

South Asia Legal Environments for Men who have Sex with Men and Transgender People

This Policy Brief is adapted from the UNDP and APCOM report, titled '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',¹ covering 48 countries and territories of the Asia and Pacific region.

The study considered legislation, cases, published research, policy reports and press reports, and drew from consultations with community representatives, legal experts and UN agencies. The following summarizes findings and recommendations relating to South Asia with inputs from two of APCOM coalition members: INFOSEM (India Network for Sexual Minorities) and SAMAN (South Asia MSM and AIDS Network).

CRIMINAL LAWS AND POLICE PRACTICES

COUNTRY	LEGALITY OF MALE-TO-MALE SEX	APPLICABLE LAWS
Afghanistan	Illegal	<i>Penal Code 1976</i> Article 427. Pederasty (generally applies to sex between a man and an adolescent boy). Penalty: long imprisonment. <i>Sharia</i> law also applies, with a maximum of death penalty for homosexual acts.
Bangladesh	Illegal	<i>Penal Code 1860</i> Section 377. Carnal intercourse against the order of nature. Penalty: imprisonment which may extend to life.
Bhutan	Illegal	<i>Penal Code 2004</i> Section 213. Sodomy or any other sexual conduct that is against the order of nature. Penalty: prison sentence up to 1 year.
India	Legal in Delhi	Legal in the National Capital of Delhi, as a result of <i>Naz Foundation Case 2009</i> . Application of this judgment to other jurisdictions of India is yet to be determined. Supreme Court proceedings are pending.
Maldives	Illegal	<i>Sharia</i> law regarding sexual conduct is recognised by the <i>Penal Code</i> (Section 88) and <i>Rules Relating to the Conduct of Judicial Proceedings</i> (100 and 173). <i>Sharia</i> law punishment for male-to-male sex is banishment for one to three years, imprisonment or a whipping of 10 to 39 strokes.
Nepal	Legal	Legal, as a result of a 2007 Supreme Court ruling.
Pakistan	Illegal	<i>Penal Code 1860</i> Section 377. Carnal intercourse against the order of nature. Maximum Penalty: imprisonment for life. In parts of Pakistan, male-to-male sex is also prohibited under <i>Sharia</i> law, with penalties of up to 100 lashes or stoning to death.
Sri Lanka	Illegal	<i>Penal Code</i> Article 365. Carnal intercourse against the order of nature. Penalty: imprisonment for a term which may extend to ten years. Article 365A Gross indecency: imprisonment for a term which may extend to two years and/or a fine.

LEGALITY OF MALE-TO-MALE SEX IN SOUTH EAST ASIA

Of the eight South Asian countries, only Nepal has decriminalized male-to-male sex between consenting adults. Although the Delhi High Court effectively decriminalized male-to-male sex in the National Capital

¹ Godwin, J. (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. Bangkok: United Nations Development Programme. Accessible at <http://www.snap-undp.org/elibrary/Publication.aspx?ID=629>.

Territory of India in 2009, the situation in India as a whole remains uncertain pending the outcome of appeals against the decision. Bangladesh, Pakistan and Sri Lanka still apply laws inherited from the British colonial era that criminalize male-to-male sex. Maldives, Afghanistan and parts of Pakistan apply Islamic *Sharia* laws that criminalize male-to-male sex.

Across the South Asia sub-region, the offences listed in the Table and a range of other more minor offences have been used to target MSM and transgender people for harassment, extortion, detention, assault and rape. In many cases men and transgender people have reported being detained for the purpose of extorting payments, but not prosecuted. These offences include prostitution, vagrancy and public nuisance offences, indecent behavior in public, breach of the peace, obscenity, and soliciting.

Police targeting of sex workers

Large numbers of MSM and transgender people in South Asia are sex workers. Poverty and lack of alternative livelihoods leads many men and transgender people to work as sex workers. A variety of factors contribute to male and transgender sex workers lack of access to HIV prevention services, including stigma and lack of targeted health promotion for male and transgender sex workers. Although prostitution that occurs in private is not illegal in most South Asian countries, the organized industry is illegal (e.g. keeping a brothel), which means that sex work is often hidden, based in informal settings and difficult to reach by prevention services. Street-based sex workers are often targeted by police with charges for public nuisance, and possession of condoms has been used as evidence of soliciting.

India

In 2009, the Delhi High Court judgment in the *Naz Foundation Case*² decriminalized sex between consenting adult males in private in India's National Capital Territory. The case was brought by the Naz Foundation (India) Trust, an Indian NGO working in HIV, which claimed that Section 377 of the *Indian Penal Code* obstructed effective HIV prevention.

The application of the judgment to other jurisdictions in India is unclear. The Supreme Court has admitted several Special Leave Petitions filed by religious groups that lodged appeals against the Delhi High Court judgment and is currently hearing the case. The national government has argued in favour of decriminalization stating “[t]he government of India does not find any error in the judgment of the High Court and accepts the correctness of the same”. When the Supreme Court issues its judgment, it will have national application.

In the *Naz Foundation Case*, India's National AIDS Control Organization (NACO) gave evidence that Section 377 *Indian Penal Code* impedes HIV prevention efforts. NACO stated to the Court that people were reluctant to reveal same-sex behavior due to the fear of law enforcement agencies, making it difficult for public health workers to access them. NACO submitted that enforcement of Section 377:

renders risky sexual practices to go unnoticed and unaddressed inasmuch as the fear of harassment by law enforcement agencies leads to sex being hurried, particularly because these groups lack ‘safe place’, utilise public places (for sex)... and do not have the option to consider or negotiate safer sex practices.

In its decision, the Court read down Section 377, so that it does not criminalize sex between consenting adult males in private. According to the Court:

the criminalisation of homosexuality condemns in perpetuity a sizable section of society and forces them to live their lives in the shadow of harassment, exploitation, humiliation, cruel and degrading treatment at the hands of the law enforcement machinery.

The Court concluded that to stigmatize or to criminalize people on account of their sexual orientation is against constitutional morality and principles of inclusiveness.

² *Naz Foundation v Government of NCT of Delhi* - Delhi High Court No. 7455/2001.

The judgment in the *Naz Foundation Case* accepted the argument that criminalization is harmful to HIV responses. Decriminalization will likely provide a greatly improved legal environment for HIV responses, enabling MSM and transgender people to be open with health care providers regarding their sexual health needs.

Although decriminalization of homosexuality in Delhi in 2009 was an important step forward for HIV prevention and the human rights of MSM, there is a risk of punitive police practices continuing if measures are not taken to change community attitudes, educate police and implement policies that require supportive and ethical policing. Police conduct in enforcing prostitution offences remains a major issue for male and transgender sex workers. The *Immoral Traffic (Prevention) Act 1986* criminalizes soliciting, running a brothel, living on the earnings of prostitution, procuring a person for prostitution and prostitution in the vicinity of a public place.

LAWS RELATING TO DISCRIMINATION

South Asian countries do not have specific anti-discrimination laws relating to sexual orientation or transgender status. It is proposed that the new Constitution of Nepal will include guarantees of non-discrimination on the grounds of sexual orientation and gender identity. The absence of anti-discrimination laws has allowed for abusive and inappropriate treatment of MSM and transgender people in the context of access to HIV-related services and mental health services.

There have been recent case law developments that are supportive of equality before the law for MSM in India and Nepal, and transgender people in Nepal and Pakistan.

In the *Naz Foundation Case*, the Delhi High Court ruled that sexual orientation is a ground analogous to sex, and that laws that discriminate on the basis of sexual orientation are not permitted by Article 15 of the *Constitution of India*.

An Indian employment case demonstrates that the provisions of India's Constitution can be used to respond to workplace discrimination by a University. In 2010, the Allahabad High Court provided an interim remedy to an employee who claimed that he was discriminated against by Aligarh Muslim University.³ The Court noted:

the right of privacy is a fundamental right, needs to be protected 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.

These cases demonstrate that application of constitutional human rights protections can be very helpful to promote equality for MSM and transgender people. In addition to constitutional rights, comprehensive anti-discrimination legislation is also required to ensure that equality and non-discrimination is enjoyed in all aspects of life, including employment in the private sector. Comprehensive anti-discrimination laws can also establish accessible complaints processes, to avoid the complexity of constitutional litigation.

Nepal

The Supreme Court of Nepal in the *Sunil Babu Pant Case* (2007) directed the Government to end discrimination on the basis of sexual orientation and gender identity. Action is yet to be taken to introduce legal protections from discrimination. However, it is proposed that the new Constitution will include guarantees of non-discrimination on the grounds of sexual orientation and gender identity. Drafts of the Fundamental Rights Chapter of the Constitution include provisions relating to non-discrimination on grounds of gender and sexual orientation, recognition of a third gender for the purposes of rights and entitlements, and the right to family of everyone, irrespective of gender or sex. Other proposals to the committees involved in drafting the new Constitution include:

³ *Dr. Shrinivas Ramchandra Siras & Ors. Vs. The Aligarh Muslim University & Ors.* Civil Misc. Writ Petition No.17549 of 2010 Allahabad High Court. <http://www.lawyerscollective.org/sites/default/files/Order%201.4.2010.pdf>

1. Citizenship to all citizens according to gender identity;
2. A non-discrimination clause in the Constitution that extends to sexual orientation and gender, with gender is defined to include male, female and third gender identities;
3. Affirmative action obligations of the state to improve the situation of marginalized people, including sexual and gender minorities;
4. Social security rights that are inclusive of sexual and gender minorities;
5. Social Justice chapter is inclusive of sexual and gender minorities; and
6. The right to family, marriage, labour, pay etc to be formulated in gender neutral language.

LEGAL STATUS OF TRANSGENDER PEOPLE

There are recent examples of laws and court judgments recognizing the legal status of transgender people and their rights to equality and non-discrimination in India, Pakistan and Nepal.

India

The *Indian Penal Code* includes as offence for “emasculatation” (Section 320, *Indian Penal Code*, which punishes “grievous hurt”). The existence of this offence can result in eunuchs being denied safe medical facilities for castration.

In passport applications, since 2005 *hijras* have been able to identify as ‘other’ rather than male or female.

The Indian electoral law was changed in 2009 to enable transgender people to register as third sex. Apart from the state of Tamil Nadu, application forms for other identity cards (e.g. ration card or drivers license) do not yet recognize a third gender identity or third sex category.

Progress has occurred in the state of Tamil Nadu in recognizing rights of transgender people (*aravanis*). In 2006, the Government of Tamil Nadu issued an *Order on Rehabilitation of Aravanis*, which provides a number of supportive measures including:

1. A special state Welfare Board has been established for *aravanis* to promote their equality and security through welfare schemes.
2. Protection from discrimination by schools and colleges.
3. Sex reassignment surgery in Government Hospitals
4. Special vocational training and loans.
5. Identification cards and ration cards

Indian courts have begun to respect transgender persons as persons deserving of fundamental protections. For example, in *Jayalakshmi v The State of Tamil Nadu & Others*,⁴ the Madras High Court dealt with a case of a transgender man who was so harassed by the police that he immolated himself and died. The Court held that the State had to pay compensation to the deceased’s family for the harassment by its police force.

Nepal

Nepal’s citizenship card regulations have denied transgender people (*metis*) basic civil rights on the basis of non-conformity to a male or female category. Legal recognition of transgender people is required as a result of the Supreme Court’s ruling in the *Sunil Babu Pant Case* (2007), which recognized

4 *Jayalakshmi v The State of Tamil Nadu & Others*, 2007 [4] MLJ 849, <http://www.indiankanoon.org/doc/1373799/>

transgender identity and equal rights for transgender people as citizens.⁵ This case was brought against Government of Nepal by four NGOs, who argued that the government of Nepal's laws and policies were discriminatory.

The Supreme Court of Nepal issued orders to the Government of Nepal to end discrimination against people of different sexual orientations or gender identities. The Supreme Court directive requires the Government of Nepal to recognize third gender people. The Supreme Court made orders that:

- Cross-dressing should not be penalized as it is within an individual's human right to freedom of expression.
- Equal rights, identity and expression must be ensured for transgender people regardless of their sex at birth.

Nepal's Election Commission plans to grant recognition to transgender voters at the next general election. A voter will be able to register as male, female or third gender. The Government has indicated the intent to include a separate column for third gender people in the House/Family List of the form prepared by Central Statistics Bureau for the 2011 census.

Pakistan

In a series of rulings in 2009, the Supreme Court of Pakistan held that transgender citizens should have equal rights and access to government benefits. The Supreme Court ordered that transgender people should benefit from the federal and provincial governments' financial support schemes. The Court held that transgender people enjoy the protections guaranteed by the *Constitution* of Pakistan. The Supreme Court rulings:

- (i) allow transgender people to receive financial support through relief organizations;
- (ii) require the Government conduct a survey of transgender people;
- (iii) direct Pakistan's Interior Ministry to ensure that police officers provide protection to transgender people from crime;
- (iv) direct the government National Database and Registration Authority to add a third gender column on national identity cards for transgender people;
- (v) direct authorities to register transgender people in electoral rolls;
- (vi) require that a mechanism be established to protect transgender people from police harassment and to help them with inheritance rights.

CONCLUSIONS

The legal environment relating to MSM and transgender people in India and Nepal is improving. Although the social context remains in many respects hostile towards sexual minorities in Pakistan, law and policy is more supportive for transgender people since the 2009 Supreme Court case. Recent court judgments in India, Nepal and Pakistan place an emphasis on the role of the law in assuring equality, human dignity and inclusiveness. Some legal measures have been taken to recognize diversity of gender identities in Nepal and India, for example in allowing electoral registration as a third sex. These events signal a trend towards a more protective legal environment.

These improvements in the legal status of MSM and transgender people will support efforts to scale-up HIV responses. For example, Humsafar Trust reports that a direct result of decriminalization of sex between men in India in 2009 has been more honest practices regarding recording of sexual histories of MSM and transgender people by clinicians to the benefit of patients seeking sexual health services.

⁵ *Sunil Babu Pant and others v Nepal Government and others* 2 NJA L.J.[2008] 261-286 http://www.njanepal.org.np/Anex_2.pdf

The progress in these three South Asian countries contrasts with the other five countries of the sub-region. In Afghanistan, Bangladesh, Bhutan, Sri Lanka and Maldives the legal environment remains to a large extent repressive, although there are significant variations between these countries in relation to the extent to which punitive laws are actually enforced.

Building on the progress in India and Nepal, repeal of the laws criminalizing male-to-male sex in Afghanistan, Pakistan, Bangladesh, Bhutan, Sri Lanka and Maldives would greatly improve the environment for HIV responses among MSM and transgender people. In India, further progress depends on the outcome of the Supreme Court appeals in the *Naz Foundation Case*, which will clarify the national position. In India, work will need to occur to monitor how decriminalization of male-to-male sex is understood by the religious community and police, and reflected in improved treatment of MSM and transgender people.

Consideration needs to be given to not only removing criminal penalties that affect MSM and transgender people, but also to introduce positive legal protections that provide remedies for discriminatory conduct and that protect from vilification and hate crimes. The *India HIV/AIDS Bill* prepared by Lawyers Collective for NACO provides a useful model.

Proposals for inclusion of constitutional guarantees of equality and non-discrimination on grounds of sexual orientation and gender identity in the draft Constitution of Nepal may provide a powerful model for the Asia Pacific region.

Across the sub-region, minor police offences relating to public conduct and nuisance are often used to target MSM and transgender people for harassment. There have also been instances where policing has impeded dissemination of sexual health information and made HIV prevention outreach workers vulnerable to police abuse of power. Although the worst of these incidents occurred eight years ago (in Lucknow, India), the risk remains of reversion to repressive policing if ongoing measures are not taken to change community attitudes, educate police and implement policies and protocols that require supportive and ethical policing.

It is important to recognize the causes of vulnerability of feminized men and transgender people in South Asia, such as *kothis*, *hijras*, *aravanis* and *metis*. They are often poor and uneducated. Gender non-conformity leads to targeting by police for extortion and harassment, social exclusion, exposure to violence and abuse, and denial of access to services. In addition, feminized males and transgender people who are living with HIV may be further stigmatized by society, discriminated against by health service providers and rejected by other people living with HIV due to moral judgments about gender non-conformity. These factors contribute to disempowerment, low self-worth, and increased HIV risk.

Repressive legal environments can result in a range of adverse consequences for HIV prevention, care, support and treatment services.

Direct adverse impacts include:

HIV prevention outreach workers harassed, threatened or detained by police.
Condoms confiscated as evidence of sex work or illegal same-sex sexual conduct.
HIV education materials censored.
Police raids on events where HIV education takes place.

Indirect adverse impacts, which are often more profound and pervasive than direct impacts, include:

1. high levels of stigma associated with homosexuality and gender variance, which drives MSM and transgender people underground and makes them difficult to reach by HIV services;
2. under-representation of identified MSM and transgender people in policy and management of HIV programs, leading to lack of resourcing for research and targeted programmes;
3. lack of provision of appropriate HIV services for MSM and transgender people, as a result of lack of funding, research and appropriate policies;

4. legitimization of discrimination and unethical treatment by health care workers, including aversion 'therapy' for homosexuality and maintaining diagnostic criteria that stigmatize transgender status as a 'disorder';
5. low self-esteem among MSM and transgender people, meaning that they fail to protect themselves or their partners from HIV and do not access HIV services;
6. failure of schools to address sexual orientation and gender identity issues in their curriculum;
7. lack of legal protections from discrimination, and poor education and work opportunities for MSM and transgender people, with the result that many turn to sex-work, greatly increasing their vulnerability to HIV.

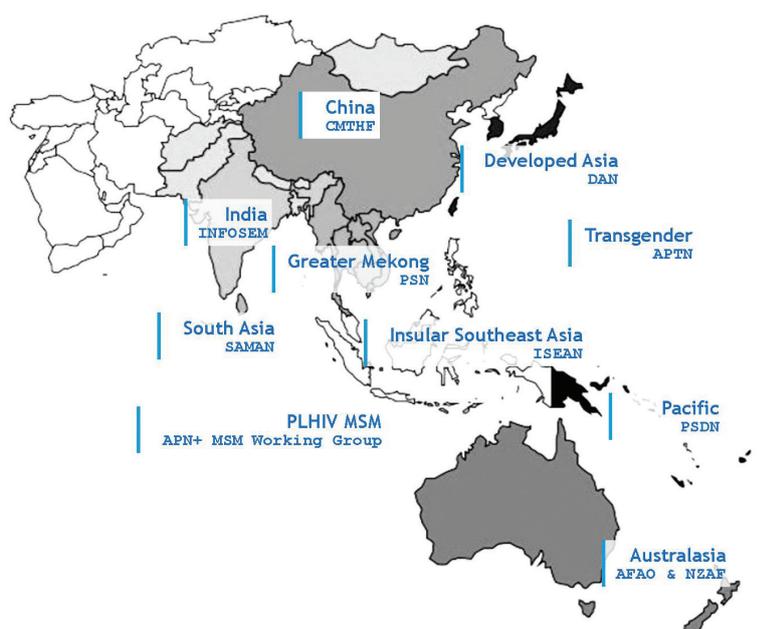
Governments should:

1. Repeal laws that criminalize sex between consenting adults.
2. Halt police harassment, violence and selective enforcement of prostitution, obscenity, vagrancy and other public order offences targeting MSM and transgender people.
3. Enact anti-discrimination laws in relation to sexual orientation and transgender status.
4. Provide legal recognition of gender reassignment and 'third sex' status.
5. Define justice sector responsibilities relating to the rights of MSM and transgender people in national HIV and AIDS plans.
6. Encourage National Human Rights Institutions to provide leadership on sexual orientation and transgender human rights issues.
7. Ensure parliamentarians, police, judges and justice ministry officials have access to evidence-based information and are trained on the epidemiology of HIV and the harmful public health impacts of punitive laws and law enforcement practices relating to MSM and transgender people.
8. Support community-based education and advocacy regarding the human rights of MSM and transgender people, and access to legal aid for MSM and transgender people who have experienced human rights violations.
9. The South Asian Association for Regional Cooperation (SAARC) should take proactive measures to promote and protect the human rights of MSM and transgender people and encourage member states commit to action to review discriminatory laws and policies, with priority to repealing laws criminalizing male-to-male sex.

About APCOM

The Asia Pacific Coalition on Male Sexual Health (APCOM) was launched at the 8th International Congress on AIDS in Asia and the Pacific (8th ICAAP, Colombo) in 2007. It is formed as a coalition composed of community, government and donor sector representatives, along with UN partner organizations. The community sector is composed of 8 sub-regional and 2 regional MSM and TG networks within Asia and the Pacific. The intention is to strongly advocate regionally and globally for increased investment in line with the need for scale up and increase coverage of MSM HIV intervention programming, research to address gaps in knowledge, and the promotion of individual rights for MSM and transgender people across Asia and the Pacific region.

SUB-REGIONS	ORGANISATIONS
Australasia	Australian Federation of AIDS Organizations (AFAO) and New Zealand AIDS Foundation (NZAF)
China	China Male Tongzhi Health Forum (CMTHF)
Developed Asia	Develop Asia Network (DAN)
Greater Mekong	Purple Sky Network (PSN)
India	India Network for Sexual Minorities (INFOSEM)
Insular Southeast Asia	Insular Southeast Asia Network (ISEAN)
Pacific	Pacific Sexual Diversity Network (PSDN)
South Asia	South Asian MSM and AIDS Network (SAMAN)
PLHIV MSM	APN+ MSM Working Group
Transgender	Asia Pacific Transgender Network (APTN)



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