 (2) of the Constitution of Pakistan previously stated that “there shall be no discrimination on the basis of sex alone.” This was amended by Section 8 of the *Constitution (Eighteenth Amendment) Act 2010* (10 of 2010) which deleted the word ‘alone’ at the end of Article 25(2) (with effect from April 19, 2010). This amendment broadened the scope of protection from discrimination. Article 25(1) can now be relied upon to seek protection from all forms of discrimination including but not limited to discrimination based on religion, caste, creed, race, age, medical condition and/or disability.

Legal commentators suggest that while Article 25 of the Constitution of Pakistan is broad enough to accord protection to people living with HIV and sexual minority populations, in the absence of more specific laws, efforts to protect such rights are dependent on these provisions being invoked before and enforced by a court of law.

Sri Lanka

The Constitution of Sri Lanka guarantees that all people are equal before the law and are entitled to the equal protection of the law under Article 12(1). Article 12(3) provides that no person shall be subject to any disability, liability, restriction or condition on the grounds of race, religion, language, caste or sex.

The Constitution of Sri Lanka provides for positive duties of the State under its directive principles; specifically in relation to the full realization of the fundamental rights and freedoms of all persons; the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions; the promotion of welfare [...] by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life.³⁸

The Constitution of Sri Lanka does not make specific provision in relation to the right to health or privacy.

VIII. ANTI-DISCRIMINATION LAWS

There is no stand-alone anti-discrimination legislation which specifically protects people living with HIV or sexual minority populations in Bangladesh, India, Nepal, Pakistan or Sri Lanka.

Bangladesh has broad anti-discrimination laws, but no provisions that specifically provide for people living with HIV or people of diverse sexual orientation or gender identity.³⁹

36 Although the Constitutionally enshrined right to privacy should protect against mandatory testing, under the *Infectious Disease Control Act 1963*, in certain circumstances, the Government of Nepal may issue any order to prevent the spread of infectious diseases. Although there is no specific provision for mandatory testing for HIV, mandatory test orders may be issued to achieve the objectives of the *Infectious Diseases Control Act*. The *Infectious Disease Control Act* does not provide for informed consent for testing for any diseases.

37 Article 27 Interim Constitution of Nepal - Right to information: Every citizen shall have the right to demand or obtain information on any matter of his or her interest or of public interest. Provided that nothing shall be deemed to compel any person to provide information on any matter of which confidentiality is to be maintained by law.

38 Article 27 Constitution of Sri Lanka

39 UNGASS Report 2010, Bangladesh

In India, legal commentators suggest there are two statutes in place that provide some insight into the type of legislation and provisions that could be utilized in protecting people living with HIV or sexual minority populations:

- *The Equal Remuneration Act 1976* (ERA) mandates that employers must equally remunerate men and women for the same work. This Act specifically addresses inequity and discrimination within the workplace but only in terms of gender based discrimination related to wages. Whilst this is not directly applicable to people living with HIV, legal activists have pointed out that this law is useful in terms of “determining responsibility for discrimination by companies and corporations”⁴⁰ and “confirms the commitment and intent of the State to right the wrongs of discrimination.”⁴¹
- *The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995* (PWD Act) attempts to give effect to the equal opportunity provision set out in Article 14 of the Constitution. The PWD Act attempts to alleviate the position of people with disabilities by providing that certain government bodies cannot dispense with, or reduce in rank, an employee who acquires a disability during his service; or deny a promotion to a person on the ground of their disability.⁴²

While the application of this article is narrow (certain government bodies only), activists have advocated for the inclusion of people living with HIV in the PWD Act on the basis that the stigma and discrimination experienced by people living with HIV is similar to that experienced by other people with disabilities.

The Country Code of Nepal contains some provisions related to certain types of discrimination on the basis of disease, under Chapter 19 on Decency/Etiquette (*Adal*). No. 10(B) of Chapter 19 provides that in the event a person commits torture or banishes any ill person from his or her place of residence (by rejecting that person or committing any inhuman or degrading treatment), on the ground that he or she has suffered from any disease, the person shall be liable to the punishment of imprisonment for a term ranging from 3 months to 2 years or a fine of 5,000-25,000 Nepali Rupees, or both.⁴³

This provision may be interpreted to cover ill treatment and/or ostracism of people living with HIV. Notably, the provision covers ill treatment at a social level only (place of residence), not ill treatment at an institutional level.

The *Nepal Civil Rights Act 1955* states that, subject to the provisions of the prevailing law, no citizen shall be denied equality before law and equal protection of law.⁴⁴ It further states that appointments to the Government or any other public body shall be based on merit and that there shall be no discrimination on the grounds of colour, gender, caste and tribe or any of them, in making such appointments.⁴⁵ These provisions do not expressly forbid discrimination in appointment to the Government or public service on the basis of sexual orientation, gender identity or on the basis of a person being infected with a disease.

IX. HIV LAWS AND BILLS

India, Pakistan and Nepal have developed bills specifically pertaining to HIV and the protection of the rights of people living with HIV and people vulnerable to HIV. None of these bills have been passed into law.

Sri Lanka and Bangladesh have not drafted HIV specific laws or bills.

40 The Lawyers Collective, *Legislating an Epidemic: HIV/AIDS in India*, (New Delhi Universal Law Publishing, 2003); pg 13

41 *Ibid*. The ERA outlines what a punishable offence is and prescribes punishments including fines and prison terms, thereby providing an example of an anti-discrimination piece of legislation that has teeth.

42 <http://www.disabilityindia.org/pwdacts.cfm#ch8>

43 No. 10(B)- If a person accuses another person of a witch or banishes him or her from his or her place of residence on such accusation or excludes him or her from social activities or does any other inhuman or degrading treatment or commits torture or banishes any ill (sick) person from his or her place of residence by rejecting or doing any inhuman or degrading treatment to him or her on the ground that he or she has suffered from any disease, the person shall be liable to the punishment of imprisonment for a term ranging from 3 months to 2 years or a fine of NRS 5,000 NRS 25,000, or both.

44 Nepal Civil Rights Act Section 3- Equality in the eye of law: No citizen shall be denied equality before the law and equal protection of law subject to the provisions of prevailing laws.

45 Nepal Civil Rights Act Section 4- No discrimination on the ground of Religion, Caste, Tribe or Gender: In the course of providing appointments, the Government of Nepal shall appoint only in the ground of merit and no citizen shall be discriminated on the ground of religion, colour, gender, caste, tribe or any of them in the appointment of government or any other Public Service.

India

In 2007, the HIV/AIDS Bill (Indian Bill) was introduced to Parliament under a joint initiative of the government and civil society. Drafted by the Lawyers Collective after rigorous consultations across the country, the Indian Bill includes human rights principles and “seeks to establish a humane and egalitarian legal regime to support India’s prevention, treatment, care and support efforts vis-à-vis the epidemic.”⁴⁶

Building upon rights enshrined in the Constitution of India, the Bill specifically recognizes the rights to equality, autonomy, privacy, health and information.

Chapter II of the Indian Bill prohibits discrimination related to HIV in both public and private spheres: “No person shall be subject to discrimination in any form by the State or any other person in relation to any sphere of public activity.” This section goes on to comprehensively define areas of HIV-related discrimination stating that no person may be discriminated against in employment, education, healthcare, travel, housing or insurance, based on their HIV status.⁴⁷ This provision provides protection against discrimination by the state and by other actors.

Significantly, discrimination is broadly defined to include “any act or omission including a policy, law, rule, practice, custom, tradition, usage, condition or situation which directly or indirectly, expressly or by effect, immediately or over a period of time:

- imposes burdens, obligations, liabilities, disabilities or disadvantages on, or
- denies or withholds benefits, opportunities or advantages, from, or
- compels or forces the adoption of a particular course of action by,

any person or category of persons, based on one or more HIV-related grounds.”

The breadth of this provision hinges on the meaning of ‘HIV-related grounds’, which are framed to include: “HIV status, actual or perceived; actual or perceived association with an HIV-positive person; or actual or perceived risk of exposure to HIV infection; or any other ground where discrimination based on that ground (1) causes or perpetuates or has a tendency to perpetuate systemic disadvantage in respect of a category of persons, (2) undermines human dignity or (3) adversely affects the equal enjoyment of a protected person’s rights and freedoms in relation to [HIV].”

This definition is drafted to encompass MSM, transgender people and populations at higher risk. The provision is intended to provide protection from discrimination which is practical and appropriate, enabling an effective response to the types of discrimination that undermine the HIV response.

Chapter IV of the Indian Bill guarantees the confidentiality of HIV-related information (including the HIV status of a person) and outlines the exceptions for disclosure, including in certain circumstances in a Court of law or in certain circumstances as required by medical practitioners.⁴⁸

⁴⁶ Lawyers Collective HIV/AIDS Unit, ‘Positive Dialogue’, Newsletter # 20: Pg 1

⁴⁷ The HIV/AIDS Bill 2007, Chapter II, Section 4. This chapter prohibits (a) Denial of, or termination from, employment or occupation (b) Unfair treatment in, or in relation to, employment or occupation; (c) Denial or discontinuation of, or unfair treatment in, healthcare services; (d) Denial or discontinuation of, or unfair treatment in, educational services; (e) Denial or discontinuation of, or unfair treatment with regard to, access to, or provision or enjoyment or use of any goods, accommodation, service, facility, benefit, privilege or opportunity dedicated to the use of the general public or customarily available to the public, whether or not for a fee including shops, public restaurants, hotels and places of public entertainment or the use of wells, tanks, bathing ghats, roads, burial grounds or funeral ceremonies and places of public resort; (f) Denial or discontinuation of, or unfair treatment with regard to, the right of movement; (g) Denial or discontinuation of, or unfair treatment with regard to, the right to reside, purchase, rent, or otherwise occupy, any property; (h) Denial or discontinuation of, or unfair treatment in, the opportunity to stand for or hold public or private office; (i) Denial of access to, removal from, or unfair treatment in, a State or private institution in whose care or custody a person may be; (j) Denial of, or unfair treatment in, the provision of insurance unless such unfair treatment is based on and supported by actuarial studies; (k) isolation or segregation of a protected person; (l) HIV testing as a pre-requisite, for obtaining employment, or accessing healthcare services or education or, for the continuation of the same or, for accessing or using any other service or facility.

⁴⁸ Chapter IV, Section 3 provides: “Informed consent for disclosure of HIV-related information or private information is not required in case the disclosure is made:(a) by a healthcare provider to another healthcare provider who is involved in the provision of care, treatment or counselling of a person, when such disclosure is necessary to provide care or treatment in the best interest of that person; or (b) by an order of a court when it determines by such order that the disclosure of such information is necessary for the determination of issues and in the interest of justice in a matter before it; or (c) in suits or legal proceedings between persons, where the disclosure of such information is

On the issue of partner notification, the Indian Bill allows doctors to notify partners in certain circumstances including if “the healthcare provider bona fide and reasonably believes that the partner is at significant risk of transmission of HIV from such person; and the HIV-positive person has been counseled to inform such partner; and the healthcare provider is satisfied that the HIV-positive person will not inform such partner.”⁴⁹ This provision places significant responsibility upon and trust in the decision making skills of the healthcare provider.

Chapter III of the Indian Bill sets out the requirements for informed consent for HIV testing in sufficient detail so as to protect persons taking a HIV test. Informed consent is defined as “consent given, specific to a proposed intervention, without any force, undue influence, fraud, threat, mistake or misrepresentation and obtained after disclosing to the person giving consent adequate information including risks and benefits of, and alternatives to, the proposed intervention in a language and manner understood by such person.”

Chapter VII of the Indian Bill addresses an important concern of community groups, the targeting of outreach workers distributing HIV prevention materials and tools (for example condoms and information) by government officials. Section 4(a) of the Indian Bill states that “No public servant, including a law enforcement official, shall arrest or detain or in any manner harass, impede, restrict or otherwise prevent any person implementing or using strategies for reduction of risk of HIV transmission.” Notably, this provision will not provide protection in the event of harassment or obstruction by private actors or civil society groups.

Chapters XI and XII of the Indian Bill address and create innovative implementation mechanisms including institutional grievance redressal machinery, Health Ombuds in each district and HIV authorities that will take over from the National AIDS Control Organization and State AIDS Control Societies, with an independent and accountable structure. The Indian Bill also specifies special Court procedures including quick trials and creative redressal. For example, under these provisions, a Court may award damages and direct the person who perpetrated the discrimination to undergo sensitization and training, and undertake community service.

Chapter XIV of the Indian Bill provides a comprehensive overview of special provisions taking into account the additional needs of particular groups (prisoners, women, children and guardians of the state).⁵⁰ Chapter XIV also addresses the link between sexual violence and HIV and directs the State to set up sexual assault crisis centers where survivors of sexual assault may access services including counseling, treatment and management of STI's including HIV and AIDS and referrals.⁵¹

The Indian Bill was cleared by the Law Ministry in March 2010. Lawyers, activists and community groups have since lobbied the Health Ministry to take action but at the date of this report, the Indian Bill had not been tabled in Parliament.⁵²

Nepal

The first draft of the Nepal HIV and AIDS (Prevention, Control, Treatment, Re-integration and Protection of Rights) Bill 2067 (2010) (Nepal Bill), was developed in 2003, but has been amended a number of times. The following comments are based on a draft version of the Nepal Bill dated 6 October 2011.

The Nepal Bill provides that “no person shall be subject to any form of discrimination because of his/her being HIV infected or on a suspicion that he/she is HIV infected.” Significantly, the ambit of this protection extends to discrimination on the basis of a suspicion that a person is HIV infected. Accordingly, this clause may be interpreted to protect MSM and transgender people (and/or other key populations at higher risk of HIV who are also the

necessary in the initiation of such proceedings or for instructing counsel; or if it relates to statistical or other information of a person that could not reasonably be expected to lead to the identification of that person.”

49 See Section 13. In dealing with ‘partner notification’ and the ‘duty to prevent transmission’, the Indian Bill also recognizes the vulnerability of women and specifies that the duty to notify partners is waived in the case of women who fear violence and loss of their homes in the event of notification.

50 The Bill recognises certain rights for women, children and persons in the care and custody of the State who find themselves more vulnerable to HIV and are disproportionately affected by the epidemic. Prisoners are provided with specific access to risk reduction strategies, counseling and healthcare services

51 See Section 74

52 In July 2011, approximately 300 people living with HIV staged a protest outside the Health Ministry demanding immediate passage of the Indian Bill and a meeting with the Minister of Health

subject of stigma and presumptions) who may be presumed to be HIV positive on the basis of stigmatizing views or lack of knowledge. This would be subject to evidence that the discriminating entity had made some presumption of HIV status or suspected the party discriminated against, to be HIV positive. Notes on the intention of the drafters and legislators would be useful in understanding the full intention of this effect of this section.

While this represents an important step to extend anti-discrimination provisions to protect people from discrimination 'on suspicion' of their status, the practicality of enforcing such a provision and the challenges in proving a person held such a suspicion must be considered.

The Nepal Bill expressly extends this degree of protection to the public, private and personal spheres. It provides:

- “No public or private enterprise shall discriminate against any person because of his/her being HIV infected or on a suspicion that he/she is HIV infected, in access or distribution of any facilities, from appointment, transfer or promotion or while nominating for training or study in any public or private enterprise. Such persons’ employment shall not be terminated by public or private enterprises nor shall his/her facilities be diminished or denied.”
- “persons infected or suspected to be infected with HIV shall not be discriminated against in his/her familial and personal life through deprivation of his/her access to or exercise of rights under law”.

Notably earlier versions of the Nepal Bill extended this protection to family members of the person infected or suspected to be infected with HIV; the ambit of protection has since been narrowed.

The Bill recognizes a person’s right to privacy and confidentiality of his/her HIV status and provides:

- a person shall not be required to disclose his/her HIV status unless otherwise required by the provisions of the Bill of any other law in force.
- all health professionals, people working in the health sector and any doctor, nurse, or other staff or worker in the government or the private sector, who has the responsibility to maintain documents or any records, reports or reports of health-related testing, [must] keep confidential any details related to the [HIV] status of any person that comes to his/her knowledge in the course of his/her work.

These provisions are in line with the constitutionally enshrined right to privacy. However, the Nepal Bill imposes an obligation only upon health professionals who may have access to the HIV status of a person in the course of their duties. A greater degree of protection could be achieved by extending this obligation beyond the health sector to other persons who may have direct or indirect access to such information; and by creating practical and accessible complaints mechanisms, with clear repercussions for a breach,

The Nepal Bill prohibits mandatory testing for HIV unless otherwise provided for in the Nepal Bill. Testing for HIV and research on HIV may not be conducted without the consent of the concerned person. Instances in which the consent of the concerned person shall not be required for HIV testing are: (a) in the course of investigation of crime under the provisions of the Nepal Bill⁵³(b) pursuant to a court order, and (c) in the course of treatment of a minor or an individual who is unable to take his/her decision because of physical or mental state.⁵⁴

The Nepal Bill does not define the manner in which consent for HIV testing should be given. The Nepal Bill could be strengthened by defining ‘consent’ as informed, written consent, free from coercion.⁵⁵

This version of the Nepal Bill was submitted by the HIV/AIDS and STD Control Board to the Ministry of Health and Population in 2010. Research indicates that the Nepal Bill is being amended and reviewed by Ministry of Health and Population, pursuant to which it will be forwarded to the Ministry of Law and Justice and finally tabled before Parliament for endorsement and enactment. Civil society has lobbied against delays in this process.

53 This includes circumstances to determine if a person has intentionally or negligently transmitted HIV - an offence under the Nepal Bill.

54 This would be based on a written consent or recommendation of the individual/minor’s family member, and if no family member is available, at the recommendation of the concerned hospital or the health officer.

55 The Nepal Bill requires that every individual who undergoes HIV testing be given compulsory pre and post-test counselling by the testing agency. The Bill further states that “Such counselling (pre and post-test counselling) shall be confidential”. The pre and post-test counselling shall be conducted in accordance with the regulations that may be framed in this regard.

Pakistan

Pakistan developed the draft *HIV/AIDS Prevention and Treatment Act* in 2007 (Pakistan Bill). The Pakistan Bill proposes to support the Government of Pakistan to establish an enabling environment by:

- According care, support and treatment to people living with HIV;
- Protecting vulnerable populations against stigma and discrimination on the basis their HIV status;
- Providing for increased prevention, care, support and treatment programs, thereby reducing the risk of HIV infection among vulnerable populations, including preventing its transmission into the general population; and
- Giving effect to all the national and international endeavors in this respect.

The Pakistan Bill defines most at risk populations as “populations at disproportionately high risk of HIV infection, whose members and their families often experience a lack of human rights protection, such as discrimination and/or are otherwise marginalized by their legal or other status, which consequently may disempower members of these populations to avoid seeking HIV tests and other HIV infection prevention measures and to cope with HIV/AIDS, if affected by it.”

MSM and transgender people in Pakistan would benefit from a definition of most at risk populations with less ambiguity. A provision which expressly names the most at risk populations would preclude doubt as to their inclusion in this category.

Section 2(e) of the Pakistan Bill defines discrimination to include: “any act or omission including a policy, law, rule, practice, custom, tradition, usage, condition or situation which directly or indirectly, expressly or by effect, immediately or over a period of time imposes burdens, obligations, liabilities, disabilities or disadvantages on, or denies or withholds benefits, opportunities or advantages, from, or compels or forces the adoption of a particular course of action by any person or category of persons, based solely on a person’s HIV status, actual or perceived.”

This is a broad protective provision and importantly provides protection for people living with HIV or ‘perceived’ to be living with HIV. Similarly to the Nepal Bill, this provision may be interpreted to cover MSM, transgender people and other key populations at higher risk of HIV. However, given the Pakistan Bill specifically defines most at risk populations but does not use this term in section 2(e); Courts may construe this section to exclude most at risk populations.

Notably, this provision would offer greater protection if it was amended to delete the word ‘solely’ – allowing the Pakistan Bill to capture cases of discrimination where discrimination occurred on the basis of a number of factors, one of which was the person’s HIV status. The Pakistan Bill could also be strengthened by extending the coverage of Section 2 to include associates of people believed to be living with HIV, whether such person’s HIV status is actual or perceived.

Section 11 of the Pakistan Bill prohibits discrimination in both the public and private sector: “No person shall be discriminated against on the basis of his HIV status in any form in relation to any activity in the private or public sectors.” The Pakistan Bill also prohibits anyone from publishing, propagating, advocating or communicating whether by words, or by actions, against any person on grounds of his/her suffering from HIV.

Section 12(2) of the Pakistan Bill makes it “obligatory for all public and private sector organizations to keep confidential the medical and personal record of people, their employees, students and members, as the case may be.”

Section 12 of the Pakistan Bill makes it illegal to coerce a person, contrary to the provisions of the Bill to test for HIV for the purposes of employment, promotion, training, or benefit (either in public or private sectors); membership in any organization; admission to any educational institution; admission to any public or private place of accommodation; marriage; immigration to, emigration from, or citizenship of, Pakistan; and visiting another country for including but not limited to, tourism, studies or work.

The Pakistan Bill provides for a fine in the event of violation of the provisions on discrimination (specifically section 11 in relation to the public and private sector) and mandatory testing (section 12). Section 39 states violation

of these sections is punishable by a fine of not less than 50,000 Pakistani Rupees or more than 300,000 Pakistani Rupees.

Section 40(1) of the Pakistan Bill recognizes the role of the Courts and provides “notwithstanding any other law for the time being in force, in the adjudication of any proceedings, which are instituted under the same, the Courts are permitted to pass appropriate orders having regard to the circumstances of the case to (i) prevent breaches of the provisions of this Act; or (ii) redress breaches of the provisions of this Act.”

Legal commentators suggest a lack of political commitment has impeded the passage of the Pakistan Bill. A consistent and effective long-term response to HIV depends heavily on bipartisan, multi-sectoral commitment. Competing political, social and economic priorities have resulted in a situation where the Pakistan Bill has been pending for five years.

In Islamabad, legislators have addressed the issue of HIV in a separate bill applicable only in the jurisdiction of Islamabad. As at the date of the report, the HIV/AIDS Safety and Control Bill 2010 (Islamabad Bill) had been accepted by Parliament for review. The Islamabad Bill provides at section 10: “No person will by publication, by advocacy or propaganda spoken or written spread prejudicial reports regarding a person or persons of [HIV] in a way that could cause psychological, physical or mental trauma to that individual or individuals or result in their being victimized or discriminated against by the society, by employers or prospective employers or associates. A person advocating or discriminating against an infected person will be guilty of a misdemeanor and is liable to imprisonment or fine or both.”⁵⁶

The key term in this section is ‘prejudicial reports’ – protection is prescribed only in the circumstance of a prejudicial report. A Court would be required to determine whether an act or statement constituted a ‘prejudicial report’. This *may* be interpreted to broadly encompass all stigmatizing or discriminatory acts or statements against people living with HIV, however, what is prejudicial may be interpreted subjectively. This section does not offer protection on the basis of presumed HIV status or on the basis of association.

The section sets a low burden of proof for claimants in relation to the impact of the prejudicial report; a prejudicial report is only required to create the possibility of trauma (“*could* cause psychological, physical or mental trauma ...or result in their being victimized or discriminated against...”). That is, the section is not drafted in a way that requires a claimant to prove that a prejudicial report caused actual damage.

The Islamabad Bill is applicable only in the territorial jurisdiction of Islamabad.

X. COURT DECISIONS AND IMPLEMENTATION OF PROTECTIVE LAWS

Bangladesh

Research failed to identify Bangladesh Court decisions related to the rights of people living with HIV, MSM and/or transgender persons.

India

There have been a number of Court orders related to the Constitutional guarantee of non-discrimination with specific regard to people living with HIV, MSM and transgender people in India. Notably, “in the absence of any law or statute that specifically addresses the issues that are raised in the HIV context in India, both appellants and the judiciary have had to make their complaints, decisions and rulings by extrapolation from a variety of law sources.”⁵⁷

56 While the Islamabad Bill seeks to accord protection to people living with HIV in Islamabad, it also seeks to make HIV testing mandatory for marriage, prison inmates, commercial sex traders, sex offenders, victims of crimes which have exposed them to risk of acquiring HIV, habitual drug users, truck drivers, and patients receiving repeated transfusions of blood.

57 K. Bhardwaj, 2008, legal commentator, <http://infochangeindia.org/agenda/hivaid-big-questions/do-we-need-a-separate-law-on-hiv.html>.

1. Delhi High Court Decision on Section 377 of the Indian Penal Code

The Delhi High Court relied upon Constitutional provisions to read down Section 377 of the Indian Penal Code which criminalized “carnal intercourse against the order of nature”, or, in effect, same sex, consensual sexual activity. In an historic judgment in June 2009, Justice A.P Shah declared this law to be unconstitutional and proclaimed, “It cannot be forgotten that discrimination is the antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

This historic judgment used the Indian Constitution and foreign case law to rule on the basis of fundamental rights. The Delhi High Court ruled that this section was a violation of the fundamental right to privacy; that a human rights approach protecting the rights of vulnerable populations is critical to HIV prevention; and that discrimination on the basis of sex includes sexuality and sexual orientation. The judgment also highlighted a critical distinction between public and constitutional morality declaring that the State cannot limit individual rights on the grounds of what the public may disapprove of, but must rely on constitutional principles of equality, plurality and inclusion.

This decision has been hailed globally as marking “the beginning of the end of the legal subordination of India’s sexual minority populations.” Appeals against the decision were being heard in the Supreme Court of India in June 2012, while this Reference Report was drafted.

2. Public Interest Litigation on Access to Healthcare Services

In 1999, the Lawyers Collective filed public interest litigation through Sankalp Rehabilitation Trust to address barriers that impeded the access of people living with HIV to healthcare services, especially discrimination in hospitals. In 2008, the Supreme Court of India passed an order endorsing fourteen points addressing these issues. These points included non-discrimination of people living with HIV in health care settings; rapid upscale of ART centres; ensuring adequate infrastructure in ART centres – adequate seating space, clean toilets and safe drinking water; the establishment of grievance redressal mechanisms via a complaint box in every ART Centre (and the appointment of nodal officers to review the complaints) as well as through the creation of a State Level Grievance Redressal Mechanisms.

3. The Supreme Court of India on Protection of Life and Personal Liberty

The Supreme Court of India has, in a number of rulings interpreted Article 21 of the Constitution of India to include the right to health and to access to proper treatment to cure diseases.

In *Vincent Panikurlangara v. Union of India* (1987) the Supreme Court held that the maintenance and improvement of public health had to rank high amongst the State’s obligations, as this is indispensable to the very existence of the community.⁵⁸

In *Paschim Bengal Khet Mazdoor Society v. State of West Bengal* (1996) the Supreme Court held that failure on the part of a government to provide timely medical treatment to a patient in need of such treatment amounts to a violation of the right to life.⁵⁹

4. Invoking the Constitutional Right to Privacy

In the case of *Dr Shrinivas Ramchandra Siras & Ors v. the Aligarh Muslim University & Ors* provisions of India’s Constitution were used to uphold the right to privacy as a tool to address workplace discrimination towards sexual minority populations. In 2010, Dr Siras, an academic and teacher at Aligarh Muslim University was suspended, directed to vacate his residence and asked not to leave Aligarh until completion of an inquiry when photos of him and a male friend were circulated. Dr Siras had been open about his homosexuality. The University alleged that Dr Siras had committed misconduct because “he indulged himself into immoral sexual activity and in contravention of basic moral ethics.” Dr Siras argued that the University had violated his fundamental rights to privacy, dignity and equality, and subjected him to discrimination on the grounds of his homosexuality. The Allahabad High Court granted an interim injunction to Dr Siras to stay the suspension, the order to vacate premises and the order not to leave Aligarh. The Court also noted that the “the right of privacy is a fundamental right, needs to be protected

⁵⁸ *Vincent Panikurlangara v. Union of India* (1987) 2 SCC 165

⁵⁹ *Paschim Bengal Khet Mazdoor Society v. State of West Bengal*, AIR 1996 SC 242; See also *Parmanand Katara v. Union Of India & Ors* on 28 August, 1989, AIR 2039, 1989 SCR (3) 997; *State of Punjab v. Ram Lubhaya Bagga* (1998) 4 SCC 117

and that unless the conduct of a person, even if he is a teacher, is going to affect and has substantial nexus with his employment, it may not be treated as misconduct.”⁶⁰

5. Bombay High Court Decision on Employment Discrimination and HIV Status

In the case of *MX v. ZY* AIR 1997 Bom 406 the Bombay High Court ruled “no person could be deprived of his or her livelihood except by procedure established by law and that the procedure must be just, fair and reasonable. It held that:

1. If a person is fit to perform his job functions;
2. is otherwise qualified and
3. does not pose a substantial risk to fellow workers;

Further, the Court held that a public sector employer cannot deny a person employment solely because he is HIV positive. Each determination of whether a person is incapable of performing the job must be made by conducting an individual enquiry taking into account the state of medical knowledge at the time. Accordingly, the High Court found that MX’s dismissal was arbitrary, unjust, and unlawful.

The court further held that in proper cases where a person can show that he or she would not be able to prosecute his or her if his status is disclosed and in the interests of the administration of justice, the Court will permit the party before it to suppress his or her identity and prosecute or defend the proceedings under an assumed name.”⁶¹

Nepal

1. The Supreme Court of Nepal and Non-Discrimination

In the case of *Sunil Babu Pant v. Government of Nepal*,⁶² the Supreme Court of Nepal made a judicial comment to the Constituent Assembly to make clear provisions in the new Constitution “guaranteeing non-discrimination on the ground of ‘gender identity’ and ‘sexual orientation’ besides ‘sex’ in line with the Bill of Rights of Constitution of South Africa.” In this case the petitioner had challenged the property law, marriage law and citizenship law, which discriminated against people of different gender orientation and sexual identities.

Much of the Court’s judgment focused on the exclusion of transgender people, or *metis* (men who dress and identify as feminine) from almost all civic rights.⁶³ Transgender people were excluded from a range of services and entitlements because they were routinely denied citizenship cards. The Supreme Court ordered (a) that transgender people be given citizenship cards that reflected their third gender and (b) that protections against discrimination on the basis of gender identity and non-discrimination be enshrined in the new Constitution. The Court held that it was the “responsibility of the State to create the appropriate environment and make legal provisions accordingly for the enjoyment of [all citizenship] rights”.

The Supreme Court further directed the Government of Nepal to make necessary arrangements to enact new laws and amend existing discriminatory laws so that all individuals with different sexual orientations and gender identities can exercise rights equal to other citizens of Nepal.

The Supreme Court acknowledged that the existing property laws, marriage laws and citizenship laws, are male and female sex specific, and therefore, there is a need to amend these laws so that people with different gender orientation and sexual identities also have equal access to the rights guaranteed by such laws.

60 *Dr. Shrinivas Ramchandra Siras & Ors.v. The Aligarh Muslim University & Ors. Civil Misc. Writ Petition No.17549 of 2010 Allahabad High Court.*

61 The Lawyers Collective, ‘Judgement & Orders’, <http://www.lawyerscollective.org/hiv-and-law/judgements-a-orders.html>.

62 Writ No. 917 of the year 2064 BS (2007 AD), Supreme Court Division Bench, 2007. Sourced from: http://www.njanepal.org.np/index.php?option=com_rokdownloads&view=file&Itemid=157&id=33:nja-law-journal-2008-issue-2).

63 Evidence was presented to demonstrate that transgender people were targeted both by police and more broadly in society, for their non-conforming gender expression and identity.

2. The Supreme Court of Nepal and the Right to Privacy

The Supreme Court of Nepal also dealt with issues related to privacy in the case of *Sunil Babu Pant v. Government of Nepal*. The petitioner challenged No. 1 and No. 4 of Chapter 16 (on bestiality) of the Country Code 1963, which is interpreted to criminalize homosexuality as ‘unnatural sex’.⁶⁴ The Supreme Court, founding its arguments on fundamental right to privacy contained in the Constitution, clarified that these provisions did not apply to homosexuals and transgender people.

The Supreme Court of Nepal found that: “No one has the right to question how two adults perform sexual intercourse and whether this intercourse is natural or unnatural. In the way the right to privacy is secured to two heterosexual individuals in sexual intercourse, it is equally secured to the people of third gender who have different gender identity and sexual orientation. In such a situation, therefore, gender identity and sexual orientation of the third gender and homosexuals cannot be ignored by treating the sexual intercourse among them as unnatural.”

In delivering this decision, the Supreme Court also referred to Article 13 of the Interim Constitution of Nepal, which provides that every citizen and every person shall obtain rights on equal basis, such as the right to have one’s own identity, and the same cannot be restricted by laws that are discriminatory and arbitrary.

3. Privacy and Confidentiality in Court Proceedings

In the case of *Forum for Women, Law and Development v. Government of Nepal & Ors*, the petitioner contended that although Article 28 of the Constitution and various international human rights instruments ratified by Nepal, provide for the right to privacy, no specific provisions exist to protect the privacy of persons living with HIV were involved in litigation.⁶⁵ The petitioner contended that if the privacy of these persons is not protected then they would be unable to exercise their right of judicial remedy, due to the stigma surrounding issues related to their cases.

The Supreme Court issued a directive order to the Prime Minister and the Office of the Council of Ministers as well as the Ministry of Law, Justice and Parliamentary Management to enact law for maintaining privacy in litigation in which ‘victims’ who are women or children or people living with HIV are involved. This law has not been passed, and does not provide for MSM or transgender people. However, the Supreme Court has issued guidelines to be complied with on this matter, until relevant law comes into force. The guidelines require that in certain lawsuits, the ‘personal introductory information’⁶⁶ of a person living with HIV is kept confidential at the time of registration of the case, and is maintained, even after the disposal of the case.⁶⁷ It further lays down the rights and duties of the concerned

64 No 1: No one may penetrate an animal or make an animal penetrate him/her or may do or make another person do any kind of unnatural sex. No 4: In this chapter, not mentioned in other sections, anyone who does or makes someone practice unnatural sex may be sentenced to one-year jail or 5,000 NRS fine. Note: The English translation of all the domestic laws have been sourced from the website of the Law Commission of Nepal (<http://www.lawcommission.gov.np/>).

65 *Sapana Pradhan Malla v Office of Prime Minister and Council of Minister & Ors.*, Writ No. 3561 of the year 2063 B. S (2006). Sourced from-Ananda Mohan Bhattarai, ed. The Landmark Decisions of the Supreme Court, Nepal on Gender Justice (Nepal: National Judicial Academy/ UNIFEM, 2010) at pg. 185.

66 Section 2(b)- ‘Personal Introductory Information’ shall signify (1) all the related description regarding disclosure of the identity including name, family title, address, etc. of the victim women in the context of the cases mentioned in sub-clause (1) of Section 2(a); (2) all the related description regarding disclosure of the identity including name, family title, address etc. of the children who are involved as a party in the context of the cases mentioned in sub clause (2) of Section 2(a); (3) all the related information regarding disclosure of the identity of the persons affected or infected with HIV/AIDS in the context of the cases mentioned in sub clause (3) of Section 2(a).
Section 2(a)- ‘Lawsuit’ means, for the purpose of these *Guidelines*, the following types of cases specified by the concerned official after making a decision on protecting the privacy of the personal introductory information:- (1) the criminal cases, requiring protection of privacy on the basis of the nature of the case and the impact that they can leave on the victims, having women as victims and including rape, abortion, sexual abuse, transactions in human beings, trafficking in human beings, incest and violence against women; (2) the criminal cases having children as a party and tried by a juvenile court or Juvenile Bench; (3) the cases related to HIV/AIDS affected or infected persons where such information has been disclosed.

67 Section 3- Personal Introductory Information not to be disclosed:- (1) All the bodies including the investigating body, the body trying the case and the verdict implementing body shall have to protect the privacy of the persons appearing as a party to the cases mentioned in Section 2 in course of all the activities conducted right from the filing of the complaint to investigation, prosecution, trial, delivery of verdict, implementation of verdict and even during the period following the implementation of the verdict. (2) The privacy of the personal introductory information, not disclosed as mentioned in Clause (1), shall have to be protected in all conditions including the lawsuit, rejoinder, complaint, petition, report, appeal, decision or any public publication to be made by the court or any other body. (3) The concerned person cannot be compelled to disclose the introductory information kept secret in accordance with clause (1). (4) Nobody, including any party or his/her counsel, expert, witness, judge or employee, who appear at any stage of the legal proceedings and come to know about the personal introductory information kept secret, must not disclose to anybody the information thus kept secret. (5) The information kept

authorities (investigating, judicial and implementing bodies) in maintaining confidentiality of personal introductory information of such persons.

4. The Supreme Court of Nepal and the Right to Information

Finally, in the case of *Gopal Krishna Shiwakoti v. HMG/N & Ors*, the Supreme Court of Nepal discussed Article 16 of the 1990 Constitution of Nepal which had a provision on right to information similar to that contained in Article 27 of the present Interim Constitution of Nepal.⁶⁸ The Supreme Court held that the government has an obligation to provide information on any matter of public interest, including public health, and that the Court may fill the gap if any procedural difficulty arises in the application of this right. Therefore, citizens can invoke their constitutional right to privacy to demand access to information on HIV. However, no law has been framed that specifically requires information to be disseminated to the general public on sensitive matters of public health and/or on the process of obtaining information.⁶⁹

Pakistan

1. The Supreme Court of Pakistan Recognizes the Rights of Eunuchs

In a landmark decision in 2009, Pakistan recognized the rights of eunuchs as citizens of Pakistan. A Constitutional Petition was brought by Islamic jurist, Dr Mohammad Aslam Khaki, before the Supreme Court of Pakistan. The case addressed the molestation and humiliation of eunuchs by the Rawalpindi Police during the raid of a wedding ceremony in Taxila, a town situated towards west of Islamabad.

The Supreme Court of Pakistan held that “[n]eedless to observe that eunuchs in their own rights are citizens of this country and subject to the Constitution of the Islamic Republic of Pakistan 1973, their rights and obligations including the rights to life and dignity are equally protected. Thus no discrimination, for any reason, is possible against them as far as their rights and obligations are concerned. The Government functionaries both at Federal and Provincial levels are bound to provide them protection of life, property and secure their dignity as well, as done in the case of other citizen.”

Legal commentators note this is an important achievement for eunuchs in Pakistan on the basis that this judgment brings eunuchs within the purview of the fundamental rights accorded by the Constitution of Pakistan. The decision ordered that eunuchs be registered with ‘third sex’ designating their gender on national identity papers. National identity papers are required to access state services, state social welfare departments and financial support programmes. The possession of national identity papers which match a person’s outward appearance are critical in facilitating access to these services.

Equally, there are limitations with this judgment, which applies to eunuchs only, and does not extend to cover transgender people or people with diverse gender identities. Representatives from the transgender community report that initially, the state attempted to define and determine a person’s status as a eunuch and proposed invasive tests and/or medical reviews. This approach was eventually abandoned following community protests.

The 2009 case catalyzed a series of Court orders enforcing the recognition of eunuch’s citizenship rights. On 14 November 2011, the Supreme Court of Pakistan ordered that eunuchs be enrolled on the voters list and directed the Election Commission of Pakistan to collect the details of eunuchs from the social welfare departments of the provinces where they are registered and take steps to register them as voters.⁷⁰

On 11 December 2011, a two-member bench of Supreme Court of Pakistan, headed by Hon. Chief Justice Iftikhar Muhammad Chaudhry, directed all provinces to provide job opportunity to the eunuchs. The Supreme Court further

secret according to these Guidelines shall not be disclosed even after the disposal of the case.

68 Nepal Kannon Patrika (NKP) 2051 B.S., Vol. 4 at pg. 255.

69 Forum for Women Law and Development “HIV/AIDS and Human Rights: A Legislative Audit”, Publication No. 76, Kathmandu, 2004 at 11.

70 <http://dawn.com/2011/11/15/eunuchs-get-on-voters-list/>; <http://www.southasiainmail.com/news.php?id=101917>; http://www.rferl.org/content/pakistan_beleagured_transgender_community_given_new_hope/24396423.html

ordered the Election Commission of Pakistan to hold meetings with the social welfare departments and eunuchs at divisional or district level to ensure registration of eunuchs as voters, furthering earlier decisions of the Court.⁷¹

Notwithstanding the value of formal employment, legal commentators and community advocates have observed that eunuchs engaged with the Tax Department have attracted a second level of stigma, associated with undertaking a job that is perceived negatively by society.

On 1 February 2012, the Supreme Court of Pakistan directed the Government of Pakistan that a transgender person should be given preference for a civil service job, *if qualified*.⁷²

The Supreme Court of Pakistan has monitored progress made in respect of implementation of the Order, as follows:

- The National Database and Registration Authority (NADRA) issued Computerized National Identity Cards (CNICs) and initiated registration of eunuchs on the electoral register in Rawalpindi, on 25 January 2012.⁷³
- The Supreme Court of Pakistan directed NADRA to issue CNICs to eunuchs in accordance with rules, on 2 February 2012.⁷⁴
- NADRA determined it would provide jobs to eunuchs so that they could be treated as equal members of society, on 6 March 2012.⁷⁵

Sri Lanka

Research failed to reveal any documented case law in the Sri Lankan Courts in relation to people living with HIV or sexual minority populations. Some instances of people living with HIV receiving legal or administrative relief were known but sources were not verifiable.

XI. OTHER LAW, POLICY AND REGULATION

Bangladesh

The Government of Bangladesh created *The Right to Information Act* in 2009 to ensure a free flow of information and to provide for the right to information. Section 7 of the *Right to Information Act* details the kind of information that can be protected by the individual and includes “information the disclosure of which would harm the privacy of the personal life of an individual.”⁷⁶ This Act may protect the privacy of people living with HIV and sexual minority populations.

The Bangladesh national response to HIV is guided by a number of strategies and guidelines, each governing a distinct area. These documents do not have the weight of law and are unenforceable.⁷⁷ None of these documents focus on the rights of people living with HIV, MSM and transgender people. Strategies and guidelines include:

- The National Harm Reduction Strategy for Drug Use and HIV (2004-2010)
- National HIV Advocacy and Communication Strategy (2005-10)
- National Anti-Retroviral Therapy Guidelines (2006)

71 <http://tribune.com.pk/story/305807/plea-to-court-eunuch-tax-collectors-want-jobs-regularised/>; http://www.dailytimes.com.pk/default.asp?page=2011\12\13\story_13-12-2011_pg7_4

72 <http://www.hindustantimes.com/world-news/Pakistan/Pakeunuchs-get-new-identity/Article1-807257.aspx>

73 <http://www.pakistantoday.com.pk/2012/01/25/news/national/registration-of-eunuchs-begins-in-rawalpindi/>

74 <http://www.brecorder.com/general-news/single/599/172/1150164/>

75 <http://www.thenews.com.pk/PrintEdition.aspx?ID=20642&Cat=4&dt=3/6/2012>

76 The Right to Information Act 2009 s7 (8).

77 3rd National Strategic Plan for HIV and AIDS Response 2011-2015, Government of the People’s Republic of Bangladesh accessed online at http://www.bdnasp.net/index.php?option=com_content&view=article&id=72&Itemid=86 on 9 June 2012

- National STI Management Guidelines (2006)
- National Policy and Strategy for Blood Safety (2007)
- Guidelines for Voluntary Counseling and Testing
- National Standards for Youth Friendly Health Services (2007)
- Standard Operating Procedures for Services to People Living with HIV and AIDS (2009)

India

The Indian Government has formally recognized gender plurality via the Electoral Commission and the Ministry of External Affairs. The Electoral Commission allows Indian registered voters to tick 'O' for other gender, creating a gender category for people who do not identify as either male or female. India's Ministry of External Affairs allows individuals to mark 'E' for eunuch on passport forms. There is an argument that neither the 'O' (considered derogatory) or the 'E' (considered eunuch specific, this excludes people of other diverse sexual orientation) are satisfactory to intersex and transgender groups. Notwithstanding this, this is a step forward in terms of state recognition of diverse sexual orientation.

The Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations 2002 specifically forbid physicians to deny treatment arbitrarily, and state that in an epidemic, 'the physician should not abandon his duty for fear of contracting the disease himself.' These regulations are relevant in the context of denial of treatment for people living with HIV and are usually called upon by Courts to determine if a physician has been negligent in his/her duties.

Sections 341 and 342 of the Indian Penal Code 1860 make wrongful restraint or confinement of any person an offence. Section 383 and 389 of the Indian Penal Code criminalize extortion. Extortion through threat of arrest is a very serious crime and police are obliged to respond if individuals file first information reports alleging this. These provisions are useful to consider with regard to protective laws because despite the current status of section 377, various other provisions in the Indian Penal Code make it possible for the police to harass, blackmail and extort money from the LGBTI community in India.

Legal commentators have suggested that it would be useful for LGBTI organizations and individuals to be aware of protections under the IPC and to leverage the existence of a rule of law framework. However, the reality is that many people from the LGBTI community are deterred from filing complaints against the police due to the risk of their families' learning of their sexuality and fear of the stigma that may accompany this.

Sri Lanka

Sri Lankan national HIV-related strategies and policies have broadly focused on the prevention of transmission of HIV, with some recognition of the importance of a rights based approach. Notably, policy is not enforceable.

Sri Lanka achieved an important milestone through the adoption of the National HIV/AIDS Policy in 2011. This draft policy was first presented at the National AIDS Committee (NAC) meeting in October 2005. Legal commentators indicate that the adoption of the Sri Lankan National HIV/AIDS Policy is a result of many years of advocacy by civil society.⁷⁸

The Sri Lankan National HIV/AIDS Policy provides a rights-based framework with which laws and policies should be aligned. The Sri Lankan National HIV/AIDS Policy outlines the purpose of the National AIDS Committee and establishes a sub-committee on Policy, Law and Ethics. This sub-committee is comprised of government, civil society and development partners.

Section 3.11 of the Sri Lankan National HIV/AIDS Policy addresses human rights. It provides "The Government of Sri Lanka will ensure that the human rights of people living with HIV/AIDS are promoted, protected and respected and measures taken to eliminate discrimination and combat stigma which will provide an enabling environment to

78 The adoption of the National AIDS Policy was an action point in the National Strategic Plan on HIV and AIDS (2007-2011).

seek relevant services. These include the rights of everyone to life, liberty and security of person, freedom from inhuman or degrading treatment or punishment, equality before law, absence of discrimination, freedom from arbitrary interference with privacy or family life, freedom of movement, the right to work (rights of the people living with HIV in the work places) and to a standard of living adequate for health and well being including housing, food and clothing, the right to the highest attainable standard of physical and mental health, the right to education, the right to information (which includes the right to knowledge about HIV/AIDS/STI related issues and safer sexual practices), the right to capacity building of the individual in dealing with this condition, the right to participate in the cultural life of the community and to share in scientific advancement and its benefit.”

The Sri Lankan HIV/AIDS Strategy Policy goes on to imply an endorsement of criminalization of transmission “However, steps shall be taken to prevent persons from willfully and knowingly infecting HIV to other persons.”

The National STD/AIDS Control Programme (NSACP) of the Sri Lankan Ministry of Health develops and implements the National Strategic Plan. The 2007-2011 National Strategic Plan is currently under review and the Strategic Plan for the next 5-year cycle will be launched in 2012. The 2007-2011 Strategic Plan identified the following areas for action in terms of securing an enabling legal environment for people living with HIV:

“5.5 Strategy 5: Policy development and legislation

1. Supportive National HIV/AIDS policy passed.

- NSACP will work towards ratification of the National HIV/AIDS Policy.

2. Sectoral HIV/AIDS policies developed in accordance with the National Action Plan.

- NSACP will provide support to relevant sectors to develop policies, and plans to train service providers and sensitize law enforcers.
- NSACP will commission a segmented, multi media campaign to reduce stigma and discrimination around HIV in families, schools, health sector and community at large
- NSACP will (as part of the advocacy strategy) sensitize members of the judiciary, law enforcers and human rights activists on the National HIV/AIDS Policy and sectoral decrees.
- Compassionate and supportive attitudes improved among lawmakers, advocates, law enforcers.”

XII. CONCLUSION

Notwithstanding the ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights by all states, and the increasing recognition of the Yogyakarta Principles, there are limited domestic legislative protections which specifically protect the rights of people living with HIV, MSM and transgender people.

In all States studied, broad Constitutional protections guarantee equality, non-discrimination, and some recognition of the right to health. While these articles represent significant commitments of the state, rights expressed within national statutes tend to be more accessible to citizens and law enforcement agencies, and easier to claim in a Court of law.

Bangladesh and Sri Lanka have put in place policies and strategies relating to public health and HIV; but have not enacted laws or bills to specifically protect the rights of people living with HIV, MSM and transgender people.

In India, Nepal and Pakistan, progressive Court judgments and HIV bills evidence some state commitment to extend the laws of anti-discrimination and privacy to people living with HIV, MSM and/or transgender people.

The Section 377 decision of the Delhi High Court has had a significant impact, not only nationally, but also regionally and internationally. It has formally reoriented thinking on sexual orientation, in a manner which recognizes the dignity and rights of all people. The rulings of the Nepal Supreme Court and Pakistan Supreme Court recognizing the third gender (noting the limitations outlined in the body of the Reference Report) also represent

ground breaking steps in protecting and promoting the rights of people of different (non hetero-normative) sexual orientation and gender identity.

Anti-discrimination provisions in the HIV Bills drafted by India, Nepal and Pakistan go some way in addressing discrimination on the grounds of HIV status. Importantly, anti-discrimination provisions extend beyond the public sector, to encompass the private sector (Pakistan, Nepal and India) and 'familial and personal life' (Nepal). Equally, the extension of discrimination on the basis of HIV status to *presumed* HIV status (for example, 'on suspicion' that a person is HIV positive – in the Indian, Nepal and Pakistan Bills) represents an important recognition of the impact of stigma on key populations at higher risk. Provisions in the Nepal and Pakistan Bills could be further strengthened by express provisions to include key populations at higher risk under these anti-discrimination provisions.

Notably, in India, Nepal and Pakistan, the HIV bills have remained in draft form, for not less than five years. There is now a reasonable argument to suggest there is a need for comprehensive review of all three bills to ensure they reflect national developments and international lessons learned. The challenge of gathering sufficient political will to pass these bills remains. Given the personal and political agendas which change and shape a bill during its passage through parliament, the question needs to be asked whether omnibus HIV laws hold the answer to protecting HIV-related rights. These bills must be viewed in light of their potential to progress the rights agenda and potential to harm the rights-based response to HIV.

ANNEX A

The Regional Legal Reference Resource recognizes and builds upon existing research and studies including:

- HIV and the Law: Risks, Rights & Health, 2012, Global Commission on HIV and the Law.⁷⁹
<http://www.hivlawcommission.org/index.php/report>
- Sex Work and the Law in Asia and the Pacific, 2012, UNDP and UNFPA.
<http://www.snap-undp.org/elibrary/Publication.aspx?id=699>
- Lost in Transition: Transgender People, Rights and HIV Vulnerability in the Asia-Pacific Region, 2012, UNDP and APTN.
<http://www.snap-undp.org/elibrary/Publication.aspx?id=651>
- HIV and men who have sex with men: Country snapshots, 2012, UNDP, UNAIDS, APCOM and HIV & AIDS Data Hub.
<http://asia-pacific.undp.org/practices/hivaids/msm-country-snapshots.html>
- PLHIV Stigma Index Reports - Bangladesh, India, Pakistan, Sri Lanka, India, Tamil Nadu and Nepal, 2009-2012, IPPF, UNAIDS, GNP+ and ICW.
<http://www.stigmaindex.org/>
- Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law, 2011 (convened by UNDP, ESCAP and UNAIDS).
<http://www.hivlawcommission.org/index.php/dialogue-documentation?task=document.viewdoc&id=1>
- United Nations Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS, 2011.
http://www.unaids.org/en/media/unaids/contentassets/documents/document/2011/06/20110610_UN_A-RES-65-277_en.pdf
- The Global HIV Epidemics Among Men Who Have Sex with Men, 2011, World Bank South Asia Multi Country Global Fund Grant on HIV among men who have sex with men and transgender persons.
<http://siteresources.worldbank.org/INTHIVAIDS/Resources/375798-1103037153392/MSMReport.pdf>
- ESCAP Resolution 67/9 Asia-Pacific regional review of the progress achieved in realizing the Declaration of Commitment on HIV/AIDS and the Political Declaration on HIV/AIDS, 2011.
http://unescapsdd.org/sites/test/files/ESCAPRes%2067_9.pdf
- ESCAP Resolution 66/10 Regional call for action to achieve universal access to HIV prevention, treatment, care and support in Asia and the Pacific, 2010.
<http://unescapsdd.org/sites/test/files/Resolution-66-10-on-HIV.pdf>
- Analysis of key human rights programmes in Global Fund-supported HIV programmes, 2010, UNDP, UNAIDS and GFATM.
<http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/analysis-of-key-human-rights-programmes-in-global-fund-supported-hiv-programmes.html>
- ACJ Report: Human Rights, Sexual Orientation and Gender Identity, Asia Pacific Forum, 2010.
http://www.asiapacificforum.net/support/issues/acj/references/sexual-orientation/downloads/Human_Rights_Sexual_Orientation_and_Gender_Identity_Final_Report.doc.pdf
- Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for Action, 2010, UNDP and APCOM.
<http://www.snap-undp.org/elibrary/Publication.aspx?id=629>

⁷⁹ The Report of the Global Commission on HIV and the Law is available at <http://www.hivlawcommission.org>.

- Tackling HIV-related Stigma and Discrimination in South Asia, 2010, World Bank.
http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1192413140459/4281804-1231540815570/5730961-1235157216166/5849907-1279637337320/Tackling_HIV_Stigma_July_2010.pdf
- The Global Fund Strategy in Relation to Sexual Orientation and Gender Identities, 2009.
http://www.theglobalfund.org/documents/core/strategies/Core_SexualOrientationAndGenderIdentities_Strategy_en/
- Guidance Note: Addressing HIV-related Law at National Level, UNAIDS, 2008.
http://www.unaids.org/en/media/unaids/contentassets/documents/priorities/2008_GuidanceNoteLaw_en.pdf
- The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, 2005.
http://www.yogyakartaprinciples.org/principles_en.pdf

Additional Resources

- The Lawyers Collective
<http://www.lawyerscollective.org/>.
- UN ESCAP - HIV and AIDS
<http://unescapsdd.org/hiv-and-aids>
- HIV and AIDS Data Hub for Asia-Pacific, UNAIDS
<http://www.aidsdatahub.org/>
- Asia Pacific Coalition on Male Sexual Health
<http://www.apcom.org/>

Additional Resources – Nepal

FWLD, in collaboration with National Centre for AIDS and STI Control, USAID and POLICY/Project Nepal was involved in conducting a legal audit of the existing laws, policies and executive orders in order to understand the effectiveness of the Nepali legal provisions in addressing the HIV/AIDS epidemic. The objective of the legal audit was to measure (by way of an audit tool comprising of a questionnaire) the extent to which Nepal's legal system is consistent with the standards contained in the International Guidelines on HIV/AIDS and Human Rights, 1996. The results of the legal audit were published in a report titled "HIV/AIDS and Human Rights: A Legislative Audit" in June 2004.⁸⁰ The scope of the report has been limited by specific questions forming part of the audit tool. Research for the Nepal Legal Reference Resource did not reveal any further or more a recent national studies on HIV and the law in Nepal.

Additional Resources - Sri Lanka

- Knowledge, Attitude and Practice in the Gay community, Gay identified men, and Men who have Sex with men in Sri Lanka, 2007, Companions on a Journey
<http://www.aidscontrol.gov.lk/web/Web%20uploads/Research%20Documents/COJ%20Knowledge,%20Attitude%20and%20Practice%20in%20the%20gay%20community,%20gay%20identified%20men,%20and%20Men%20who%20have%20Sex%20with%20men%20in%20Sri%20Lanka.pdf>

"Another key finding is that of the men's awareness and dislike of laws outlawing sex between consenting adult males. The findings suggest that these laws so have a direct impact upon the ways in which these men live and have sex with other men. Amending such laws such as Section 365a of the Penal Code would also have a direct impact upon services, including the NSACP, working with these men, for they would no longer be viewed legally as criminals. A change in the law would not necessarily bring about wide spread public attitudinal change

80 Forum for Women Law and Development "HIV/AIDS and Human Rights: A Legislative Audit", Publication No. 76, Kathmandu, 2004.

towards these men but it would act as a catalyst for further reforms as well as symbolize the governments leadership in the fight against HIV/AIDS in Sri Lanka and indeed the region.”

- HIV/AIDS in Sri Lanka: A Profile on Policy and Practice, 2007, conducted by the Centre for Policy Alternatives <http://www.hivpolicy.org/Library/HPP001560.pdf>

The report identifies the spheres of access to health care, employment and social life where PLHIV face most cases of stigma and discrimination which is detailed below along with a concluding comment:

“1. Health Care. With regards to health care it was found that PLHIV faced many difficulties when obtaining medical treatment. These were identified as: Lack of confidentiality, lack of informed consent, discrimination against the patients and their families by the hospital staff, lack of basic services and refusal to treat.

2. Employment. The majority of people interviewed during the study were unemployed, and a few were self-employed. It was reported that those who were employed and whose HIV/AIDS status was made known to their employers and co-workers were subject to much discrimination and had to face the lack of regard for confidentiality pertaining to their HIV/AIDS status.

3. Social Life. Due to ignorance and fear, people living with HIV/AIDS and their families are often treated with insensitivity and cruelty. Lack of awareness on what HIV/AIDS is and how it can be transmitted has left many people with misconceptions about the disease. Fear and ignorance can lead to various discriminatory practices, which sometimes turn violent.

Conclusion: In addition very little attention is given to a rights based framework in relation to the HIV/AIDS response, raising issues including the rights and dignity of PLHIV and their families, informed consent, confidentiality, participation and inclusiveness in decision making. For an effective response, it is crucial to have a rights based approach coupled with good governance principles ensuring the decentralisation of health care and decision making in relation to the response.”

- First Sri Lanka National Consultation Meeting on MSM, HIV and Sexual Health, 2009, report by Companions on a Journey (supported by UNAIDS, Naz Foundation International, UNDP and the Asia Pacific Coalition on Male Sexual Health) http://www.msmgf.org/files/msmgf//Asia/ART_EN_181109_FIR.pdf

Recommendations: Among the recommendations of decriminalizing homosexuality and sensitizing law enforcement officials, a specific recommendation was made under section 3.6 as follows: “MSM and transgenders need to be recognized both institutionally and legally as active participatory citizens in their countries.”

- People Living with HIV Stigma Index Sri Lanka, published by the National STI/AIDS Control Programme, 2010, Family Planning Association of Sri Lanka with support from UNAIDS [http://www.aidsdatahub.org/dmdocuments/UNAIDS,_Family_Planning_Association_Sri_Lanka_and_Partners_\(2010\)_People_Living_with_HIV_Stigma_Index_Sri_Lanka.pdf](http://www.aidsdatahub.org/dmdocuments/UNAIDS,_Family_Planning_Association_Sri_Lanka_and_Partners_(2010)_People_Living_with_HIV_Stigma_Index_Sri_Lanka.pdf)

“13% of respondents claimed that they had their rights abused, but only 38% of these (5 respondents) attempted to get legal redress, of which 3 respondents indicated that nothing happened and 2 claimed that the matter was still being dealt with. The research team in discussing issues around laws and policies spoke of how HIV positive people have had poor experiences with HIV and law. They also underlined that people had no confidence in the system and were afraid of being subject to further stigma and discrimination in seeking legal redress for violation of their rights.”

The following recommendations were made in terms of strengthening legal rights of PLHIV:

- Document cases of violations towards PLHIV.
- Establish legal aid services for people living with HIV that include expertise on inheritance property rights, discrimination within healthcare settings and wrongful dismissal under existing laws and policies.
- Strengthen partnerships and referral systems with government and civil society agencies that provide legal aid services to people living with HIV.

- Develop more effective information, education and communication approaches around existing laws, policies and services so that people living with HIV know and understand their rights and seek legal redress in the event their rights are violated.
- Ensure the rights and confidentiality of potential migrant workers in relation to voluntary counseling and testing (Ministry of External Affairs).
- UNGASS Report Sri Lanka 2008-2009
<http://www.aidscontrol.gov.lk/web/Web%20uploads/Guidelines.Reports.Publications/UNGASS%20%20Report%202008.2009%20-Sri%20Lanka.pdf>

The UNGASS report makes the following observations:

“1. Although, the relevant penal provisions are rarely used, their existence contributes to the ongoing stigma and discrimination these groups face in the community and harassment in the hands of law enforcement agents.

2. Legal provisions drive the MSM community and sex workers underground.

3. The sweeping statements of the penal code address alleged ‘indecentry’ of ‘unnatural’ sex leads to criminalize the LGBTIQ community.

- Law, Ethics and HIV/AIDS in South Asia - A study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka, 2004, UNDP
<http://www.undp.org/content/undp/en/home/librarypage/hiv-aids/law-ethics-and-hiv-aids-south-asia/>

“In the 1990s, a bill was introduced to decriminalize homosexuality in Sri Lanka, in an effort to overturn previous legislation that criminalized sexual relationships between two males. However, opposition to the bill was voiced by some Muslim and Catholic MPs, who stated that homosexuality was not recognised by their faiths. As a result, the sponsors withdrew the bill, fearing that it would spark a damaging debate on religion and ethnicity and create further polarization in an already divided country. After the bill, aimed at decriminalizing homosexuality, was withdrawn, it was pointed out that the wording of the existing “anti-homosexual” provision referred only to “man”, and that this was discriminatory.

Therefore, the word “person” was used to replace “man”, resulting in legislation that criminalizes both men and women for same sex sexual activity. In this way, the introduction of a bill aimed at decriminalising homosexual conduct between men ultimately resulted in a widening of the scope of the original law.

An anomaly of the legislative process in Sri Lanka means that there is a constitutional bar on judicial review of legislation. This makes it impossible for any legislation, such as the laws against homosexuality, to be challenged in the courts on the grounds that it - or provisions within it - violates the national Constitution”.

- Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for action, 2010, UNDP
<http://www.snap-undp.org/elibrary/Publication.aspx?id=629>

The key recommendation made for Sri Lanka on the legal environment for Sri Lanka focuses on reading down the sections of the Penal Code to decriminalize consensual sex between adults and strengthen local and national advocacy efforts with government, educational establishments, medical schools, law enforcement agencies, and the judiciary towards the same as well as reduce discrimination meted towards MSM.

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