LEGAL REFERENCE BRIEF
PAKISTAN

PROTECTIVE LAWS RELATED TO HIV, MEN WHO HAVE SEX WITH MEN AND TRANSGENDER PEOPLE

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

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

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

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

The Roundtable Dialogue was a joint initiative of SAARCLAW, the International Development Law Organization (IDLO), the United Nations Development Program (UNDP), the Joint United Nations Program on HIV/AIDS (UNAIDS) and the World Bank; under an overarching goal to promote a legal enabling environment and strengthen the legal response to HIV in South Asia. The Roundtable built upon the momentum of the Asia Pacific Regional Dialogue of the Global Commission on HIV and the Law (February 2011) and supports the human rights commitments of the Economic and Social Commission for Asia and the Pacific (ESCAP) under Resolution 66/10 and 67/9.

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

The first case of HIV in Pakistan was diagnosed in 1987. At the end of 2009, Pakistan had an estimated 98,000 people living with HIV. Until recently Pakistan was classified as a low prevalence high risk country. Now Pakistan is considered to be in a concentrated phase of the epidemic. The concentrated HIV epidemic is primarily among high-risk populations, with injecting drug users (IDUs) exhibiting the highest HIV prevalence (27.2%) in 2011, followed by Hijra or transgender and male sex workers (MSWs) at 5.2% and 1.6%, respectively. Female sex workers (FSWs) exhibit a prevalence of 0.6%.

The 2010 UNGASS Report identified a number of challenges in addressing the HIV epidemic. These include a lack of capacity, funding constraints, limitations in the multi-sectoral approach, rising terrorism and insecurity, socio-cultural barriers that inhibit open discussion of sexual behaviors in the general populations and unsafe injecting practices.

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

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

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

1. LEGAL ENVIRONMENT IN PAKISTAN – OVERVIEW

The legal system of Pakistan is based on the British system of law, with strong influence of Islamic law, particularly in relation to family law matters. Laws are enacted by the legislature and interpreted by the courts. There have been a number of noteworthy judicial interpretations of the fundamental rights contained in the constitution to extend protections to PLHIV, men who have sex with men (MSM) and transgender persons.

In the case of Dr. Mohammad Aslam Khaki & another v. Senior Superintendent of Police (Operation) Rawalpindi & others, the Supreme Court recognized Hijras as citizens of Pakistan, and held that they were entitled to equal protection of rights, including right to life and dignity. The Supreme Court further directed that (i) the Election Commission take steps to register Hijras as voters, (ii) all provinces to create job opportunities for Hijras, and (iii) the Government of Pakistan that a transgender person, if qualified, will be given preference for civil service jobs. This is a landmark decision and has set a positive precedent in the protection of transgender persons in Pakistan.

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5 UNGASS Pakistan Report above n 2, at 51-53.
6 Dr. Mohammad Aslam Khaki & another v. Senior Superintendent of Police (Operation) Rawalpindi & others, Supreme Court, Constitutional Petition No. 43 of 2009.
Notwithstanding this, same-sex relations are criminalized under Section 377 of the Penal Code 1860.

Pakistan is a party to a number of international instruments which contain provisions that are wide enough to accord protection to PLHIV and people with diverse SOGI. These provisions are not enforceable in Pakistan unless they are explicitly incorporated into domestic law.

While there are protective provisions under the constitution guaranteeing equal protection under law and ensuring that non-discrimination is applicable to PLHIV and people with diverse SOGI, enforcement of rights under the provisions has proven to be a lengthy process in absence of specific legal framework. A draft HIV/AIDS bill has been developed to bridge this gap yet the draft has not yet been finalized and passed into law.

2. INTERNATIONAL LAW AND CONVENTIONS RELATING TO HIV/AIDS

a. Relevant Provisions

Pakistan has been a member of the United Nations (UN) since 30 September, 1948. Pakistan has ratified the following Treaties of the United Nations:

- the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) – ratified 17 April, 2008;
- the International Covenant on Civil and Political Rights, 1976 (ICCPR) – ratified 23 June, 2010; and
- the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT) – ratified 23 June, 2010.

The ICESCR promotes universal respect for, and observance of, human rights and freedoms and inter alia, recognizes:

- that the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; and
- that such rights are derived from the inherent dignity of the human person.

The ambit of the ICESCR is wide enough to cover provision of an enabling environment to PLHIV and people with diverse SOGI by virtue of them being "humans."

In particular, Article 11(1) of the ICESCR confers upon individuals the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.

b. Application of International Law and Conventions in Pakistan

Pakistan is a dualist state; hence there exists a difference between national and international law. In order for international law to be effective and enforceable in Pakistan, the same has to be translated into national law. Accordingly, if Pakistan is a signatory to an international treaty, but does not adapt its national law in order to conform to the treaty, or does not create a national law explicitly incorporating the treaty, then the rights conferred by such treaty are unenforceable in Pakistan. It is therefore essential that the Government of Pakistan put in place domestic measures and legislation compatible with the ICESCR for its provisions to have effect in Pakistan.

In regards to whether international laws and conventions are influential on domestic laws and measures, the preamble of the draft HIV/AIDS Prevention and Treatment Act 2007, discussed below, categorically states:

“AND WHEREAS, it is expedient to consolidate, amend, and enact a law to give effect to all the national and international endeavors in this respect; and to amend laws for the purposes hereafter appearing;” (emphasis added).
3. DOMESTIC LAWS RELATING TO HIV/AIDS


The rights and protection primarily accorded to the citizens of Pakistan is by means of laws that laws elaborate upon and further re-enforce the rights and protections accorded by the Constitution of the Islamic Republic of Pakistan 1973 (Constitution).

*Right to equality before the law:* Article 25(1) of the Constitution provides that “all citizens are equal before law and are entitled to equal protection of law.”

*Right to non-discrimination:* Initially, Article 25 (2) of the Constitution of Islamic Republic of Pakistan 1973 provided “there shall be no discrimination on the basis of sex alone.” Section 8 of the *Constitution (Eighteenth Amendment) Act 2010,* deleted the word “alone” at the end of Article 25(2), with effect from April 19, 2010. Accordingly, the constitutional protection from discrimination is no longer restricted to discrimination on the basis of sex alone, thereby broadening the scope of the protection from discrimination accorded by Article 25(1) of the Constitution. As a result the Constitution can be relied upon to seek protection from all forms of discrimination, including, but not limited to, discrimination based on religion, caste, creed, race, age, medical condition and/or disability.

Both Article 25(1) and Article 25(2) of the Constitution are broad enough to accord adequate rights and protection to PLHIV and people with diverse SOGI. However, in the absence of specific laws according rights and protections to PLHIV and people with diverse SOGI, upholding these implied rights and protections is dependent upon the invocation of these provisions before, and enforcement by, a court of law. This presents a significant challenge and is in itself a long drawn-out process.

In 2009 Dr. Mohammad Aslam Khaki, an eminent Islamic jurist, filed a Constitutional Petition (the Petition) before the Supreme Court of Pakistan against molestation and humiliation of Hijras by the Rawalpindi Police while conducting a raid on a wedding ceremony in Taxila, a town situated towards the west of Islamabad. Dr. Khaki researched the position of Hijras in Pakistan and discovered them to be the most oppressed and deprived segment of society, subjected to humiliation and molestation.

The Supreme Court of Pakistan, in its order dated August 17, 2009 (the Order), held as follows:

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

This is a key achievement for eunuchs as it brings them within the purview of the fundamental rights accorded by the Constitution. Hijras in Pakistan will now be registered with ‘Third Sex’ designating their gender on national identity papers, which will enable them to access the services of state social welfare departments and financial support programs.

Since passing of the Order the Supreme Court of Pakistan has been regularly monitoring the progress of the implementation of the Order. At the hearing of the Petition held on November 14, 2011 the Supreme Court of Pakistan ordered that Hijras be enrolled on the voters list and directed the Election Commission of Pakistan “to

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7 Article 238 of the Constitution of Islamic Republic of Pakistan, 1973, states that the Constitution can only be amended by means of an Act duly passed by the Parliament.
8 These articles have been tested in a Court of law in relation to sex based discrimination.
9 Dr. Mohammad Aslam Khaki & another v. Senior Superintendent of Police (Operation) Rawalpindi & others, Supreme Court, Constitutional Petition No. 43 of 2009.
collect the details of eunuchs from the social welfare departments of the provinces where they are registered and take steps to register them as voters.”

At the hearing of the Petition held on December 11, 2011 the Hijra community sought regularization of their jobs in the Tax Departments. The Supreme Court of Pakistan directed all provinces to create job opportunities for Hijras.

The Supreme Court, at the hearing of the Petition held on 1 February 2012, directed the Government of Pakistan that, if qualified, a transgender person should be given preference for a civil service job.

The progress on implementation of the Order is as follows:

- 25 January 2012: issuance of Computerised National Identity Card (CNIC) and registration of votes of eunuchs has been initiated in Rawalpindi by National Database and Registration Authority (NADRA);
- 2 February 2012: the Supreme Court directs NADRA to issue CNICs to Hijras in accordance with rules, and
- 6 March 2012: NADRA decided to provide jobs to eunuchs so that they could be treated as equal members of society.

b. Legislation

i. Anti-discrimination legislation

There is no anti-discrimination legislation that specifically protects PLHIV or people with diverse SOGI in Pakistan.

iii. Pending legislation concerning HIV/AIDS

The national policies to address prevention and treatment of HIV are incomplete without having a legal framework in place according adequate protection and rights to PLHIV and people with diverse SOGI.

The proposed HIV/AIDS Prevention and Treatment Act 2007 (HIV Bill) intends to supports the Government of Pakistan in providing an “enabling environment” for PLHIV and people with diverse SOGI by:

- according care, support and treatment to PLHIV;
- protecting vulnerable populations against stigma and discrimination on the basis their being PLHIV;
- providing for an increase in prevention, care, support and treatment programs, thereby reducing the risk of HIV infection among vulnerable populations, including preventing its transmission into the general population; and
- giving effect to all the national and international endeavors in this respect.

Section 2(e) of the HIV Bill defines discrimination as follows: “any act or omission including a policy, law, rule, practice, custom, tradition, usage, condition or situation which directly or indirectly, expressly or by effect,

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17 The term enabling environment is not defined in the Act.
immediately or over a period of time imposes burdens, obligations, liabilities, disabilities or disadvantages on, or
denies or withholds benefits, opportunities or advantages, from, or compels or forces the adoption of a particular
course of action by any person or category of persons, based solely on a person’s HIV status, actual or perceived.”

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

Explanation: Such populations include but are not limited to, injecting drug users, female sex workers, men who
have sex with men, women vulnerable and at risk for HIV infection, children, adolescents, migrants, refugees, and
internally displaced persons, people with disabilities, long distance truckers, and prisoners.”

Section 11 of the proposed HIV Bill prohibits discrimination against PLHIV and provides as follows: “No person shall
be discriminated against on the basis of his HIV status in any form in relation to any activity in the private or public
sectors.”

Section 12 of the proposed HIV Bill makes it illegal to coerce a person, contrary to the provisions of the HIV Bill, to
test for HIV for the purposes of:

a. employment, promotion, training, or benefit, either in public or private sectors;

b. membership in any organization;

c. admission to any educational institution;

d. admission to any public or private place of accommodation;

e. marriage;

f. immigration to, emigration from, or citizenship of, Pakistan; and

g. visiting another country for including but not limited to, tourism, studies or work.

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

The HIV Bill also obligates the employer to endeavor to provide reasonable alternative working arrangements, and
to provide the maximum possible benefits to an employee who suffers from HIV and is no longer able to work.

The HIV Bill further states that all employees suffering from HIV are to receive education on HIV/AIDS, as well as
relevant counseling and appropriate referral for treatment and social services from their employers. Under the HIV
Bill, it is obligatory for all public and private employers employing more than fifty (50) employees to implement a
workplace HIV policy.

The HIV Bill also prohibits anyone from publishing, propagating, advocating or communicating whether by words,
or by actions against any person on grounds of his suffering from HIV.

In terms of Section 39 of the HIV Bill, any person in who is in contravention of Section 11 and Section 12 of the
same shall be “punishable with fine which shall not be less than Rupees fifty thousand or more than Rupees three
hundred thousand”

Additionally, Section 40(1) of the HIV Bill provides, “ notwithstanding any other law for the time being in force,
in the adjudication of any proceedings, which are instituted under the same, the Courts are permitted to pass
appropriate orders having regard to the circumstances of the case to:

a. prevent breaches of the provisions of this Act; or

b. redress breaches of the provisions of this Act.”
Section 40(2) of the proposed HIV Bill provides as follows: "In a proceeding relating to discrimination in employment under this Act, the court shall have the power to pass any or all of the following orders:

a. that the person discriminated against be employed;
b. that the person discriminated against be reinstated;
c. that the person who has discriminated make arrangements for the reasonable accommodation of the person discriminated against; and/or
d. the payment of wages, allowances, benefits, perquisites and privileges that may have been lost on account of non-employment or termination."

While the HIV Bill confers extensive rights and protection to PLHIV and people with diverse SOGI, the same has been pending approval of the GOP for 5 years.

In absence of specific laws, the rights and protection to be accorded to PHLIV and people with diverse SOGI is subject to and dependent upon interpretation of the courts of law.

Also in bill form (not yet passed into law) is the HIV/AIDS Safety and Control Act 2010 (Islamabad Bill). This act is intended to be applicable in the territory of Islamabad.

Section 10 of the Islamabad Bill provides as follows: “No person will by publication, by advocacy or propaganda spoken or written spread prejudicial reports regarding a person or persons of AIDS/HIV in a way that could cause psychological, physical or mental trauma to that individual or individuals or result in their being victimized or discriminated against by the society, by employers or prospective employers or associates; a person advocating or discriminating against an infected person will be guilty of a misdemeanor and is liable to imprisonment or fine or both.”

Although the Islamabad Bill seeks to accord protection to PLHIV in Islamabad, it also seeks to make HIV testing mandatory for inter alia:

a. marriage;
b. prison inmates;
c. commercial sex traders;
d. sex offenders;
e. victims of crimes which have exposed them to risk of acquiring infection;
f. habitual drug users;
g. truckers; and
h. patients receiving repeated transfusions of blood

The Islamabad Bill has been accepted by the Parliament for review.

While the Islamabad Bill confers extensive rights and protection to PLHIV and people with diverse SOGI, it is only applicable in the territory of Islamabad and does not extend to whole of Pakistan. In the event the Islamabad Bill is passed by the Parliament, it would be consistent with Article 25(2) of the Constitution however it would not accord protection to PLHIV outside the territorial jurisdiction of Islamabad. In the absence of specific laws, PLHIV outside the territorial jurisdiction of Islamabad will have to invoke Article 25(2) of the Constitution and shall be dependent on interpretation of the courts of law.

These two draft laws in respect of HIV/AIDS have been pending since 2007 and 2010 respectively. One of the key reasons for this is the lack of political commitment to this issue. A consistent and effective long-term response to HIV/AIDS is highly dependent on commitment from all political parties and at all government levels. The political and economic conditions prevalent in Pakistan and the fact that these laws have been pending for years now, substantiate a lack of political commitment. In order for these laws to be promulgated by the Parliament, it is
essential that Pakistan’s response to HIV/AIDS is agreed upon by all parties and by governments at all levels, and that political leaders provide leadership by understanding the issues relating to HIV/AIDS in their jurisdiction and promoting the HIV/AIDS response.

CONCLUSION

Since the detection of the first HIV case in 1987, the Government of Pakistan, with support of bilateral/multilateral donors, has been making concerted efforts for implementation of an effective policy/program to tackle the HIV epidemic in Pakistan.

The national policies of Pakistan have been repeatedly revised over last 24 years to address the prevention and treatment of HIV. However despite having effective treatment and prevention policies in place, PLHIV and people with diverse SOGI continue to be discriminated against and stigmatized.

Having appropriate laws in place, which not only accord rights but also provide adequate protection to PLHIV and people with diverse SOGI should create an enabling environment for PLHIV by:

• according care, support and treatment to PLHIV;
• protecting vulnerable populations against stigma and discrimination on the basis their being PLHIV; and
• increasing prevention, care, support and treatment programs, thereby of reducing the risk of HIV transmission among vulnerable populations, and preventing transmission within the general population

Efforts by the Government of Pakistan and bilateral/ multilateral donors should be supplemented with a strong legal regime which not only accords adequate protection and rights to PLHIV but also enables them to enforce such rights in cases of infringement.