ABSTRACT: This Legal Reference Brief is an output of the South Asian Roundtable on Legal and Policy Barriers to HIV, held in Kathmandu from 8-10 November 2011 (Roundtable Dialogue).

The Reference Brief reports on the results of research on key protective laws focused on HIV, men who have sex with men (MSM) and transgender people. This Reference Brief is not intended to be a complete analysis of the country’s legal and policy framework or social environment. The objective of this Reference Brief is to provide an entry point for discussion on protective laws in Bangladesh.

Reference Briefs were prepared by legal researchers in Bangladesh, India, Nepal, Pakistan and Sri Lanka to support the development of the Regional Legal Reference Resource.

The Regional Legal Reference Resource documents key protective laws focused on HIV, MSM and transgender people in the abovementioned five countries in South Asia. The two primary objectives of the Regional Legal Reference Resource are to build the capacity of legal professionals to analyze protective laws (focusing on people living with HIV, MSM and transgender people);1 and develop a resource to support legislative drafting, law reform and advocacy initiatives.

The Roundtable Dialogue 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) and supports the human rights commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under resolution 66/10 and 67/9.

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

The first case of HIV in Bangladesh was detected in 1989. Since then, the number of HIV cases has grown to an estimated 7,500 in 2011. This represents less than 0.1 percent of the total population. In 2011, the National AIDS/STD Program (NASP) reported 445 new cases of HIV, 251 new AIDS cases and 84 AIDS related deaths. Thus the cumulative number of reported HIV cases to date in Bangladesh stands at 2,533, AIDS cases at 1,101 and deaths at 325.

The key affected populations include female sex workers, men who have sex with men (MSM), Hijras and transgender persons, and people who use drugs. According to the 2011 National HIV Sentinel Surveillance (NHSS) Round 8, HIV prevalence was estimated at 0.3% among female sex workers and 1.1% amongst transgender people. The prevalence amongst people who use drugs is 1.1%. Therefore the estimated prevalence amongst the key affected populations is approximately 0.7% which is consistent with the 2007 NHSS Round 7.

While Bangladesh continues to be a low-prevalence country, its population is highly vulnerable. Specifically, risk behaviours including high levels of unprotected sex with commercial partners and unsafe drug injecting practices are areas of concern.

Recognising legal and policy barriers to HIV prevention, treatment, care and support services in South Asia, the International Development Law Organization (IDLO), the United National Development Programme (UNDP), SAARCLAW, the World Bank, and the Joint United Nations Programme on HIV/AIDS (UNAIDS) convened the South Asia Roundtable Dialogue: Legal and Policy Barriers to the HIV Response in Kathmandu from 8-10 November 2011 (Roundtable Dialogue). The Roundtable Dialogue was a follow-up to the Asia-Pacific Regional Dialogue of the Global Commission on HIV and Law held during February 2011 in Bangkok.

The key outcomes of the Roundtable Dialogue were the identification of law and policy issues that act as barriers to effective HIV responses and the development of recommendations linked to these issues. One of such recommendations was the strengthening the legal environment for people living with HIV (PLHIV) and high risk populations in order to (i) protect them from stigma and discrimination, (ii) enable them to access critical services, and (iii) ensure accessible and affordable recourse to the law.

Pursuant to these recommendations, review and analysis of laws protecting people with diverse sexual orientation and gender identity (SOGI) and PLHIV in Bangladesh, India, Nepal, Pakistan and Sri Lanka, was undertaken. This Legal Reference Brief is the Bangladesh chapter to the study. It is proposed that this document will serve as a reference resource for future legislative drafting, law reform initiatives and advocacy initiatives with respect to PLHIV and people with diverse SOGI in Bangladesh.

1. LEGAL ENVIRONMENT IN BANGLADESH – OVERVIEW

Bangladesh has a common law legal system, however, personal law is based on Islamic law. The majority of laws are enacted by the legislature and interpreted by the courts.

Bangladesh is a party to various international conventions that contain a number of provisions that directly and/or indirectly protect the rights of people with diverse SOGI and PLHIV. These provisions need to be translated into the domestic laws for them to be legally enforceable in Bangladesh as the country has a dualist approach to international law.

While it may be noted that the Constitution independently provides for certain fundamental rights, the scope of some of these rights are limited and may not be applicable to PLHIV, MSM and transgender people. In this context, the courts have been playing an important role in giving a broader interpretation to the scope of these rights.

3 Ibid at 6.
4 Ibid at 42.
One such example, though not the specific focus of this brief, is the High Court Division’s decision in the case of Society for the Enforcement of Human Rights (BSEHR) and Others v. Government of Bangladesh and Others. In this case the court held that the fundamental right to equal protection of law under Article 31 of the Constitution and protection of life and personal liberty contained in Article 32 of the Constitution applied to sex workers and pursuant to these fundamental rights, the sex workers had the right to occupation and the State has the legal duty to protect that right.

However in relation to MSM, section 377 of the Penal Code 1860 criminalizes same-sex relations in Bangladesh.

It is also important to note that the Government has initiated a number of programs and policies to protect the rights of PLHIV and high risk populations. However, due to the absence of adequate legal framework the effectiveness of these initiatives are limited.

2. INTERNATIONAL LAW AND CONVENTIONS RELATING TO HIV/AIDS

a. Relevant Provisions

Bangladesh became a member of the United Nations (UN) in 1974, and has since signed and ratified or acceded to adopted a number of conventions, including:

• the International Covenant on Civil and Political Rights 1966 (ICCPR) - acceded to 6 September 2000;
• the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW) – acceded to 6 November 1984; and

These conventions contain a number of provisions that directly and/or indirectly protect the rights of people with diverse SOGI and PLHIV, which are listed below:

• **Right to health:** Article 25 of the Universal Declaration of Human Rights (UDHR) provides that everyone has the right to health, medical care and necessary social services. Article 12 of the ICESCR provides for the right to the highest attainable standard of physical and mental health. Article 5(e)(iv) of CERD, Article 12 of CEDAW and Article 24 of CRC all specifically provide for the right to health without discrimination based on race, ethnicity or gender. These provisions relate to all citizens of the state and may all be read to protect from and provide services for PLHIV and people with diverse SOGI.

• **Provisions against discrimination:** Article 2 of the UDHR entitles all persons to all rights and freedoms without distinction of any kind such as race, color sex, language, religion, political or other opinion, national or social origin, property birth or other status, while Article 7 of UDHR provides that all are equal before the law without discrimination and entitled to equal protection of the law. The ICCPR, ICESCR and CRC all provide that the rights contained within these instruments shall be exercised and/or protected without discrimination of any kind on any basis.
Right to privacy: the right to privacy is enshrined in Article 12 of the UDHR, Article 17 in the ICCPR and in Article 16 of the CRC. The right to privacy that no one shall be subjected to either arbitrary or unlawful interference with his/her privacy and that everyone has the right to the protection of the law against such interference or attacks. These provisions may be read to protect a person’s privacy in relation to a person’s sexual orientation, gender identity and HIV/AIDS status.

Right to education: Article 26 of the UDHR states that everyone has the right to education, and Article 28 of the CRC states that education should be available to every child. Further, Article 19 of UDHR and Article 19 of ICCPR provide for freedom of expression and the freedom to impart and receive information and ideas. Also relevant is Article 17 of the CRC, which provides that children should have access to information, and material that relates to, inter alia, their physical and mental health. These provisions may all be read to ensure provision of education and information relating to sexual health including HIV prevention.

b. Application of International Law and Conventions in Bangladesh

Bangladesh has a dualist legal system, meaning that international conventions must be passed into domestic law to have effect.

3. DOMESTIC LAWS RELATING TO HIV/AIDS


Human rights and remedies against violations of fundamental rights: Article 11 of the Constitution of Bangladesh guarantees fundamental human rights and freedoms. Article 102 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.

Right to equality: according to Article 27 “all citizens are equal before law and are entitled to equal protection of law.” The broad scope of this Article may allow those discriminated against on the basis of gender identity, sexual orientation or HIV status to seek remedies. Article 28 deals with prevention of discrimination but to a limited extent “grounds only of religion, race caste, sex or place of birth.” Gender identity and sexual orientation are not included.

Provision of basic necessities: Article 15 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” and further “the right to social security, that is to say, to public assistance in cases of undeserved want arising from unemployment, illness or disablement.”

Public health: Article 18 of the Constitution states that it is the primary duty of the State to improve public health, which could be interpreted to act to prevent the transmission of HIV.

12 Article 11 of the Constitution of Bangladesh states “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.”

13 Article 102 (1) of the Constitution of Bangladesh states “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.”

14 Article 27, Constitution of Bangladesh.

15 Article 28, Constitution of Bangladesh.

16 Article 15 (a), Constitution of Bangladesh.

17 Article 15(d) Constitution of Bangladesh.

18 Article 18 (1) of the Constitution of Bangladesh states “The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and of drugs which are injurious to health.”
Right to protection from law: Article 18 also contains a morality clause that places a duty on the State to adopt effective measures to prevent prostitution\textsuperscript{19} and, presently, laws exist that allow for punishments for operating a brothel or living from the earnings of prostitution.\textsuperscript{20} This is noted in recognition of the fact that some MSM and transgender people sell sex — it is not intended to imply that all MSM or transgender people sell sex. In a positive step towards anti-discrimination of sex workers, the High Court Division in March of 2000 recognised the right of sex-workers to an occupation.\textsuperscript{21}

The case of Society for the Enforcement of Human Rights (BSEHR) and Others vs. Government of Bangladesh and Others as mentioned above, concerned the forced and violent eviction of sex workers from brothels and their subsequent detention by authorities with a view to “rehabilitating” sex workers. The High Court Division reiterated the fundamental right to equal protection of the law and protection of life and personal liberty enshrined, respectively, in Articles 31 and 32 of the Constitution and the court unequivocally censured such eviction, since the workers evicted were citizens of Bangladesh who were enrolled as voters and who were “maintaining their earning or livelihood which the State, in absence of any prohibitory legislation, has a duty to protect, and a citizen has the right to enforce the rights enshrined in Articles 31 and 32 of the Constitution.”\textsuperscript{22}

b. Legislation

i. Anti-discrimination legislation

Research failed to identify laws or regulations which specifically protect the basic rights of PLHIV and people with diverse SOGI in Bangladesh.

Research also failed to identify anti-discrimination laws or regulations that protect PLHIV or people with diverse SOGI. While there are broader laws against discrimination, there are none that specifically focus on HIV or people with diverse SOGI.\textsuperscript{23}

ii. Other legislation

The Government of Bangladesh passed the Right to Information Act in 2009 to ensure the free flow of information and to provide for the right to information. Section 7 of the Act details the kind of information that is not open and can be protected by the individual and includes “information the disclosure of which would harm the privacy of the personal life of an individual.”\textsuperscript{24} This Act would arguably protect the privacy of PLHIV and people with diverse SOGI.

4. GOVERNMENT INITIATIVES AND POLICIES RELATING TO HIV/AIDS

Bangladesh has a low prevalence HIV epidemic, however significant levels of risk taking behavior make Bangladesh vulnerable to HIV.\textsuperscript{25} HIV is under-reported because of the country’s limited voluntary testing and counseling capacity. Social stigma and discrimination attached to HIV creates a further impediment to prevention.\textsuperscript{26}

The Government of Bangladesh first addressed the issue of HIV in 1985, when the Ministry of Health and Family Welfare established the National AIDS/STD Programme (NASP) with the overall policy support of the National

\textsuperscript{19} Article 18 (2) of the Constitution of Bangladesh states “The State shall adopt effective measures to prevent prostitution and gambling.”
\textsuperscript{20} See section 4 and section 8 of the Suppression of Immoral Traffic Act 1933.
\textsuperscript{21} Society for the Enforcement of Human Rights (BSEHR) and Others vs. Government of Bangladesh and Others 53 DLR (2001) 1
\textsuperscript{22} Ibid.
\textsuperscript{24} Section 7(8) Right to Information Act 2009.
AIDS Committee (NAC), also established in 1985. The NAC is chaired by the Minister of Health and Family Welfare and is a multi-sectorial body that acts as an advisory body to the Government of Bangladesh. The NAC released a policy on HIV/AIDS and STD related issues in 1996.

The Government of Bangladesh subsequently adopted a comprehensive national policy on HIV/AIDS and STDs in 1997, which was followed by the release of the first National Strategic Plan for HIV/AIDS, also in 1997. Bangladesh now has its third National Strategic Plan for HIV and AIDS Response, 2011 – 2015.

The current national response to HIV is being guided by a number of laws, strategies and guidelines. These include:

- National HIV Advocacy and Communication Strategy (2005-10)
- 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).

In addition, a number of manuals, modules and guidelines have been developed:


The National Health Policy 2011 of the Government of Bangladesh recognises the right to health as a basic human right. Within the policy HIV is regarded as a serious challenge to public health. The importance of public health, the control of disease, gender equality and access to health services by disadvantaged classes, are considered critical areas of concern in the policy.

Finally, the Government of Bangladesh has established initiatives under social safety net programmes to implement the responsibility of the State to secure for its citizens, inter alia, “the basic necessities of life.” For the first time in 2011, the Government created rehabilitation programmes for hijra including a monthly allowance, distribution of health cards and a micro credit program.
CONCLUSION

Bangladesh has signed/ratified a number of international treaties that contain provisions that can be interpreted for the benefit of PLHIV and people with diverse SOGI. The Constitution of Bangladesh protects certain rights that can be read to include PLHIV and people with diverse SOGI. As of yet, these provisions have not led to legislative reform to prevent discrimination against these vulnerable groups or to the development of law focused on HIV. There is some indication of government commitment to address HIV in the numerous strategic plans, guidelines and policies that deal with treatment and prevention, however, strategic plans, guidelines and policies are not legally enforceable and are insufficient to protect the rights of PLHIV and people with diverse SOGI.