

SOUTH ASIA ROUNDTABLE DIALOGUE 'LEGAL AND POLICY BARRIERS TO THE HIV RESPONSE'

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GLOSSARY

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| AIDS | Acquired Immune Deficiency Syndrome |
| ESCAP | Economic and Social Commission for Asia and the Pacific |
| HIV | Human Immuno-deficiency Virus |
| IDLO | International Development Law Organization |
| LGBTQI | Lesbian, Gay, Bisexual, Transgender, Queer and Intersex populations |
| M&E | Monitoring and Evaluation |
| MSM | Men who have Sex with Men |
| NGO | Non-Governmental Organization |
| OFID | OPEC Fund for International Development |
| PLHIV | People Living With HIV |
| PWUD | People who use Drugs |
| SAARC | The South Asian Association for Regional Cooperation |
| SAARCLAW | The legal apex body of SAARC |
| STIs | Sexually transmitted infections |
| TANSACS | Tamil Nadu State AIDS Control Society |
| UNAIDS | The Joint United Nations Programme on HIV/AIDS |
| UNDP | United Nations Development Program |
| UNGASS | UN General Assembly Special Session |
| VAMP | Veshya Anyay Mukti Parishad, a collective of sex workers based in Maharashtra, India |
| WHO | World Health Organization |

I. EXECUTIVE SUMMARY

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

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 their home countries. 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.

During the course of the Roundtable, the following law and policy issues were identified as key barriers to the HIV response: the criminalization of behaviors of key populations at higher risk of HIV exposure; law enforcement policy and practices; lack of sensitivity, knowledge and awareness by law and justice sector leaders and stakeholders; the gap between black letter law and practice; and the clear need for greater coordination and collaboration within the law and justice sector.

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



Photo 1 - South Asia Roundtable Dialogue Participants

Comments from Leaders of the Law and Justice Sector

Leaders from the judiciary, intergovernmental and governmental recognized the inherent, inalienable, and universal nature of human rights afforded to all persons; with Hon. Justice Kalayan Shrestha of the Supreme Court of Nepal stating that “no pretext can be made in the name of public health and safety ...to deny [people living with HIV] their rights. In fact public interest lies in the protection of their rights.”

Leaders further stressed the debilitating impact of stigma and discrimination on access to services.

Legal and Policy Barriers to HIV Prevention, Treatment and Care: Focus on the Right to Health

A panel comprised of one representative from each of the key populations at higher risk, led discussion on the right to health; emphasizing the impact of stigma and discrimination and the denial of rights relating to privacy and confidentiality.

Representatives from the community of people who use drugs (PWUD) led debate on the impact of punitive drug related law and policy and called for government actors to adopt a public health approach and endorse harm reduction initiatives. Panelists highlighted the negative impact of contradictory law and policy, and practical issues around law enforcement and arrest. Participants considered the big picture question of when it is appropriate to criminalize an act (in light of law and policy on drug possession and consumption) and the issue of proportionality of punishment.

Legal and Policy Barriers Impacting upon Sexual Orientation, Gender Identity and Profession

Representatives from the sex worker community led a session on the legal and policy barriers faced by the sex worker community. One of the critical points, made by panelists focused on the freedom to choose ones’ own work or profession. It was argued that sex workers do not need to be ‘rescued.’ Sex workers have the right to choose the work they do. Panelists explained that stigma, discrimination and fear of violence and arrest, prevent many sex workers from accessing services. Participants shared case studies and recognized that, within a framework of laws, it is possible to create space where state, communities and police collaborate.

Representatives from the communities of men who have sex with men (MSM) and transgender people led discussion on legal and policy barriers faced by their communities. Noting the existence of colonial laws against sodomy in a number of South Asian countries, panelists applauded the leadership of the Delhi High Court in holding sodomy laws to be unconstitutional.

The criminalization of same sex behaviors and law enforcement practices act as a substantial deterrent to MSM and transgender people seeking healthcare for HIV and STIs. Transgender community representatives further articulated that, faced with high levels of police harassment and violence, health is de-prioritized.

Recommendations arising from the Roundtable can be summarized as follows:

1. Decriminalize conduct linked to key populations at higher risk (including PWUD, sex workers, MSM and transgender persons) through appropriate

legislative processes or judicial interventions. Work simultaneously on short term initiatives to address and mitigate the impact of relevant criminal laws.

2. Sensitize and disseminate information on the rights and issues of people living with HIV (PLHIV) and key populations at higher risk to law and justice sector stakeholders and healthcare providers.

3. Recognize the need for space for key populations at higher risk to collaborate (strength in synergies).

4. Empower PLHIV and key populations at higher risk with knowledge about their rights under the law and the mechanisms that they may utilize to access and defend these rights.

5. Empower human rights institutions with the necessary and appropriate statutory powers to enable them to address and respond to diverse legal and ethical issues and implications pertaining to human rights.

6. Advocate for constitutional challenges and public interest litigation, recognizing the role of judicial leadership.

7. Sensitize the media about the objectives of a legal enabling environment, and the rights of key populations at higher risk and PLHIV

8. Advocate for healthcare providers and law and justice sector authorities to commit to a public health approach

9. Strengthen the legal enabling environment

II. BACKGROUND

a. Objectives

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

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 their home countries. 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. The Roundtable Program is attached at **Annex 1**.



Photo 2 - From left to right: Hon. Chief Justice Lyonpo Sonam Tobgye, Bhutan; Hon. Justice Shiranee Tilakawardane, Supreme Court of Sri Lanka; Ms Shoko Noda, UNDP Country Director Nepal; Mr Albertus Voetberg, World Bank; Ms Naomi Burke-Shyne, IDLO

The objectives of the Roundtable were to stimulate participants for future initiatives by supporting them to:

- Identify and understand legal and policy barriers (including discriminatory or punitive laws and policies, law enforcement mechanisms and practices) to HIV prevention, treatment and care services for PLHIV, MSM, transgender persons, sex workers and people who use drugs;
- Identify and discuss strategies and initiatives to address these barriers (for example law reform, legal aid services and training);
- Strengthen the rights-based response to HIV in their countries.

Participants included community leaders and advocates, lawyers, law students, representatives of the judiciary and parliamentarians actively dealing with HIV and human rights (and/or the law relating to key populations at higher risk),

representatives of human rights institutions and representatives of government ministries. The Roundtable participant list is attached at **Annex 2**.

The Roundtable supports 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 affected populations at higher risk.” The Roundtable further supports the 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.

The Roundtable recognizes and builds upon the research and strategies listed at **Annex 3**.

b. The Roundtable Dialogue

The format of the Roundtable consisted of a series of short panel presentations, each complemented by group and plenary discussion emphasizing active participation and sharing. Group sessions facilitated in-depth discussion and analysis of the issues, after which each group presented ideas, strategies and issues back to the plenary.

This report details the themes and key issues discussed, and the learning and sharing that took place; not necessarily depicting conversations by session but rather by linking inputs of different participants within the relevant themes. Plenary and group dialogue and discussion are featured in text boxes.

c. Context

South Asia’s HIV epidemic is severe in magnitude and scope, and impacts disproportionately on key populations at higher risk (in particular MSM, transgender individuals, sex workers and PWUD). There are a diverse range of structural factors that amplify HIV vulnerability and risk in South Asia, including widespread poverty and inequality; stigma and discrimination; cultural impediments to sex education and sexual discourse; high rates of injecting drug use; an extensive, cross border sex work industry; and high levels of mobility and migration – these complex socio-cultural issues are exacerbated by punitive and discriminatory legal frameworks, criminalization of the behaviors of key populations, and law enforcement practices.

Photo 3 - Hon. Chief Justice Lyonpo Sonam Tobgye, Bhutan with Mr Ubaidullah Mashori, Community Support Foundation, Pakistan



Since the UN General Assembly Special Session (UNGASS) on HIV/AIDS in 2001, there has been a heavy emphasis on the importance of law reform and the protection of legal rights in the context of HIV. Building upon the UNGASS statement of commitment to human rights, 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'). This guidance note recognized and acknowledged the importance of law reform, but also proposed a focus on community empowerment to access law, and appropriate law

enforcement. These components of the legal response were reflected in the presentations of panelists.

III. COMMENTS FROM LEADERS OF THE LAW AND JUSTICE SECTOR

The Hon. Chief Justice Lyonpo Sonam Tobgye of Bhutan opened the Roundtable. The Hon. Chief Justice Tobgye spoke about three crucial rights that should be guaranteed by SAARC (The South Asian Association for Regional Cooperation) countries: the right to life without ostracism and discrimination; the right to privacy and information; and the right to access to justice.

Hon. Justice Kalayan Shrestha of the Supreme Court of Nepal noted that “human rights are by nature inherent, inalienable, and universal. A sense of equal worth and dignity are the crux of equality and human rights. Because [people living with HIV] have all human rights... no pretext can be made in the name of public health and safety ...to deny them their rights. In fact public interest lies in the protection of their rights.” Hon. Justice Shrestha further called for law enforcement agencies and service providers to “come to serve humanity at this crossroad.”

Hon. Justice Shiranee Tilakawardane of the Supreme Court of Sri Lanka spoke on the role of the judiciary, noting the importance of informed decision making and calling for sensitization of all involved in the administration of justice in order to ensure that PLHIV are afforded the rights to which they are entitled.



Photos 4 and 5 - (left) Hon. Justice Shiranee Tilakawardane, Supreme Court of Sri Lanka; (right) Hon. Justice Kalayan Shrestha, Supreme Court of Nepal

Hon. Justice Tilakawardane also emphasized that “gender-based discrimination is perpetuated at both the family and community level... Gender based violence and woman having minimum power to negotiate sex (as well as negotiate using condoms) further heightens women’s vulnerability to STIs and HIV.”

Hon. Justice Umesh C. Banerjee (retired.) (formerly Supreme Court of India; formerly Chief Justice Andhra Pradesh High Court) accentuated the fact that stigma and discrimination result in widespread human rights violations of people living with and affected by HIV; and that this must be addressed at all levels of society. He also reiterated that the judiciary could play an important role in promoting change through progressive interpretation of the laws.

Nepali Parliamentarian and human rights lawyer, Hon. Sapna Pradhan Malla, spoke about the glaring contradiction that exists in South Asia. Despite the many laws, policies and committees in place to address access to justice, justice is denied to many. Ms Malla questioned constitutional commitments about equality and rights for all, asking “shouldn’t these constitutionally guaranteed rights exist

for everybody, including marginalized communities?" Ms Malla argued that culture is not static and past beliefs cannot hinder our responses to present realities.

Ms Malla called for all parliamentarians to change their mindsets, broaden their understandings and examine their political commitments.

Ms Shoko Noda, UNDP Country Director, Nepal emphasized the important role of the law in every society, noting: "It can be a tool for social change and [a tool for] the pursuit and achievement of justice. Where the legal environment protects and promotes human rights it benefits the health and well-being of individuals, families, communities and nations. Where the legal environment protects and promotes human rights, it benefits the health and wellbeing of individuals, families, communities and nations."

UNAIDS Country Coordinator for Nepal and Bhutan, Dr Marlyn Borrromeo, noted the debilitating impact of stigma and discrimination and stressed the need for an enabling environment to support HIV prevention, treatment, care and support.

Mr Albertus Voetberg from the World Bank noted the importance of capacity building so that key populations at higher risk can address stigma and discrimination and fight for access to critical services.

IV. LEGAL AND POLICY BARRIERS TO HIV PREVENTION, TREATMENT AND CARE: FOCUS ON THE RIGHT TO HEALTH

The right to health is "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, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and international levels."¹

Photo 6 – Roundtable Dialogue Participants



The right to health further includes certain freedom and entitlements, for instance the right to be free from forced medical treatment and the right to equal access to health services. These rights, as well as the ability to access prevention, care, treatment and support services are particularly relevant in the context of HIV.

The focus of day one of the Roundtable was the right to health; including sensitization on confidentiality and the broader issues of stigma and discrimination.

¹ Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment No. 14 (2000); The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights).

Day one was designed to support participants from the legal community to recognize and understand the urgent issues facing PLHIV and key populations at higher risk of HIV exposure.

Co-facilitators, Professor Dr. Joga Rao, from the National Law School of India, and Ms Ayesha Mago, commenced the Roundtable with a summary of the background paper. The background paper, included at **Annex 4**, outlines the principal issues facing key populations at higher risk and provides a summary of the significant barriers to prevention, treatment, care and support services.² These include:

- weak design and implementation of rights-based interventions
- poor sensitization of the law and justice sector
- stigma and discrimination within the health care sector and within society
- key populations at higher risk are routinely subjected to mandatory HIV testing
- key populations at higher risk lack awareness about their rights under the law
- key populations at higher risk are subjected to unlawful arrest, detention and harassment by the police
- drug control laws obstruct harm reduction measures and fail to take into account public health considerations

a. Stigma, Discrimination and Confidentiality

"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."³

"Stigmatizing attitudes in the general population and discriminatory treatment by actors ranging from health providers to local policy makers intensify the marginalization of vulnerable groups at highest risk, driving them further from the reach of health services and much-needed prevention, treatment, care, and support. Daily harassment and abuse also cause health problems and adversely affect mental health, thereby leading to depression, social isolation, and an array of adverse socioeconomic outcomes related to HIV."⁴

Denial of services, mandatory testing for HIV and widespread failure to maintain the confidentiality of medical records are violations of the right to health. Ensuring consent to HIV testing and confidentiality in respect of HIV status is a critical step in protecting the rights of PLHIV, key populations at higher risk and their families and encouraging people to undertake voluntarily testing.

Representatives of key populations at higher risk led the discussion on the right to health, stigma and discrimination. Community representatives spoke about personal experiences relating to the impact of stigma and discrimination and the denial of rights relating to privacy and confidentiality.

Panelists

- Ms Tseltrim Dema, Lhak Sam, Bhutan
- Ms Bijaya Dhakal, Jagriti Mahila Maha Sang (JMMS), Nepal, together with Ms Shruti Karki, JMMS, Nepal

² Prof. Joga Rao, 'South Asia Roundtable Dialogue: Legal and Policy Barriers-The Background Paper', 2011

³ Tackling HIV-related Stigma and Discrimination in South Asia, 2010, World Bank

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

- Mr Jeevan Ghale, Recovering Nepal, Nepal
- Mr Kasem Iqbal Khwaja, Naz Male Health Alliance, Pakistan
- Ms Agniva Lahiri, People Like Us (PLUS), India

Ms Dema, a representative of the positive community from Bhutan, spoke about how people diagnosed with HIV are stigmatized from the point of testing and diagnosis, due to a lack of confidentiality within the health services. Ms Dema reports that when she discovered her status, so did everyone else. Being unable to control disclosure of status means that many PLHIV face potential stigmatization by their families and by society at large. This represents a deterrent to voluntary testing.

Although the Constitution of Bhutan safeguards equality, there are no specific laws on HIV and the protection of related rights. Ms Dema believes that a legal protective framework is required. In the absence of a legal framework, it is difficult to deal with issues such as breach of privacy and discrimination in health care settings.

All panelists spoke about societal perceptions of HIV and stigma, and the extent to which it hindered their work and access to rights and services. Ms Dhakal, President of the Nepal national sex workers network, JMMS, explained that she addressed the audience not only as a sex worker but also as a mother, a sister and a wife – all of which are important parts of her identity. She explained that being a sex worker has enabled her to earn a livelihood and educate her children and questioned why society judges her, if she is happy in her choice of work. Society's attitude is reflected in the approach of police who, she explained, harass and abuse sex workers.

Similarly, Mr Ghale, the National Program Coordinator from Recovering Nepal, described how community attitudes and discrimination affect PWUD. Anti-drug campaigns tend to target drug users and include stigmatizing media coverage, which has led to public beatings of drug users and public shame. In this context, public health programs, which attempt to improve access to prevention, treatment, care and support for PWUD, are hampered.

It was explained NGO staff, outreach workers and volunteers working with PWUD or in harm reduction services also face arrest and/or humiliation by the police. This is demonstrated by a recent case in Pokhara, Nepal, where police allegedly took prevention tools away from outreach workers, crushed their sterile syringes, and forced them to tear up the identification cards they issued to PWUD.

Drug related policies and programs in Nepal are divided between those that prioritize enforcement (criminalization) and those that prioritize public health. The clash created by this dichotomy negatively impacts upon HIV prevention work and harm reduction initiatives.

Mr Iqbal, a HIV positive, self-identified gay male, explained that he is "sick of seeing our boys infected and dying, sometimes without even being diagnosed." He explained that in Pakistan only male sex workers are recognized as MSM, although a recent study has showed that MSM may have more male partners than male sex workers. Despite this, there is much denial about MSM activity in Pakistan. There is no data on the prevalence of HIV within the MSM community, other than that of male sex workers; no laws protecting male victims of rape; no sex education and no awareness about condom use.

Ms Lahiri, a transgender person from India, pointed out that legal recognition does not equate to acceptance. Formal recognition of the third gender in India

and Pakistan has not translated into lower levels of stigma, reduced scrutiny and harassment, or resulted in an increase in access to services. Transgender individuals are still largely excluded from formal sector employment. Community members report they feel their rights to life, security, dignity and privacy are perpetually under threat.

Panelists acknowledged that positive changes are being made. For instance, the fourth phase of the National AIDS Control Program in India (NACP IV) identified transgender people as a separate category of people requiring specific services. Further, a monthly pension scheme has been launched for transgender people in Delhi. However, Ms Lahiri noted, a sense of entitlement or dignity is still lacking within the transgender community, and needs are so great that “whatever the powers that be give us, we have to accept like hungry dogs.”

Dialogue on the Right to Health, Stigma and Discrimination

It was suggested that legislating for rights needs to be supported by acceptance and formal recognition. For instance, recognition of the third gender in India, means that people can now mark male (M), female (F) or other (O) on their passports. However, in a recent debacle, a large group of *hijras* traveling on O passports were refused entry into Saudi Arabia for the Haj because the Saudi authorities did not recognize this passport.

On the topic of criminalization of the behaviors of key populations, it was pointed out that criminalization negates constructive interaction. This approach does not help governments to ensure access to healthcare. All governments should emphasize harm reduction and preventive approaches.

On the question of how to address the issue of police harassment of transgender people, it was suggested that police training curricula should provide trainees with adequate information to support them to treat Lesbian, Gay, Bisexual, Transgender, Queer and Intersex populations (LGBTQI)⁵ with respect, thus preserving their honor and dignity.

The issue of healthcare and access to services for undocumented migrants (also vulnerable to HIV) was also raised. According to participants, migrants do not need documents to access health services in India. They are legally entitled to go to a hospital and get medical services. However, they are often not aware of this, and police harassment creates fear of official spaces. The police need to be sensitized on how to deal with this.

b. Legal and Policy Barriers impacting upon People Who Use Drugs and the Right to Health

Commentators have pointed out that laws related to drug use provide disproportionately harsh punishments under criminal law, even for small quantity consumption and possession. This approach to drugs in South Asia has resulted in the disruption of HIV prevention programs and has impeded harm reduction services including the delivery of clean needles and syringes and/or substitute drug therapy.

Criminal laws pertaining to drug use and possession tend to have the effect of pushing PWUD underground and significantly inhibiting access to services. Finally, criminalization of drug use and possession also results in greater numbers of

⁵ LGBTQI: Lesbian, Gay, Bisexual, Transgender, Questioning, Intersex

people in detention and prison settings, which greatly increase risk of infection to HIV.

The World Health Organization (WHO) guidelines confirm that substitution therapies, such as methadone and/or buprenorphine maintenance, are still the most promising method of reducing drug dependence.⁶ However, methadone is not legally available anywhere in South Asia and buprenorphine is legally available only in India, Pakistan and Nepal.

Panelists:

- Mr Bijay Pandey, Asian Network of People Who Use Drugs (ANPUD), Nepal
- Mr Chandana Mahesh, Alcohol and Drug Information Centre (ADIC), Sri Lanka
- Mr Hussain Rasheed, Human Rights Commission, Maldives.

Mr Pandey spoke about how harsher laws had worsened the situation in Nepal by creating barriers to harm reduction services. He explained that in the 1990s the Nepal government restricted all heroin coming from India into Nepal, and in response drug users had shifted to pharmaceutical injections.

Mr Pandey echoed earlier comments in relation to the Nepal government's contradictory policies on drugs. Nepal passed the *Drug Control Policy* (2006) and *Drug Control Strategy* (2010) providing protection against discrimination against PWUD; however these policies conflict with the *Narcotic Drug Control Act* (1976), amended in 1993, which still criminalizes drug use as well as the distribution of clean needles. This results in a situation where the Ministry of Health distributes clean needles and syringes while the Ministry of Home (through the police) arrests people who receive these services. Mr Pandey also noted that public health policies exist without corresponding implementation on the ground.

Nepal criminalizes purchase and possession of drugs, even for small amounts of illicit substances (amounts for personal use). Severe penalties apply for possession of both hard and soft drugs.

A further issue exists in the determination of sentences and/or treatment for PWUD. Police, rather than qualified healthcare professionals, are given power to decide upon treatment regimes for PWUD. Police are allowed to commit PWUD to compulsory rehabilitation centers where they can be detained for three or more months. These rehabilitation centers do not include HIV prevention or treatment services and expose the inmates to a host of other infectious diseases including tuberculosis.

It was noted that while community sensitization programs have been implemented in Nepal, they have failed to yield clear results. "It is society that criminalizes the drug user" Mr Pandey remarked. Often PWUD have no knowledge at all about their rights and accept social isolation, discrimination and violence.

The participants representing the drug user community in Nepal agreed that law reform was essential and that there needs to be a balance struck between the twin objectives of access (to healthcare and harm reduction services) and drug control.

Mr Mahesh provided some insight into the situation in Sri Lanka, focusing specifically on heroin users. In Sri Lanka, the possession of injecting equipment is

⁶ WHO, The Methadone Fix. Bull World Health Organ. 2008 Mar;86 (3):164-5.

illegal for anyone who is not a medical practitioner. Compounding this, is the fact that PWUD are subject to police abuse and harassment if they are found in possession of condoms. This again demonstrates how the enforcement of laws on the ground may negatively impact upon HIV prevention initiatives.

Mr Mahesh noted that typically, local police know who the heroin users are. This results in circumstances where PWUD are arrested and imprisoned even when they are not in possession of drugs. Once arrested, heroin users face compulsory treatment in centers where, they report, they are often subject to physical and sexual abuse.

Mr Rasheed stated that while there is a very low incidence of HIV in the Maldives, injecting drug use is a key driving factor. According to Mr Rasheed, in terms of the right to health, barriers would include *accessibility and affordability*.

The newly adopted Maldivian Constitution, ratified in 2008, ensures the abolition of all forms of discrimination. In addition, the Maldives have in place the National Strategic Plan for HIV and AIDS, and programs on sensitizing the police on human rights and the rights of PWUD at the time of arrest. There is also a *Public Health Bill*, and a new and important policy stating that all Maldivians will be covered under health insurance by 2012.

Mr Rasheed reported the Human Right Commission provides assistance, according to certain rules of eligibility, if people who wish to file cases cannot afford the related fees.

Dialogue on PWUD

Participants agreed that laws relating to PWUD need to be more harm reduction focused and that supportive interpretation of the law is also required. The question arose, where it is not possible to change laws, what is the best way to promote access to HIV prevention, treatment and care services? Would it be useful to have specific laws around service delivery that would at least protect those providing services?

In light of this, participants proposed:

- greater media engagement and sensitization in relation to the rights of PWUD and harm reduction;
- advocacy and lobbying with the health and education sectors would be valuable;
- involvement of schools in education on health and rights issues;
- health rights, drug use and the harm reduction approach should be incorporated into university curricula for healthcare personnel;
- PWUD should be engaged and supported to address rights violations and advocate for their rights in a constructive, non-confrontational manner; and
- A reform-oriented approach to punishment should be taken, which looks at alternatives like community service rather than harsh penalties and prison sentences.

Mr Rasheed was asked if sentencing for drug offences is same for distributors and users in the Maldives? He responded that amendments to the penal code with regards to this issue are in process.

Finally, participants agreed user-friendly healthcare services are desperately needed for PWUD. PWUD find lengthy administrative procedures in government hospitals difficult to manage. This, coupled with stigma and a lack of understanding about the issues faced by PWUD, results in poor uptake of general health services.

Maintaining confidentiality and privacy within healthcare settings is also a challenge. Drug users are understandably reticent to seek health care services because with no guarantee of confidentiality, they may be arrested. Systems and healthcare professionals must ensure PWUD give informed consent to treatments and/or rehabilitation services. Health care providers need to be sensitized so that they see drug users as human beings with the illness of addiction.

Female drug users are especially vulnerable; they are stigmatized, subject to sexual abuse in healthcare settings and broader society, and face specific reproductive health issues including fertility and childbirth. Women who use drugs may also be sex workers, this overlap needs to be recognized and addressed in programmatic interventions. Rehabilitation support specifically for female drug users is needed.

Participants discussed the fact that religions are dynamic and open to new interpretations. They suggested that an interesting strategy would be to engage with religious bodies and perhaps work on a global compilation of positive interpretations of religions, which have been supportive of people living with HIV and key populations at higher risk.

The session ended with some important questions, highly relevant in the context of this Roundtable:

- What is an effective law? Presumably if it deters the behavior that it prohibits.
- When should we make something criminal? Should the standard of 'criminality' not be linked with harm caused to others?

Finally, of particular importance to the debate on PWUD, participants were left considering the issue of proportionality of punishment.

V. Legal and Policy Barriers Impacting upon Sexual Orientation, Gender Identity and Profession

a. Choice of Profession: Sex Workers

A number of South Asian countries criminalize sex work or the activities surrounding sex work. Laws that criminalize sex work or that have the effect of pushing sex workers on to the streets (and into unsafe and violent situations), have been found to negatively affect access to health services, as well as sex workers' ability to demand condom use from clients. Exacerbating this situation is the fact that sex workers often find they are unable to get help from the police in situations where they are the victims of violence.

Panelists

- Ms Shabana Goundi, VAMP, India⁷
- Ms Sutapa Mazumdar, VAMP, India
- Ms Shruti Karki, Jagriti Mahila Maha Sangh (JMMS), Nepal⁸
- Mr Rup Narayan Shresta, Forum for Women, Law and Development, (FWLD) Nepal
- Ms Muna Upadhyay, Forum for Women, Law and Development, Nepal

⁷ Veshya Anyay Mukti Parishad (VAMP) is a collective of sex workers based in Maharashtra, India

⁸ Jagriti Mahila Maha Sangh (JMMS) is a federation of female sex workers in Nepal

Representatives from the sex worker community as well as individuals working with the sex worker community led the discussion on legal and policy barriers impacting upon sex workers' access to services. A critical point made repeatedly by panelists focused on the freedom to choose ones' own work or profession. Ms Goundi argued that sex workers do not need to be 'rescued.' They have the right to choose the work they do. "I demand respect from society and demand to have the rights that other people have as citizens. I want people to understand that I don't need pity, I am choosing to do what I do." Ms Goundi shared VAMP's position on the issue: sex is work; adults can consent to this work; and raids and forced rescue and rehabilitation of women who consent to sex work is a violation of their rights. These raids push the sex worker community underground and worsen their vulnerability because they cannot access health or legal services.

Photo 7 - Roundtable Dialogue Participants



The legal framework in India also works as a barrier to HIV interventions. Ms Mazumdar explained that the existing legislation, namely the *Immoral Trafficking (Prevention) Act (1956)*(ITPA) penalizes acts related to sex work including: keeping a brothel, soliciting in a public place, living off the earnings of prostitution and living with or habitually being in the company of a prostitute. The ITPA further provides these provisions

apply "with or without consent" – which effectively infantilizes adult women. The ITPA assumes that adult women could not possibly have given their consent to be sex workers. This is inconsistent with laws on abduction or confinement where consent (or the lack thereof), is considered critical to determining whether an offence has taken place.

Globally the conflation between sex work and trafficking is a complex and challenging issue, with laws and strategies meant to combat trafficking being at odds with programmatic interventions and policy required to ensure the rights of sex workers. Laws that allow the police to abuse, harass and extort money and sex from sex workers create a considerable barrier to access to health services and HIV prevention, testing and treatment services. It was suggested that whilst governments have officially recognized the importance of targeting and involving sex workers in HIV prevention work, they have not taken responsibility for the structural issues that make sex workers vulnerable to the virus—specifically police violence and lack of protection under the law.

Police violence towards sex workers is not confined to India. Ms Karki shared a recent survey conducted among 75 female sex workers from Kathmandu which found that 89.3% respondents reported experiencing more than one form of violence from law enforcement officials including arbitrary detention, rape, extortion, sexual abuse, physical abuse and verbal insults. In the words of one sex worker "when the police arrest us, they call our names and abuse us and we feel very scared to even utter a word in case the punishments become worse or [in case] they inform our husbands, children or families. We just want to go out from there at any cost - giving bribes or sex."

Ms Karki explained that in this environment of fear, vulnerability and exploitation, where sex workers are arrested on the grounds of carrying condoms; HIV prevention is low on sex workers' list of priorities.

Panelists noted another common trend: outreach workers in possession of condoms and/or informational pamphlets about STIs being arrested and/or harassed by the police.

Mr Shreshta, detailed how the legal framework could negatively impact upon prevention, treatment and care services. In the Nepali case, the *Human Trafficking and Transportation (Control) Act (2007)* enacted provisions which criminalize the actions of the client but not the sex worker. Under this law, police have made many arrests then forced female sex workers to file cases against clients and establishments. In Kathmandu, more than 70 cases are pending at the District court and the sex workers and their families have been subjected to threats. Almost all those concerned have left Kathmandu and gone into hiding. This has meant that HIV service providers have lost their networks while HIV related vulnerability still remains high. The law has also made it harder for street based sex workers to negotiate condom use with clients.

The *Public Offences and Punishment Act (1970)* is another law causing problems for sex workers in Nepal. The *Public Offences and Punishment Act* was enacted with a view to maintaining peace and order in public spaces and is used by police and the District Administration to arrest male and female sex workers on the grounds of nudity or vulgarity in public places. This provision is also commonly used as the ground for arrests in hotel rooms or after requesting the sex workers to come to the police station. Once arrested, the District Administrator may remand sex workers in custody for days or fine them. This puts pressure on sex workers to take on more clients, to make up for income lost while in custody. Privacy, confidentiality and stigmatization are issues under the enforcement of this legislation.

The Forum for Women, Law and Development (FWLD) represent sex workers in making claims against the police, but due to the stigma and discrimination associated with sex work, sex workers rarely take legal action against the police. Ms Upadhyay shared the details of a FWLD case where a policeman was caught extorting money from a sex worker. As a result of pressure from the community and FWLD, together leadership from within the police force, the policeman was demoted on the basis of his actions.

Hon. Justice Tilakawardane provided an example of how the application of laws against key populations at higher risk can be combated by progressive judicial decisions. In Sri Lanka, the archaic *Vagrancy Ordinance (1841)* is commonly used by police to arrest sex workers. While there is no law against sex work in private in Sri Lanka, street based sex work and brothels are illegal. The *Vagrancy Act (1978)* creates offences for sex workers found "wandering in public street or highway" and "behaving in a riotous or indecent manner." It also uses antiquated and stigmatizing language that categorizes an offender as an "idle and disorderly person." Female sex workers charged under this Act are usually sent to detention homes. However, a recent Sri Lankan judgment in the High Court demonstrated the power of the judiciary in interpreting the law in a progressive way.⁹ Two women appealed their convictions under the *Vagrancy Act* on the ground that the law does not penalize sex workers who live "on their own earnings." The High Court of Sri Lanka confirmed that the *Vagrancy Act* was not intended to be interpreted to apply to sex workers living on their own earnings.

Dialogue on Sex Work

Participants asked about the criminalization of clients of sex workers and whether this was an effective way to legislate against sex work without having a negative impact upon sex workers. Ms Goundi responded that criminalizing clients could

⁹ *Saibo vs Chellem et al*, Sri Lanka High Court

only hurt sex workers as deterring clients blocks a sex workers source of income and forces them to conduct business in less safe settings.

It was also queried whether in the case of sex work, HIV could be looked at as an occupational hazard. VAMP was asked what action it takes (as a sex workers collective) to protect sex workers from contracting HIV. Ms Goundi explained that VAMP has regular meetings in all seven districts in which they operate, and that they ensure that each and every woman uses condoms in her transactions. They also ensure that no young girls are working in their collective. All the women are taken to the hospital for regular checkups. Additionally, if a sex worker is living with HIV she is cared for by the collective, "We take care of [the women] as our family... we are not like [the part of] society that throws people out of their homes. We ensure the women have access to food, shelter, healthcare services, emotional support and have regular contact with doctors."

Examples of two contrasting red light areas were discussed; one in India-Kamathipura in Mumbai, and one in Sonagachi in West Bengal. In Sonagachi, sex workers have unionized themselves against police harassment and violence and run intensive education programs on condom use, and the prevention of STIs and HIV. As a result, HIV prevalence among sex workers in this area has stayed at around 5-7% while condom use increased dramatically from 3% to 97%. By contrast, HIV prevalence among sex workers in Kamathipura (where there is no collective and where police harassment and eviction from living spaces is routine) is around 35%.

Sex Work and Access to Health Care

Stigma, discrimination and fear of violence and arrest, prevent many sex workers from accessing services. More education is needed in terms of the right to health. In India, the government has started sex worker led interventions in order to encourage female sex workers to access services.

Participants suggested that while current laws are in place, an approach of harm minimization should be adopted. It is possible to create space where state, communities and police collaborate, notwithstanding existing laws. Consensus between these stakeholders facilitates the delivery of health, education and legal services to both male and female sex workers in a safe and efficient manner. This demands committed, open minded stakeholders, legal resources and police training.

Participants also debated whether the identity of HIV positive people should be disclosed to society. For instance, does VAMP feel they should be informed if one of their sex workers' clients is HIV positive? Some participants suggested that it should not be mandatory to disclose HIV status. The view that the emphasis should be on all people to take full responsibility for their own health (therefore taking all possible precautions to prevent transmission of HIV), was also expressed. A counter view was posited, suggesting that because a small risk of transmission exists even with safe practices in place, there should be an obligation upon positive people to disclose their HIV status.

Trafficking

The distinction between trafficking and sex work remains challenging. Sri Lankan delegates discussed the fact that that trafficking should not be conflated with sex work but queried how this issue should be best dealt with. Ms Goundi explained that the VAMP experience has shown that only 25% of the women in the collective were trafficked. It was argued by some participants that the state should recognize the distinction between the current reality and the past.

Therefore, even if a woman was, at one point, trafficked into sex work, her right to choice exists in the present. A woman's present choice should be a key factor in determining responses and programmatic interventions.

b. Sexual Orientation and Gender Identity: Men who have Sex with Men and Transgender People

Many of South Asia's former British colonies still have in place colonial laws against sodomy. Bangladesh and Pakistan have preserved the archaic anti-sodomy provision section 377, which criminalizes "carnal intercourse against the order of nature." Sri Lanka has a similar provision in Article 365 and 365A of the Sri Lankan Penal Code.

India became the most recent South Asian country to abolish section 377 when, in June 2009, it was declared unconstitutional by the Delhi High Court. In a historic judgment Hon. Justice A.P Shah 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."¹⁰

In December 2007, the Supreme Court of Nepal ruled that transgender people and men who have sex with men have equality under the Constitution. The writ petition cited Nepal's responsibility to fulfill their commitments and duties under ratified international human rights conventions (Nepal has a monist legal system). The strategy of using Constitutional guarantees of equality and non-discrimination as well as human rights obligations under international covenants may indeed be one way towards ensuring rights for LGBTQI communities within South Asia.

Panelists:

- Ms Manisha Dhakal, Federation of Sexual and Gender Minorities Nepal (FSGMN), Nepal
- Mr Aditya Bondhopadhyay, Lawyer, India
- Mr Anjan Joshi, SPACE, India¹¹
- Ms Rosanna Flamer-Caldera, Equal Ground, Sri Lanka

Injustice anywhere is injustice everywhere - Ms Dhakal commenced her presentation by quoting Martin Luther King's powerful statement. Ms Dhakal explained how health is a very low priority for transgender people, as they are generally preoccupied with protecting themselves from police harassment and violence. *The Public Offences and Punishment Act (1970)*, which, as discussed, has been used in Nepal to harass sex workers, is also used to threaten and intimidate transgender people on the basis that they cause a disturbance in public areas. According to Ms Dhakal, this is a gross misuse of the law and violation of the right to human expression and choice.

Mr Joshi, reiterated how laws are misapplied to harass transgender people and discriminate against them. In India under the *Bombay Prevention of Begging Act (1952)* any person can be arrested on the spot. Street based transgender people are particularly vulnerable under this Act and are rounded up by police on a regular basis. In these circumstances, transgender people report that they are given no information, legal aid or healthcare; subjected to physical and verbal abuse; forced to wear men's clothing; forced to have an HIV test and put in a detention centers. The social welfare department runs such detention centers

¹⁰ Chief Justice A.P Shah, Delhi High Court, NAZ Foundation (India) Trust v. Government of NCT, Delhi and Others

¹¹ SPACE is a Delhi based NGO working with transgender people, MSM and young people on issues related to HIV.

SPACE is currently collaborating with the Lawyers Collective¹² to file a case against this law.

Panelists reported that another serious obstacle in terms of HIV prevention is simply the lack of information and denial of services to young MSM and transgender people. The most vulnerable age group of 15-25 year olds are often denied access to information, condoms and lubricants because of their age.

This problem is not restricted to youth in India. A recent study on the sexual behavior of adolescents in Pakistan illustrated a serious paucity in sex education - with no awareness of condom use among the young men surveyed.

Panelists noted that even when transgender people know that the use of condoms and lubricant is critical, they are afraid to carry them because if police find these items, they accuse them of being sex workers and prosecute them. Transgender people who *are* sex workers report that law enforcement agencies are the primary sources of violence they face, subjecting them to rape, beatings, detention, extortion and sexual abuse.

In a recent case in Nepal, a transgender person was severely beaten by twenty policemen, according to Blue Diamond Society (BDS).¹³ The legal unit of BDS took up the case and lodged a complaint with the National Human Rights Commission. The day after this complaint was lodged, twenty members of the transgender community in Nepal were arrested. On this occasion, the media supported the transgender community, spoke out against police intimidation and about the lack of enforcement of the 2007 Supreme Court ruling on the third gender. The National Human Rights Commission is continuing to investigate this case.

According to Ms Dhakal, the most important thing is to support people to know and understand their rights. Ms Dhakal explained that she is aware of her rights and therefore, can debate with the police when they try to harass her. This awareness of rights as citizens of society is sorely lacking, according to panelists, because being labeled as abnormal leads to self stigmatization, a sense of worthlessness and lack of self esteem that "no amount of funding can deal with."



Photo 8 – Roundtable Dialogue Participants

Mr Bondopadhyay identified some of the cultural markers that cause disempowerment and stigmatization of LGBTQI people in South Asia. He suggested that one factor is the 'shame based' culture which allows people to do what they want as long as it remains hidden and does not bring shame to the family or community. The recent visibility of LGBTQI people in various forms of activism and celebration in South Asia (for instance in contesting law in Court and in gay pride initiatives) has pushed these issues into public consciousness, thus forcing society to confront and discuss issues previously swept under the carpet.

¹² Established in 1981, Lawyers Collective is one of the leading public interest service providers in India with a proven record of setting high standards in human rights advocacy, legal aid and litigation.

¹³ Established in 2001. The Association provides advice and assistance for sexual minorities in Nepal.

The idea of shame is linked to ideas of honor. The corollary, *regaining* honor, is very often affected through violence perpetrated on those who are perceived to have brought shame onto the family or community.

Patriarchy and gender roles that emphasize male dominance and control of female sexuality have a profound effect. Women who are same sex attracted are violating the principles of male dominance, asserting sexual independence and challenging men's control of their sexuality. This has the propensity to incite a response which is often violent. 'Feminized' gay and transgender men are often also subjected to this violence and indeed may accept it because they feel that this feminization is defined by the disempowerment.

South Asian countries tend to be marriage centric cultures where social position and respectability is defined by marital status. Ms Flamer-Caldera spoke specifically about how many LGBTQI people in Sri Lanka end up forced into heterosexual marriages by parents and relatives. This situation leads to extreme vulnerability, especially for lesbian women, who may be subjected to violence and forced sex. It may also cause mental health issues for LGBTQI people, stemming from the fact that they are unable to have fulfilling relationships with the people of their choice. In this situation, suicide is not uncommon.

Mr Bondopadhyay also spoke on the subject of the *venality of culture*. The acceptance of corruption if it comes from people in positions of power and authority, means that the misuse of laws leading to extortion, rape, blackmail and harassment towards LGBTQI people (and indeed all the key affected communities) is looked at as normal.

It was contested that sodomy offences are the only offences that do not have a victim. The question of how an act can be a crime where there is no victim, was debated. Many countries have very specific provisions dealing with sex between men. In Pakistan, the *Women's Protection Bill* (2006), still criminalizes non-marital consensual sex. Lesbian consensual sex is also covered by this law.

Notably, the maximum punishment prescribed under section 377 of the Pakistan Criminal Code is death, but Courts more commonly impose fines and jail sentences. Section 377 and related provisions are commonly used to harass and blackmail people. In Pakistan, the *Hudood* ordinances impose severe penalties for homosexuality including stoning or flogging. Mr Iqbal pointed out that, understandably, these harsh laws act as a deterrent to MSM seeking healthcare for HIV and STIs.

Sri Lanka also has laws against consensual sex between same sex partners, male or female. Section 365A of the Sri Lanka Penal Code criminalizes same sex activity. Hon. Justice Tilakawardane explained that the *Sri Lankan Vagrancy Act* (1978) has also been used to harass MSM, transgender people and sex workers. Transgender people have had their movements restricted in public places and there have been instances of prolonged blackmail. One positive trend that has been seen recently is that outreach workers and police have begun to cooperate; with police electing not to intervene in discrete condom distribution to specific groups. However, Ms Flamer-Caldera explained that LGBTQI interventions still largely neglected to address the specific needs of lesbian and bisexual women. LGBTQI people are not granted protections under the law in Sri Lanka. Fear of violence and arrest means that lesbian and bisexual women live in an environment where their issues are invisible. In this environment they will not try to access health, information or legal services.

Dialogue on MSM and Transgender Persons

There was some discussion around why the *Bombay Prevention of Begging Act* (1952) had not been challenged by activist groups in India. The process of filing a case against an existing law is time consuming and many things need to be considered, in particular, the implications in the event of an adverse judgment. However, participants reported that Lawyers Collective are now initiating the process of challenging this Act.

One participant suggested that it is important to reach out to people who may not be target populations for interventions, for instance, upper class gay men who may not need services but are poorly informed about how to protect themselves or their partners and wives from exposure to HIV. These include men who are forced into heterosexual marriages but continue having sex with other men. These men are unlikely to approach NGOs or government clinics, but need information. Women partners of MSM also need to be aware of risks; peer interventions would support education with this group.

Participants agreed that there is a clear need for comprehensive education, awareness raising and sensitization in law and justice and health sectors on issues related to sexual orientation and gender identity and related rights. Participants supported the idea of raising awareness through peer education, mass media, theatre and art, to break through the environment of shame and stigma surrounding these issues.

VI. State Sponsored Legal Interventions and Support for the Legal Response to HIV

Panelists

- Ms Rathna Thara, Lawyer, Tamil Nadu State AIDS Control Society, India
- Ms Sana Iftikhar, Barrister-at-Law, Pakistan
- Mr Senaka Dissasyayake, Human Rights Commission, Sri Lanka
- Professor Mizanur Rahman, Human Rights Commission, Bangladesh

Ms Thara shared her experience working as a lawyer in legal aid clinics set up by the Indian government in districts of Tamil Nadu. A study revealed approximately 800 widows in just one district were in urgent need of legal help on a variety of HIV related disputes, including denial of housing, inheritance property and insurance. This led the government to set up legal aid clinics in 16 districts in Tamil Nadu. These clinics act as mechanisms for PLHIV and key populations at higher risk to get professional support and assistance for legal and non-legal issues.

The legal aid clinics work on a variety of disputes including dowry, maintenance, custody, divorce, property disputes, health, education, employment, insurance, accidents and debt.

In addition to representing PLHIV in legal disputes, the legal staff conduct training sessions for outreach workers so that information about these facilities can be disseminated.

Of 1581 legal cases, the TANSACS legal aid clinics have settled 784 to date. A client of these services stated "the lawyer was proactive and extremely

supportive. She was able to get immediate police assistance... it took just 17 days (from filing the complaint at the LAC) to get my dues."¹⁴

Ms Iftikhar spoke about the *HIV/AIDS Prevention and Treatment Bill (2007)* currently under legislative review in Pakistan. The Bill is intended to address stigma and discrimination against PLHIV; support and facilitate the provision of HIV specific information, care, support; and ensure equitable access to treatment. Ms Iftikhar pointed out that in order to protect key populations at higher risk, it is necessary to confer specific rights. As this point, no rights have been conferred upon PLHIV and the various taboos and religious concerns within society make it very difficult to have the necessary conversations. The Bill however, specifically identifies key populations at higher risk including as MSM, male sex workers, female sex workers and PWUD. It specifically prohibits all forms of discrimination against people on the basis of their HIV status.

A number of judicial decisions have shown that the Pakistani judiciary may be willing to make orders for the protection of marginalized communities. For instance, in 2009, the Supreme Court of Pakistan passed a ruling that entitles transgender people to complete citizenship rights under the Constitution.¹⁵ Transgender people in Pakistan are now being registered with third sex designating their gender on national identity papers. This will enable them to access the services of state social welfare departments and financial support programs.

Another significant decision was taken by the Sindh High Court on 21 July 2011. The Court directed the provincial Sindh Finance Secretary to appear and justify the government's policy of closing down the HIV Control Program launched in prisons and diverting its funds towards the rehabilitation schemes for flood-affected people. The Sindh High Court directed the provincial Secretaries of the Finance, Health and Planning and Development Departments to provide medical and screening facilities to all inmates living with HIV in all prisons of in Sindh Province.

Professor Rahman, Chairperson of the Human Rights Commission of Bangladesh, explained that the emphasis in Bangladesh has now shifted from civil & political rights, to economic, social and cultural rights. This emphasis has meant that this dialogue is relevant in terms of the current Strategic Plan (2010-2015) of the National Human Rights Commission.

Professor Rahman quoted eminent Islamic Jurist Siti Musdah Mulia who stated that "people are equal in the eyes of God regardless of their gender, ethnicity, wealth, social status or sexual orientation." Professor Rahman suggested that the major obstacle for LGBTQI people is not religion but rather religious interpretation, that tends to be heteronormative, gender-biased and patriarchal.

Photo 9: Roundtable Dialogue Participants

Mr Dissayayake from the Human Rights Commission of Sri Lanka explained that key populations at higher risk are stigmatized and criminalized in Sri Lanka. However, there are enshrined rights to equality and non-discrimination. While law reform is a lengthy and challenging process, there are various national policies that have been approved by the government which are relevant in the context of



¹⁴ The case dealt with a construction worker who was not being paid his dues once his employer learned about his HIV status.

¹⁵ Article 4 rights of individuals to be dealt with in accordance of law; Article 9 security of a person

HIV. These include the National Policy on Health, National Labor Policy and National Education Policy.

Mr Dissayayake suggested that national human rights institutions need to both promote and protect rights. This would involve advocacy with the government, pushing government to change old laws, procedures and systems; promoting human rights and educating society on specific rights such as education on HIV; enlarging the mandate of national human rights institutions; and facilitating management of complaints.

A specific labor rights case taken up by the Sri Lankan Human Rights Commission, where a favorable judgment was delivered to a man dismissed on the basis of his HIV status. This case prompted the Sri Lankan Human Rights Commission to look at the possibilities of addressing the rights of PLHIV even in the absence of supportive laws.

Dialogue on State Sponsored Legal Interventions

A question arose about the *International Covenant on Civil and Political Rights*; namely the fact that Sri Lanka is a signatory to this Convention, with little practical effect. Hon. Justice Tilakawardane explained that in dualist legal systems, for international human rights obligations to be legally enforceable, a national law needs to be passed. In Sri Lanka, this has not been done. However, Hon. Justice Tilakawardane suggested that it is important to ratify international human rights conventions because judges can use them to interpret the laws in their own countries.

VII. RECOMMENDATIONS

The final session of the meeting was devoted to country focused planning and recommendations. Below is a summary of the ten key recommendations of the Roundtable.¹⁶ Following this, is a breakdown of the recommendations developed by each participating country.

1. Decriminalization

Criminalization of certain conduct of key populations at higher risk poses a significant challenge to the rights based response to HIV. The decriminalization of same sex relations, sex work and drug use through appropriate legislative processes or judicial interventions would enhance access to essential services and support the HIV response. Noting that law making and law reform are challenging and time consuming; efforts should be made simultaneously to advocate for:

- (a) Progressive judicial interventions; judicial interventions in Nepal, India and Pakistan have positively impacted upon the rights of PLHIV and key populations. However, appropriate follow up is required to ensure meaningful implementation of court decisions.
- (b) Immunity for those who are involved in HIV related interventions and the delivery of HIV related legal services (providing services to sex workers, PWUD, MSM and transgender people).

¹⁶ As summarised during the closing of the meeting by Professor Joga Rao

- (c) Constructive state policy; there is an urgent need for right based, harm reduction focused policy to fill gaps in legal frameworks and support implementation of protective laws.

2. Sensitization and Dissemination of Information

The judiciary, law and justice sector (including law enforcement personnel) and healthcare providers at all levels should be exposed, made aware and educated on legal and policy barriers that impede access to HIV related services across South Asia.

3. Recognition of Space for Key Populations at Higher Risk

There is a need for networking of diverse human rights groups working on protection and promotion of rights. Key populations at higher risk could find strength in synergy between their different movements since many of the obstacles faced are common.

4. Empowerment of PLHIV and Key Populations at Higher Risk

It is critical that PLHIV and key populations at higher risk be made aware of their rights under the law and the mechanisms through which they access and defend these rights. Policy and strategy design should be led by empowered PLHIV and key populations at higher risk.

Appropriate, accessible, non-judgmental legal services and representation are critical in facilitating the process whereby empowered PLHIV and key populations, defend their rights.

5. Empowerment of Human Rights Institutions

Human rights institutions should be empowered with the necessary and appropriate statutory powers to enable them to address and respond to diverse legal and ethical issues and implications pertaining to human rights. Complaint mechanisms within human rights institutions should be practical, accessible and efficiently processed. National human rights institutions should be able to respond in ways that are not merely recommendatory in nature.

6. Constitutional Challenges and Public Interest Litigation

In light of the significant impact of judiciary driven decriminalization initiatives in India, efforts should be focused on supporting similar judicial leadership across South Asia. Lawyers and communities should be supported to scale up public interest litigation.

7. Media Sensitization

From the perspective of a broader legal enabling environment, media sensitization about PLHIV and key populations at higher risk is of paramount importance. In cases where the media is responsible for contributing to misconceptions and stigmatization, redress should be sought from a regulatory authority.

8. A Public Health Approach

Advocate for healthcare providers and law and justice sector authorities to commit to a public health approach. In particular, law enforcement authorities and non-governmental organizations should collaborate to shape and implement public health oriented policy and interventions. Law and justice sector stakeholders should be made aware of the arguments for a public health approach.

9. Strengthening the Legal Enabling Environment

The legal enabling environment should be strengthened. There is an overwhelming need for effective, rights based legal frameworks that (1) protect PLHIV and key populations at higher risk from stigma and discrimination (2) enable PLHIV and key populations at higher risk to access critical services and (3) ensure accessible and affordable recourse to the law should PLHIV and key populations at higher risk require it. To achieve this, consensus will need to be generated amongst PLHIV, key populations at higher risk, parliamentarians, judiciary, policy makers and law and justice sector stakeholders.

Stigma and discrimination exacerbate barriers to access to services and access to justice. Accordingly widespread efforts should be directed at increasing tolerance, knowledge and empathy on HIV related issues amongst society at large.

VIII. COUNTRY RECOMMENDATIONS

The following recommendations were developed by participants in country groups, with a view to highlighting and addressing country specific challenges.

Bangladesh

1. Law and Policy

- Enact an adequate HIV law that specifically addresses the provision of safe spaces to access HIV related services and provides immunity for HIV service providers.
- Sensitize political and government bodies; sensitization should be led by communities. Political and government bodies include: Municipal Counselors, Union Parishads' elected representatives and chairpersons, Up-Zila Parishads, and Zila Parishads).
- Develop laws that attribute civil and criminal liability for unsafe blood transfusion and blood safety related negligence.

2. Health Settings:

- Implement and enforce the existing laws on safe blood screening.
- Ensure that private blood collection agencies follow the established screening procedures and protocols.
- Sensitize doctors on HIV related issues and laws that deal with penalties for denial of medical services.

3. Judiciary and Legal Profession

- Identify supportive judges and support them to become agents of change within the judiciary.
- Involve more lawyers on HIV related legal issues and issues pertaining to vulnerable populations.

- Engage the 64 district Legal Aid Committees to provide free legal aid to PLHIV and key populations at higher risk.

4. The Police and Home Ministry

- Issue directions to all the police stations in the country to provide support and security to HIV service providers.
- Expand the sensitization work with police in a bottom up approach (from the Constable level up).

5. Media:

- Leverage the corporate social responsibility of media houses to highlight and promote HIV related issues and rights in the mainstream media.
- Use media sensitization to reach government agencies with support of NGOs on HIV related issues and the issues of key populations at higher risk.
- Use supportive journalists to catalyze these processes.

6. Education:

- Advocate for the Ministry of Education to change school curricula to include facts on HIV, rights, appropriate sex education, and gender issues.

Bhutan

1. Law and Policy

- Advocate at a national level to promote awareness on the legal rights and protections available to PLHIV.
- Establish free government run legal aid services for people from key communities.

2. Health care

- Develop guidelines for health care service providers on obtaining informed consent, confidentiality and respect with regards to treatment of PLHIV and key populations at higher risk.
- Promote the harm reduction approach, which should include free health care services; raising awareness through education; poverty reduction and employment initiatives; and a strong response through Public Private Partnerships involving governments and NGOS.

India

1. Law and Policy

- Pass the *HIV/AIDS Bill*.
- Amend the *Bombay Prevention of Begging Act (1952)* to exclude transgender people.
- Decriminalize castration.
- Decriminalize solicitation.
- Provide rights to marriage and adoption for MSM.
- Include refugees and undocumented migrants within the definition of key populations at higher risk.

2. Sex Workers:

- Take action to push insurance companies to make health insurance policies available to sex workers.
- Stop violent rescue raid and rehabilitation programs targeting sex workers.
- Protect the rights of adults who consent to and choose sex work.
- Increase advocacy on preventing conflation of 'trafficking' and 'sex work.'

3. Transgender People

- Establish transgender and Hijra Welfare Boards in every State to ensure overall welfare of the community.
- Ensure transgender people have access to social benefits like education, health and employment.
- Make sex reassignment surgery safe and accessible for the transgender and *hijra* community, with proper policy and procedures.

Nepal

1. Law and Policy

- Revise the *Narcotic Drug Control Act (1976)* to align with the new *Narcotics Policy the Drug Control Policy (2006)* and *Drug Control Strategy (2010)*.
- Amend the draft criminal code and civil code that negatively impacts the rights of PLHIV, LGBTQI, female sex workers, and PWUD.
- Enact the *HIV/AIDS Bill* as per the directive issued by Supreme Court of Nepal.
- Take necessary actions to implement directives put forward by the Supreme Court of Nepal in relation to sexual and gender minorities.

2. Empowerment

- Design program interventions that address empowerment of key populations at higher risk through provision of legal support, legal literacy, leadership, advocacy and life skills to help build self-esteem and confidence.

3. Awareness Raising

- Sensitize security forces, police personnel, lawyers and judges so that in different contexts they can all deal with key populations at higher risk effectively and with sensitivity.
- Establish transparent, independent complaint mechanisms within law enforcement bodies that can address and respond to police abuses against PLHIV and key populations at higher risk.

Maldives

1. Law and Policy

- Enact key legislation such as the *Public Health Act, the Health Professions Act and the Medical Negligence Act*.
- Create better linkages between government ministries in order to promote health and rights and better coordinate the HIV response.
- Create employment opportunities for recovered drug addicts and advocate for amendments of civil service regulations.

Pakistan

1. Law and Policy

- Enact, enforce and implement the *HIV and AIDS Bill* (submitted to Parliament in 2007).
- Enact innovative legislation that balances religion and culture with human rights, including anti-discrimination legislation.
- Relax and amend laws prohibiting sex work.
- Legalize castration and hormonal therapies.
- Repeal Section 377 and *Hudood* ordinances.
- Create linkages between various government ministries in order to promote health and rights and better coordinate the HIV response, for instance the Ministry of Justice and Ministry of Health.

2. Service Providers

- Provide legal immunity and police protection for HIV service providers and outreach workers.

3. Awareness Raising

- Develop strategies to sensitize the media, the general public, persons in positions of power and authority, and the medical community in respect of the rights of PLHIV and key populations at higher risk.

Sri Lanka

1. Law and Policy

- Identify abusive rehabilitation centers for PWUD and LGBTQI people.
- Deepen engagement of national human rights institutions; if this institution speaks out this provides an umbrella for other individuals to address issues of human rights violations.
- Engage law and justice sector representatives (including lawyers and the judiciary) in the legal response to HIV.

2. Advocacy and Training

- Train PLHIV, sex workers, MSM, transgender people and PWUD to work as peers in educating others about rights.
- Sensitize the police force, media, general public, liberal clergy, and parliamentarians in relation to HIV-related issues and rights. Create a platform for safe dialogue and networking between key populations at higher risk and broader stakeholders.
- Identify funding for the publication of statistics that debunk myths; for example the myth that PWUD are biggest perpetrators of petty crimes.

ANNEX 1: PROGRAM

South Asian Roundtable Dialogue
Legal and Policy Barriers to the HIV Response
8-10 November 2011
Hotel Yak & Yeti, Kathmandu, Nepal
Welcome Reception

Tuesday 8 November, 2011

| Time | Session | Details |
|-------------|---------------------------|--|
| 6:00pm | Registration | |
| 6:30-8:30pm | Welcome evening reception | <p><i>Key Note Address:</i> Hon. Justice Kalayan Shrestha Supreme Court of Nepal, President SAARCLAW Nepal Chapter, Vice President SAARCLAW.</p> <p><i>Welcome:</i> Mr Hemant Batra Secretary General, SAARCLAW</p> <p>Dr Marlyn Borromeo UNAIDS Country Coordinator, Nepal</p> <p>Mr Asela Kalugampitiya, IDLO Health Law Program</p> |

**Day 1 - Legal and Policy Barriers to HIV Prevention, Treatment and Care, and the Right to Health
Wednesday 9 November, 2011**

| Time | Session | Details |
|--------------------|--|---|
| 8:30-10:00 | <p>Session 1 – Opening</p> <p>Formal opening and addresses Introduction to Roundtable objectives and overview</p> <p>Moderator: Ms Ayesha Mago</p> | <p><i>Formal Address:</i> Hon. Chief Justice Lyonpo Sonam Tobgye Chief Justice of Bhutan, President of SAARCLAW</p> <p><i>Key Note Address:</i> Hon. Justice Shiranee Tilakawardane Supreme Court of Sri Lanka</p> <p><i>Guest Speakers:</i> Ms Shoko Noda UNDP Country Director, Nepal</p> <p>Mr Albertus Voetberg World Bank, Lead Health Specialist South Asia Region</p> <p>Ms Naomi Burke-Shyne IDLO Health Law Program</p> <p>Prof. (Dr.) Sripada Venkata Joga Rao Roundtable Moderator - introduction and overview</p> |
| GROUP PHOTO | | |
| 10:00-10:30 | Morning Tea | |
| 10:30-12:30 | Session 2 – Background paper presentation: how legal and policy barriers limit access to HIV prevention, treatment and care services; and the | <p><i>Presentation of Background Paper</i></p> <p>Prof. (Dr.) Sripada Venkata Joga Rao</p> |

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| | <p>law and policy environment in South Asia.</p> <p>Legal issues faced by key affected populations</p> <p><i>Session 2 Objectives – Strengthened understanding of the link between law and health outcomes, specifically, an appreciation of and understanding that marginalization and criminalization of people due to their sexual orientation, gender identities, work choices and behaviour impacts their upon ability to access HIV and health services.</i></p> <p>Moderator: Ms Ayesha Mago</p> | <p><i>Panellists:</i></p> <p>Ms Tsheltrim Dema, Lhak Sam, Bhutan, Representative from the positive community</p> <p>Mr Jeevan Ghale, Recovering Nepal, Nepal Representative from the community of people who use drugs (PWUD) community</p> <p>Ms Bijaya Dhakal and Ms Shruti Karki, Jagriti Mahila Maha Sang (JMMS), Nepal Representative from the sex worker community</p> <p>Mr Kasem Ikbal Khawaja, Naz Male Health Alliance, Pakistan Representative from the men who have sex with men (MSM) community</p> <p>Ms Agniva Lahiri, People Like Us (PLUS), India Representative from the transgender community</p> <p>Floor open for questions and dialogue</p> |
| 12:30-1:30 Lunch | | |
| 1:30-3:00 | <p>Session 3 – Legal interventions and case studies from the region: overcoming legal and policy barriers impacting upon key affected populations.</p> <p><i>Session 3 Objectives – increased understanding of the impact of effective legal initiatives and interventions; opportunity to consider adapting appropriate interventions to different country contexts.</i></p> <p>Moderator: Prof. (Dr.) Sripada Venkata Joga Rao</p> | <p><i>Panellists:</i></p> <ol style="list-style-type: none"> 1. Mr Senaka Dissayayake, Human Rights Commission, Sri Lanka 2. Mrs Rathna Thara, Tamil Nadu State AIDS Control Society (TANSACS), India 3. Ms Rosanna Flamer-Caldera, Equal Ground, Sri Lanka 4. Ms Sana Iftikhar, Lawyer, Pakistan <p>Group dialogue</p> |

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| 3:00-3:30 Afternoon Tea | | |
| 3:30-5:00 | <p>Session 4 – Legal and policy barriers impacting upon PWUD and the right to health</p> <p>Key legal issues faced by PWUD: criminalisation and the impact of punitive laws on public health outcomes, harm reduction and the right to health.</p> <p>Session 4 Objectives – <i>increased sensitisation to legal and related social issues faced by PWUD; strengthened understanding of the impact of laws and policy on PWUD and the flow on impact on health; strengthened ability to advocate for a harm reduction/public health approach, law and policy reform and the rights of PWUD.</i></p> <p>Moderator: Ms Ayesha Mago</p> | <p><i>Panellists:</i></p> <p>Mr Bijay Pandey, Asian Network of People who Use Drugs (ANPUD), Nepal Mr Chandana Mahesh, Alcohol and Drug Information Centre (ADIC), Sri Lanka Mr Hussain Rasheed, Human Rights Commission, Maldives</p> <p>Group dialogue</p> |

**Day 2 - Legal and Policy Barriers to HIV Prevention, Treatment and Care impacting upon Sexual Orientation, Gender Identity and Profession
Thursday 10 November, 2011**

| Time | Session | Details |
|-------------|---|---|
| 8:30-8:45 | Day 2 opening | <p><i>Formal Address</i></p> <p>Prof. Dr. Mizanur Rahman Chairperson, Human Rights Commission, Bangladesh</p> |
| 8:45-10:15 | <p>Session 5 – Legal and policy barriers impacting upon sex workers</p> <p>Key legal issues faced by sex workers: criminalisation, specific and non-specific laws impacting upon sex workers, use and misuse/abuse of law and policy impacting upon</p> | <p><i>Panellists:</i></p> <p>Ms Shabana Dastagir Goundi, Veshya AIDS Mukabala Parishad (VAMP), India (translator Ms Sutapa Majumdar) Mr Rup Narayan Shrestha and Ms Muna Upadhyaya, Forum for Women Law and Development (FWLD), Nepal</p> |

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| | <p>sex workers.</p> <p><i>Session 5 Objectives – increased sensitisation to legal and related social issues faced by sex workers; strengthened understanding of the impact of laws and policy on sex workers; increased ability to advocate for law and policy reform and the rights of sex workers.</i></p> <p>Moderator: Ms Ayesha Mago</p> | Group dialogue |
| 10:15-10:45 | Morning Tea | |
| 10:45-12:30 | <p>Session 6 – Legal and policy barriers impacting upon MSM and transgender people</p> <p>Key legal issues faced by MSM and transgender people: criminalisation, recognition of the different legal and related social issues faced by MSM and transgender people; the criminalisation of consensual sex between men, use and misuse of law and policy relating to MSM and transgender people.</p> <p><i>Session 6 Objectives – increased sensitisation to legal and related social issues faced by MSM and TG; strengthened understanding of the impact of laws and policy on MSM and TG; increased ability to advocate for law and policy reform and the rights of MSM and TG.</i></p> <p>Moderator: Prof. (Dr.) Sripada Venkata Joga Rao</p> | <p><i>Panellists:</i></p> <p>Ms Manisha Dhakal, Federation of Sexual & Gender Minorities Nepal (FSGMN), Nepal Mr Aditya Bondyopadhyay, International Lesbian and Gay Law Association, India Mr Anjan Joshi, SPACE, India</p> <p>Group dialogue</p> |
| 12:30-1:30 | Lunch | |
| 1:30-3:00 | <p>Session 7 – Recommendations</p> <p>Development of recommendations.</p> | Group dialogue facilitated by Ms Ayesha Mago |

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| | <p>Group dialogue to develop recommendations. Recommendations will be recorded and included in the Roundtable Report.</p> <p><i>Session 7 Objectives – increased engagement in the national legal response to HIV; opportunity for the development of creative and innovative recommendations; participant commitment to take ideas forward at national level.</i></p> | |
| 3:00-3:30 | Afternoon Tea | |
| 3:30-4:30 | Session 8 – Presentation of Recommendations | <p>Presentations facilitated by Prof. (Dr.) Sripada Venkata Joga Rao</p> <p>Country presentations</p> |
| 4:30-5:15 | Closing | <p><i>Formal Address:</i> Hon. Justice Umesh C. Banerjee (retd), India President of SAARCLAW India Chapter, Vice President SAAARCLAW</p> <p><i>Key Note Address:</i> Hon. Sapana Pradhan Malla, MP, Nepal, Executive Council Member SAARCLAW</p> <p><i>Formal thanks:</i> Mr Purna Man Shakya Secretary General SAARCLAW Nepal Chapter, Executive Council Member SAARCLAW</p> <p><i>Closing:</i> Mr Edmund Settle HIV Policy Specialist, UNDP Asia Pacific Regional Center</p> |

ANNEX 2: PARTICIPANTS LIST

'Legal and Policy Barriers to the HIV Response'
South Asia Roundtable Dialogue on HIV and Law
8-10 November 2011, Kathmandu, Nepal

| Participant Name | Sector | Role, Affiliation |
|---------------------------------------|---------------------------------------|--|
| Bangladesh | | |
| Prof Dr Mizanur Rahman | Human Rights Commission | Chairman, Human Rights Commission |
| Hon Sanjida Khanam | Parliamentarian | Parliamentarian |
| Mr Sanian Rahman | Barrister | SAARCLAW |
| Representative | People Who Use Drugs (PWUD) Community | President, Prochesta |
| Representative | Positive Community | Positive Network |
| Bhutan | | |
| Chief Hon Justice Lyompo Sonam Tobgye | Judge | Hon Chief Justice Bhutan, President of SAARCLAW |
| Hon Justice Tshering Wangchuk | Judge | Supreme Court, President Bhutan Chapter & Vice President SAARCLAW |
| Ms Pelden Wangmo | Registrar General | Registrar General, High Court, SAARCLAW Executive Council |
| Hon Ugen Wangdi | Parliamentarian | Parliamentarian |
| Mr Tenzin Jamtsho | Lawyer | Office of the Attorney General |
| Representative | Positive Community | Positive Network |
| Representative | Positive Community | Positive Network |
| India | | |
| Hon Justice Umesh C. Banerjee (retd) | Judge (retd) | Supreme Court, President SAARCLAW India Chapter, Vice-President SAARCLAW |
| Mr Hemant Batra | Lawyer | Secretary General, SAARCLAW |
| Prof Dr Sripada Ventaka Joga Rao | Professor of Law | National Law School of India University |
| Ms Ayesha Mago | Human Rights | Human Rights Consultant |

| | | |
|--------------------------------|-------------------------|--|
| Ms R Rathna Thara | Lawyer | Tamil Nadu State AIDS Control Society (TANSACS) |
| Mr Oishik Bagchi | Lawyer | Private Practitioner |
| Mr Advait Malviya | Lawyer | The West Bengal National University of Juridical Sciences |
| Mr Aditya Bondyopadhyay | Lawyer | International Lesbian and Gay (ILG) Law Association |
| Ms Jagriti Singh | Lawyer | National Law School of India University |
| Representative | MSM Community | Naz Foundation International |
| Mr Imran Khan | Lawyer | Maan AIDS Foundation |
| Representative | Transgender Community | SPACE |
| Representative | Transgender Community | People Like Us (PLUS) |
| Representative | Sex Worker Community | Veshya Anyay Mukti Parishad (VAMP) |
| Representative | Sex Worker Community | Translator for Veshya Anyay Mukti Parishad (VAMP) |
| Maldives | | |
| Mr Hussain Rasheed | Human Rights Commission | Director, National Preventive Mechanism, Human Rights Commission |
| Ms Geela Ali | Government | Permanent Secretary of Ministry of Health and Family |
| Hon Abdul Gafoor Moosa | Parliamentarian | Parliamentarian |
| Mr Ibrahim Munaam Naeem | Youth Representative | Youth Representative |
| Nepal | | |
| Hon Justice Kalayan Shrestha | Judge | Supreme Court, President SAARCLAW Nepal Chapter, Vice President SAARCLAW |
| Hon Sapana Pradhan Malla | Parliamentarian | Parliamentarian, SAARCLAW Executive Council |
| Ms Padma Mathema | Human Rights Commission | Human Rights Commission |
| Ms Indira Dahal | Government | Ministry of Law and Justice |
| Mr Komal Acharya | Lawyer | Ministry of Health |
| Mr Purna Man Shakya Nepal | Lawyer | Advocate Supreme Court, Secretary General SAARCLAW Nepal Chapter |
| Mr Surendra Kumar Mahato Nepal | Lawyer | Advocate Supreme Court, SAARCLAW |
| Mr Tirtha Basaula | Lawyer | Advocate Supreme Court, |

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|------------------------------------|-----------------------------------|---|
| Nepal | | SAARCLAW |
| Mr Rup Narayan Shrestha | Lawyer | Forum for Women Law and Development (FWLD) |
| Ms Muna Upadhyaya | Lawyer | Forum for Women Law and Development (FWLD) |
| Ms Sushma Gaudam | Lawyer | Forum for Women Law and Development (FWLD) |
| Mr Shiva Acharya | Consultant/ Community Advocate | Consultant, National STI AIDS Control Board |
| Representative | Positive Community | President, National Association of PLHIV Nepal |
| Representative | Sex Worker Community | JMMS |
| Representative | Transgender Community | Blue Diamond Society |
| Representative | MSM Community | Federation of Sexual and Gender Minorities Nepal |
| Representative | IDU Community | Asian Network of People who Use Drugs (ANPUD) |
| Representative | IDU Community | Recovering Nepal |
| Ms Sumi Devkota | HIV and Human Rights | Consultant |
| Mr Rakesh Ayer | Community Advocate | Consultant, National STI AIDS Control Board |
| Pakistan | | |
| Ms Huma Fakhar | Lawyer | SAARCLAW |
| Ms Sana Iftikhar | Barrister | SAARCLAW |
| Representative | MSM Community | Naz Male Health Alliance |
| Representative | MSM Community | Naz Male Health Alliance |
| Representative | MSM Community | Naz Male Health Alliance |
| Mr Ubaidullah Mashori | Community Advocate | Community Support Foundation |
| Sri Lanka | | |
| Hon Justice Shiranee Tilakawardane | Judge | Supreme Court of Sri Lanka |
| Mr Senaka Dissayayake | Human Rights Commission | Human Rights Commission |
| Mr A.K.D.D.D. Arandara | Government | Senior Asst. Secretary of the Ministry of Hon Justice |

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| Mr K. Ajith Rohana | Government | Superintendent of Police, Director-Legal Legal Division, Police HQ |
| Representative | Positive Community | Lanka Plus |
| Representative | PWUD Community | Alcohol and Drug Information Centre (ADIC) |
| Ms Rosanna Flamer- Caldera | Community Advocate | Equal Ground (Sexual Minority Rights) |
| Regional | | |
| Mr Midnight (Panusart) Poonkasetwatana | Advocate | Asia Pacific Coalition of Sexual Health (APCOM) |
| UNAIDS/UNDP | | |
| Mr Edmund Settle | UNDP Asia Pacific Regional Center | HIV Policy Specialist |
| Dr Marlyn Borrromeo | UNAIDS Nepal and Bhutan | Country Coordinator |
| Mr Li Zhou | UNDP Asia Pacific Regional Center | HIV Technical Officer |
| Mr Dayanath Ranatunga | UNAIDS Sri Lanka | Social Mobilization Officer |
| Mr Umesh Chawla | UNDP India | HIV and Development Unit |
| Ms Jennifer Branscombe | UNDP Asia Pacific Regional Center | HIV and Mobility Programme Officer |
| Ms Bina Pokharel | UNAIDS Nepal | Social Mobilization Officer |
| IDLO Delegation | | |
| Ms Naomi Burke- Shyne | IDLO | Legal Officer, Asia Pacific Region, Health Law Program |
| Mr Asela Kalugampitiya | IDLO | Monitoring, Information and Reporting Officer, Health Law Program |
| Ms Sara Nardicchia | IDLO | Project Officer, Health Law Program |
| Ms Anju Paudel | IDLO | Project Intern, Health Law Program |
| Partners | | |
| Mr Albertus Voetberg | South Asia Region, The World Bank | Lead Health Specialist |
| Dr Joe Thomas | South Asia Technical Support Facility (TSF) | Director |
| Ms Surabhi Joshi | TSF | Monitoring and Evaluation |

ANNEX 3: RELEVANT RESEARCH AND STRATEGIES

The Roundtable initiative recognizes and builds upon the following existing research and studies including:

- *Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law*, 2011 convened by UNDP, ESCAP and UNAIDS;
- *Legal environments, human rights and HIV responses among sex workers in Asia and the Pacific*, 2011, John Godwin; co-published by UNDP, UNFPA and UNAIDS [*working title; to be completed by November.*]
- *Stigma Index Reports* (Bangladesh, India, Pakistan, Sri Lanka) (2011 – India, Tamil Nadu and Nepal)
- *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
- *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, John Godwin; co-published by the UNDP and APCOM.
- *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
- *Tackling HIV-related Stigma and Discrimination*, 2010, World Bank
- *The Global Fund Strategy in Relation to Sexual Orientation and Gender Identities*, 2009
- *Addressing HIV-related Law at National Level*, 2008, UNAIDS Guidance Note
- *The HRLN/ UNAIDS National Judicial Colloquium on the Role of the Judiciary in Responding to the HIV/AIDS Epidemic in India*, 2007 (note publications: *HIV/AIDS and the Law, Volumes I & II – Case Law and Judgments*).
- *International Guidelines on HIV/AIDS and Human Rights*, 2006 Consolidated Version, UNOHCHR, UNAIDS
- *Handbook for Legislators on HIV/AIDS, Law and Human Rights*, 1999, UNAIDS, IPU; *Handbook for Parliamentarians: Taking Action Against HIV*, 2007, UNAIDS, IPU, UNDP

ANNEX 3: BACKGROUND PAPER

South Asia Round Table Dialogue

“The Legal and Policy Barriers to the HIV Response”

S.V. JOGA RAO¹⁷

1. BACKGROUND:

Despite efforts over a period of three decades, HIV continues to significantly impact upon the lives of millions. While rights based approaches have contributed to the response to the epidemic, much more needs to be done to protect and uphold the rights of people living with HIV and key populations at higher risk. Protection and appropriate law and policy can play an important role in creating a legal enabling environment and improving access to essential prevention, treatment and care services. At the same time, such laws can play a significant instrumental role in challenging stigma and discrimination, promoting public health and protecting human rights. Equally, restrictive and punitive laws targeting key populations at higher risk or laws enforced against key populations at higher risk can hinder the response to HIV¹⁸.

In 2001, the United Nations General Assembly Special Session (UNGASS) on HIV/AIDS laid the pathway for a rights based approach to HIV. The UNGASS resolved that *“the full realization of human rights and fundamental freedoms for all is an essential element in a global response to the HIV/AIDS pandemic, including in the areas of prevention, care, support and treatment, and that it reduces vulnerability to HIV/AIDS and prevents stigma and related discrimination against people living with or at risk of HIV/AIDS”*.

The Resolution 66/10 of 19th May, 2010 passed by the Economic and Social Commission for Asia and Pacific (ESCAP), took cognizance of the continuing high prevalence of HIV among key populations at higher risk, as well as the role of law and policy.

Similarly, ESCAP, in its 67th Session of 19-25th May, 2011 called upon members to scale up and establish strategic and operational partnerships at the national and community levels between representatives of public health, law enforcement agencies, civil society and key populations at higher risk.

The United Nations General Assembly¹⁹ in its meeting held on Political Declaration on HIV/AIDS: Intensifying our Efforts to Eliminate HIV/AIDS during 8 to 10th June, 2011 expressed its commitment 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. The Political Declaration in the same resolution also expressed a commitment to support non-discriminatory access to education, healthcare, employment and social services that provide legal protection for people affected by HIV including inheritance rights and respect for privacy and confidentiality; and to promote and protect all kinds of human rights and fundamental freedom with particular attention to all people vulnerable to and affected by HIV.²⁰

¹⁷ PROFESSOR OF LAW, NATIONAL LAW SCHOOL OF INDIA UNIVERSITY, BANGALORE, 560072 – SAARCLAW ROUNDTABLE 2011 MODERATOR AND CONSULTANT.

¹⁸ Like sex workers, people who use drugs (PWUD), men who have sex with men (MSM), and transgender people.

¹⁹ Resolution 77

²⁰ Resolution 77

Also under the Political Declaration in Resolution 78, the United Nations General Assembly has committed to review laws and policies which adversely impact upon services related to HIV prevention, treatment, care and support.

In response, and with a view to supporting the above mentioned commitments, SAARCLAW²¹ partnered with IDLO, UNDP, UNAIDS and the World Bank to promote a legal enabling environment and to support a rights based response to HIV in South Asia.

The SAARCLAW Roundtable will examine and evaluate legal and policy barriers to the HIV response. The Roundtable is a follow-up to the Asia-Pacific Regional Dialogue of the Global Commission on HIV and Law held during February 2011 at Bangkok.

2. ROUNDTABLE OBJECTIVES:

The SAARCLAW Roundtable will facilitate dialogue between participants. Participants include, judges, lawyers, representatives from government agencies, parliamentarians, representatives from human rights institutions, representative from key populations at higher risk.

Specific objectives of SAARCLAW Roundtable are as follows:

1. Identify and understand legal and policy barriers to HIV prevention, treatment, support and care services for PLHIV, MSM, transgender persons, sex workers and people who use drugs (PWUD);
2. Identify and discuss strategies and initiatives to address these barriers like policy reforms, progressive judicial pronouncements, governmental and non-governmental collaborative efforts, legal aid services and the like;
3. Strengthen the rights based response to HIV in their countries.

The Roundtable aims to build an informed and engaged group of legal professionals, advocates, and community activists committed to leading the legal response to HIV in their home countries.

3. SOUTH-ASIAN CONTEXT : A BRIEF OVERVIEW

South Asian countries tend to have a low prevalence of HIV with a disproportionate impact upon key populations at higher risk.

In Afghanistan the HIV prevalence rate is low, and as of 2008, the prevalence in the general population was less than 0.5 per cent. Key populations at higher risk in Afghanistan include PWUD, female sex workers, MSM, truck drivers and prisoners²².

In Bangladesh, the prevalence rate of HIV is less than 0.1 per cent in the general population; the estimated number of people living with HIV is 7500. The prevalence of HIV is less than 1 per cent in key populations at higher risk with the exception of the PWUD community who experience a prevalence of 1.6 per cent²³.

In Bhutan, there have been 217 cases of HIV reported. About 50% of people living with HIV are between the age 15 to 29. There are 46 people on treatment and about 43 have lost their lives to the epidemic²⁴.

²¹ SAARCLAW is an association of the legal communities of the SAARC countries comprising of judges, lawyers, academicians, law teachers and public officers. SAARCLAW has the status of a Regional Apex Body of SAARC. SAARCLAW was established to (a) bring together the legal communities within the region for close co-operation, developing understanding, promoting exchange of ideas and dissemination of information; and (b) use and develop the law as a source and an instrument towards social change for development as well as for building co-operation among people of the region.

²² Afghanistan Country Progress Report, 2010.

²³ Bangladesh Country Progress Report, 2010.

²⁴ An update on Human Immuno Deficiency Virus/Acquired Immuno Deficiency Syndrome (HIV/AIDS), July 1, 2010, Ministry of Health, Thimphu: Bhutan.

In India, approximately 2.7 million people are living with HIV, this represents about 0.29 per cent of the adult population. The epidemic is more prevalent and concentrated in key populations at higher risk and is heterogeneous in its spread, with some states and districts within the India showing a high prevalence of HIV²⁵.

In Maldives, the number of people living with HIV in 2007 was reported to be 14; 10 of these people died. The cumulative number of people living with HIV in December 2009 amongst the expatriate population was 257 (these people left the Maldives as they were not granted work permits)²⁶.

In Nepal it is estimated that about 70,000 people are infected with HIV. The epidemic is concentrated amongst key populations at higher risk; in some areas there are higher rates of HIV amongst migrants and trucker drivers²⁷.

In Pakistan, at the end of 2009 there was an estimated 97,400 people living with HIV. The country has a concentrated epidemic with prevalence levels of greater than 5 per cent amongst PWUD and hijra (transgender) sex workers²⁸.

In Sri Lanka, at the end of 2009 the estimated number of people living with HIV was 3000. The prevalence rate amongst adults is less than 0.1 per cent, which is indicative of a low level HIV epidemic²⁹.

A detailed examination of the HIV epidemic in the region by the AIDS Commission in Asia concluded that unlike Africa, the epidemic in this region is concentrated.

The etiological factors for the prevalence of HIV may be attributable to the following³⁰:

1. Criminalization of the conduct which forms part of their sexual orientation, gender identity, behaviours and work choice;
2. Arbitrary legal enforcement practices;
3. Social stigma, and discrimination;
4. Lack of awareness about rights on the part of key populations at higher risk;
5. Social and legal barriers to accessing services;
6. Weak access to justice; and
7. Increasing mobility and migration leading to sex work and more particularly unsafe sex practices.

4. LEGAL AND POLICY ENVIRONMENTS

The broad themes apparent within South Asian legal and policy frameworks are as follows:

- (a) Key populations at higher risk including sex workers, MSMs, transgender people and PWUD are subjected to punitive and discriminatory legal frameworks;
- (b) Law and policy tends to lack evidence based research and grounding;
- (c) Sensitization among key stakeholders in the realm of law and justice sector is weak.
- (d) Many countries experience political, fundamentalists and/or religious based opposition to key populations at higher risk.

²⁵ Annual Report, 2009-2010, Department of AIDS Control, Ministry of Health and Family Welfare, India.

²⁶ Maldives Country Progress Report, 2010.

²⁷ Nepal Country Progress Report, 2010.

²⁸ UNGASS Pakistan Report, 2010.

²⁹ UNGASS Report, Sri Lanka, 2008-2009.

³⁰ John Godwin, 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, at p.2-3 and Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law, Bangkok, February, 2011.

5. SIGNIFICANT LEGAL AND POLICY BARRIERS³¹:

The following legal and policy barriers negatively impact upon the HIV response:

- (a) weak design and implementation of rights-based interventions;
- (b) Poor sensitization of the law and justice sector;
- (c) Stigma and discrimination within the health care sector;
- (d) Key affected populations are routinely subjected to mandatory HIV testing.
- (e) Key affected populations lack awareness about their rights under the law.
- (f) Key affected populations are subjected to unlawful arrest, detention and harassment by the police.
- (g) PWUD are subjected to compulsory treatment for drug dependence.
- (h) Drug Control laws lack public health approach.
- (i) Drug control laws obstruct harm reduction measures.

6. RIGHT TO HEALTH : HUMAN RIGHTS AND HIV RESPONSE:

A rights based response to HIV not only protects the interests of key populations at higher risk and people living with HIV but advances public interest at large. The right to health is comprised of a preventive aspect, namely, ability to access prevention services and a curative aspect, namely, key populations at higher risk and people living with HIV must be empowered to access appropriate care, support and treatment.

The right to Health includes informed consent to HIV testing, pre and post test and counselling, and confidentiality. Non-consensual or mandatory testing is a human rights violation. When the access to treatment is not ensured, mandatory testing does not serve any public health rationale. On the contrary, voluntary testing promotes healthy behaviours. Similarly, confidentiality plays a crucial role in this regard which primarily protects the interests of PLHIV and affected members of the family.

7. THE LEGAL RESPONSE: EMERGING LEGAL TRENDS, INITIATIVES AND INTERVENTIONS

A. PEOPLE WHO INJECT DRUGS

Across South Asia, laws related to drug use tend to provide for harsh punishment (even for small quantity consumption and possession), thus criminalizing the user.

A significant partnership between the Kolkata police and an NGO (Society for Community Intervention and Research) which provides needles and syringes has rendered much awaited ray of hope in this regard. Though the relevant law has not been amended, appropriate policy changes can bring in desired results³².

A co-operative and collaborative action between NGO and the police can definitely result in positively impactful results.

³¹ IDLO submission on Asia Pacific Regional Dialogue 2011 to Global Commission on HIV and the Law, December, 2010

³² Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law, Bangkok, 2011, at p.8.

B. SEX WORKERS

In almost all South Asian countries, sex workers and their clients represent large proportion of new infections.

Several South Asian countries criminalise sex work or the activities surrounding sex work. Though in India, sex work is not illegal, however, soliciting is criminalized. In Bangladesh, the courts have played a leading role in recognizing sex work as livelihood and the rights of sex workers to carry out their occupation.

Laws that criminalise sex work or that push sex workers on to the streets (and into unsafe and violent situations) have been found to negatively affect their access to health services as well as their ability to demand condom use from clients.

A good practice example from India demonstrates how respecting the rights of sex workers can have a significant impact on the HIV epidemic. In Sonagachi in West Bengal, sex workers have unionized themselves against police and client violence and harassment, run a co-operative bank, promoted and ensured admission into schools for their children and run intensive education programmes on condom use, and the prevention of STIs and HIV.³³

In Kolkata, the Durbar Mahila Samanwaya Committee (DMSC) represents 65,000 sex workers and developed a model of community mobilisation of sex workers to advocate for labour rights and protective laws³⁴.

C. MEN WHO HAVE SEX WITH MEN

In majority of South Asian countries, MSM represent a considerable proportion of new HIV infections.

Criminalization of sex between men, social stigma and weak access to services compounds the vulnerability of MSM.

In Nepal, Supreme Court decriminalized homosexuality on the ground that the sexual activity falls under the definition of privacy. Quite categorically Supreme Court held that no one has the right to question how do two adults perform sexual intercourse and whether this intercourse is natural or unnatural³⁵.

In 2009, the Delhi High Court handed down a groundbreaking decision to decriminalize consensual sex between men. The Court accepted the argument that criminalization is harmful to HIV responses. The Court concluded that to stigmatize or to criminalize people on account of their sexual orientation is against constitutional morality and principles of inclusiveness in the Indian Constitution. In finding that criminalization of male-to-male sex between adults is in breach of the Article 21 of the Indian Constitution, which provides that no person shall be deprived of his life or personal liberty except according

³³ As a result, HIV prevalence among sex workers in this area has stayed at around 5-7% while condom use increased dramatically from 3% to 97%. By contrast HIV prevalence among sex workers in Mumbai where police harassment and eviction from living spaces is routine is around 35%.

³⁴ Report of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law, Bangkok, 2011, at p.8.

³⁵ Decision of the Supreme Court on the Rights of the Lesbian, Gay, Bisexual, Transexual and Intersex (LGBTI) People NJA Law Journal (2008) p.280.

to the procedure established by law³⁶. Though the judgment was denounced by leaders of certain religious groups, the decision was broadly welcomed.

D. TRANSGENDER POPULATIONS

In South Asia countries, laws do not recognize the identity of a transgender person except in Nepal owing to a progressive Judicial pronouncement rendered in the case of Sunil Babu Pant and Others v. Nepal Government and Others³⁷. Transgender people have severely limited access to services owing to legal and cultural dimensions. In addition, in almost all the jurisdictions, they become soft targets for selective penal enforcement practices pertaining to sex work, homosexuality and public order.

An exception to this was the progressive judgment on the rights of transgender people was rendered by Supreme Court of Nepal in the case of *Sunil Babu Pant and others Vs. Nepal Government and others* in 2008³⁸. In this case, the Supreme Court directed the Government of Nepal to provide legal recognition of identity based on different gender. Consequently, legal identity on the basis of a different gender enables transgender people to claim protection from discrimination based on gender sexual orientation and health status, right to public employment, right to passport etc.

Notwithstanding challenges in implementation and enforcement of this decision, this judicial reinforcement of the rights of transgender people represents a significant step.

In Indian context also Transgender people are experiencing positive discrimination in their favour in a relative sense. Since 2005, passport applicants have been permitted the option of identifying themselves as male, female or others. Similarly, in the year 2009 appropriate changes in the electoral law in India enabled Transgender people to register for voter identity as third sex.

In this particular regard, State of Tamil Nadu introduced several constructive measures. These law reforms enabled Transgender people to apply for ration cards and driving licenses³⁹.

The Supreme Court of Pakistan has also rendered legal recognition to the transgender people ('the third gender'), stating that they are entitled to national identity cards.

In addition, a 2009 judgment⁴⁰ of the Supreme Court of Pakistan directed the Government of Pakistan to initiate measures to support and enable transgender people to gain government employment.

At a community level, organizations, activists and NGOs have played a key role in ensuring transgender voices being represented in advocacy for law reform.⁴¹ For instance, in Indian context, Bangalore based SANGAMA formed a collective consisting of Hijras and Kothis to work on improving the legal environment. In addition, SANGAMA established a service providing free legal representation to Hijras and Kothis who reported harassment and abuse at the hands of police. SANGANA succeeded in networking with other social

³⁶ Naz Foundation (India) Trust v. Government of NCT (2009) 160 DLT 277

³⁷ (2008) 2 NJA L.J. 261-286

³⁸ (2008) 2 NJA L.J. 261-286

³⁹ Aditya Bondyopadhyay, *Laws Affecting LGBT Persons in South Asia – A Desk Review*, February, 2011 at Pp.48-49.

⁴⁰ Dr. Muhammad Aslam Khaki and Almas Shah v. SSP Rawalpindi & others, Supreme Court of Pakistan, 2009

⁴¹ Strategies to improve the legal environment for hijras and kothis in Bangalore, India – Human Rights Violations against the Transgender Community : A study of kothi and hijra sex workers in Bangalore, India (2003) Karnataka : Peoples' Union for Civil Liberties.

movements which gave self-confidence to Hijras and Kothis to resist and police harassment⁴².

Organizations like Humsafar Trust, INFOSEM, SANGAMA, Alternative Law Forum, India NF and others have developed materials including LGBTI rights advocacy, training and educational materials and provide referrals to other service providers such as legal aid groups⁴³.

Community organizations played a critical role in influencing and development of the National Strategy Evidence to Action: Strategic Plan for scaling up interventions for MSM and Transgender Populations in India 2008-2012⁴⁴.

⁴² Strategies to improve the legal environment for hijras and kothis in Bangalore, India – Human Rights Violations against the Transgender Community : A study of kothi and hijra sex workers in Bangalore, India (2003) Karnataka : Peoples’ Union for Civil Liberties.

⁴³ John Godwin, 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, July 2010 at P.43-44.

⁴⁴ John Godwin, 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, July 2010 at P.44.

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