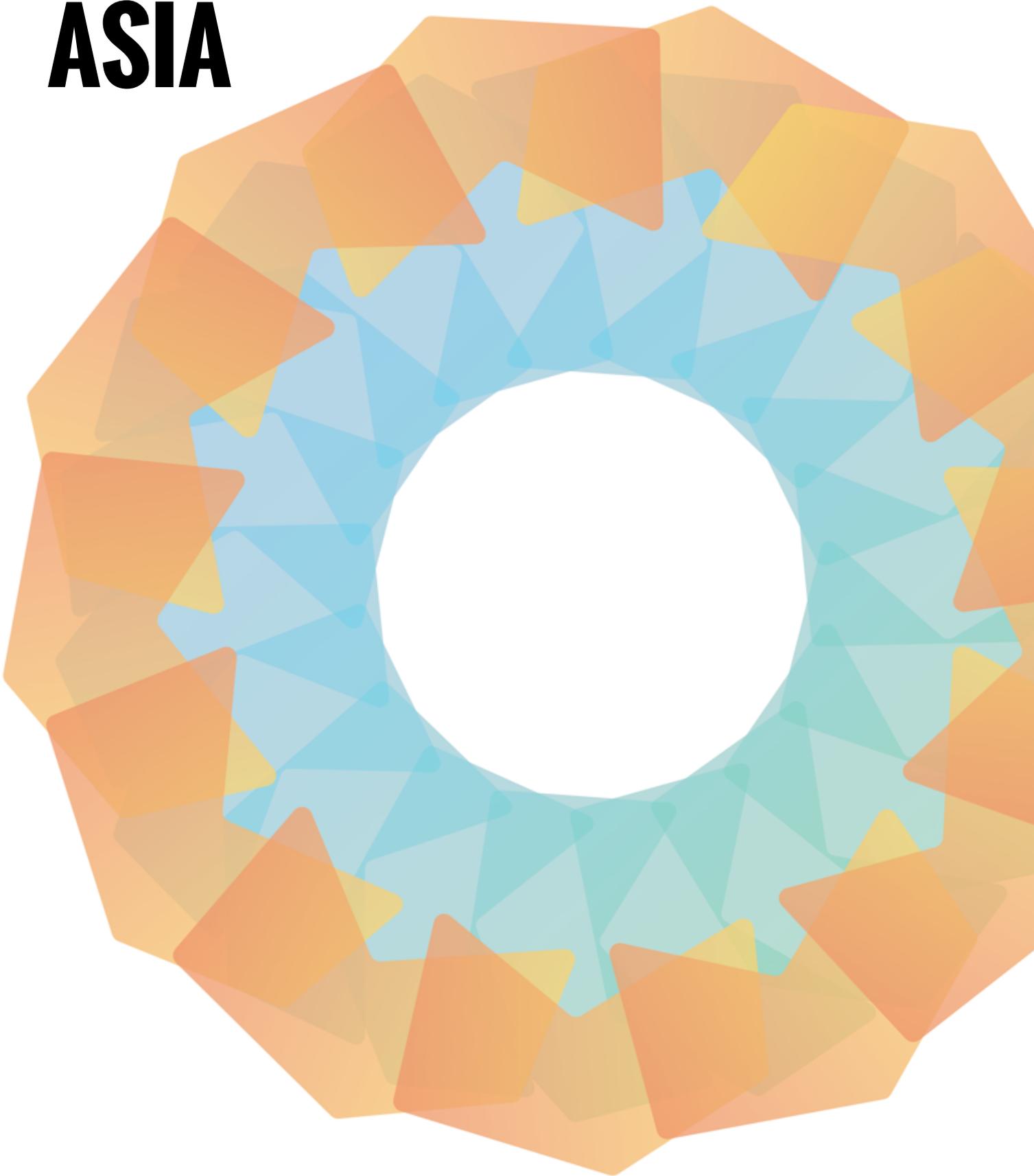


REGIONAL HIV CRIMINALISATION REPORT

ASIA



Produced by



GLOBAL NETWORK OF
PEOPLE LIVING WITH HIV

On behalf of
**HIV JUSTICE
WORLDWIDE**

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BACKGROUND

Project Overview

HIV JUSTICE WORLDWIDE (HJWW) defines HIV criminalization as the unjust application of the criminal law to people living with HIV (PLHIV) based solely on their HIV status – either via HIV-specific criminal statutes, or by applying general criminal laws that allow for prosecution of unintentional HIV transmission, potential or perceived exposure to HIV where HIV was not transmitted, and/or non-disclosure of known HIV-positive status.

Such unjust application of the criminal law in relation to HIV:

- (i) is not guided by the best available scientific and medical evidence relating to HIV;
- (ii) fails to uphold the principles of legal and judicial fairness (including key criminal law principles of legality, foreseeability, intent, causality, proportionality and proof);
- (iii) infringes upon the human rights of those involved in criminal law cases.

As a network of HIV affected communities, advocates and legal practitioners, HJWW has committed to eliminate such discriminatory legal environment which implies a missed opportunity to control the epidemic by driving the populations most at risk of HIV deep underground, rather than creating a supportive environment that encourages already marginalized populations to come out and seek healthcare services.

Working on behalf of HJWW, GNP+ and the HIV Justice Network (HJN) have developed a method to identify existing laws, criminalization practices and the prosecutions for HIV non-disclosure, potential or perceived exposure and/or non-intentional transmission as a way to provide evidence for advocacy towards an improved legal environment in the global fight against the HIV epidemic. So far, this method has been implemented by PLHIV groups in several regions and disseminated publicly as the HIV criminalization mapping report. Now it is time for this initiative to be rolled out to capture the current situation in the Asia region.

Objectives

The overall purpose of this report is to share the process and outcome of monitoring HIV criminalization laws and prosecutions in the Asia region.

Specific Objectives:

1. To provide an update on HIV criminalization in the legal environment in the Asia region
2. To document any HIV criminalization prosecutions in the Asia region
3. To provide recommendations for future work of HIV JUSTICE WORLDWIDE in the Asia region

Methodology

The process of documenting HIV criminalization laws and practices was conducted through several stages:

Planning

1. With regards to the nature of the issue and recognizing the contexts in the Asia region, where the topic of HIV criminalization does not surface widely in the region's response to the HIV epidemic, it is important to note that this initiative would serve as a strategic effort to bring more attention and further inform future design and programmatic approach within HIV response in Asia in particular to ensure a

supportive legal environment that strives towards equal access to healthcare services for PLHIV and key populations. The main goal of this report was to identify existing laws which criminalize HIV transmission as well as documenting court cases where such law was used to prosecute people with HIV. A community-based approach, using the network of PLHIV community in Asia, was used to capture the different situation in the Asia region. However, with limited availability of resources to complete this process, it was decided to build this documentation using a community-based approach by using the network of PLHIV community in Asia. Ten PLHIV networks and civil society organizations were pre-identified to be involved in the process:

- 1) Youth Development and Health Organization – Afghanistan
- 2) Bandhu Welfare Society – Bangladesh
- 3) AIDS Care China – China
- 4) National Coalition of PLHIV India – India
- 5) Indonesia AIDS Coalition – Indonesia
- 6) KLASS – Malaysia
- 7) MPG+ - Myanmar
- 8) APLHIV – Pakistan
- 9) TTAG – Thailand
- 10) VNP+ – Vietnam

Data collection

A combination of desk reviews, an online survey and key informant interviews was used to collect data.

Desk Review

Existing reports and publications on HIV criminalization in Asia from UN agencies, GNP+'s Global Criminalization Scan portal and other sources were reviewed.

Online Survey

An adapted tool from HJN was used to collect data from the 10 countries mentioned above to:

- (i) identify the existence of laws which criminalize HIV non-disclosure, exposure or transmission;
- (ii) obtain information on court cases using such law in the past 3 years;
- (iii) obtain information about the scope of their organizations' work and priorities;
- (iv) obtain knowledge and experience of their organization in HIV criminalization issue;
- (v) find out respondents' interest in participating in future HJN works.

Data Processing

Primary and secondary data gathered from the process above then compiled and analyzed for report writing

Report Writing

The mapping report describes findings from 10 countries in Asia which serves as a baseline for similar activity in the future to ensure continued process of community based monitoring on HIV criminalization in the region.

CONTEXT¹

HIV epidemic in Asia

At the end of 2013 the UNAIDS report showed an estimated 4.8 million [4.1 million–5.5 million] people to be living with HIV across the Asia region. Only six countries – China, India, Indonesia, Myanmar, Thailand, and Vietnam – account for more than 90% of the PLHIV in this whole region. Four other countries – Cambodia, Malaysia, Nepal and Pakistan – account for another 6% of the total number of PLHIV in Asia and the Pacific. India has the third largest number of PLHIV in the world: 2.1 million [1.7 million–2.7 million] at the end of 2013. This accounts for about 4 out of 10 PLHIV in the Asia region. Furthermore, in some regions of Papua New Guinea, a high HIV prevalence has been observed.

Overall, new HIV infections in South and South-East Asia declined by 8% and 16% respectively in the Pacific between 2005 and 2013. However, a mixed picture emerges looking at the countries individually. New infections declined by 58% in Myanmar, 46% in Thailand, 43% in Vietnam and by 31% in Papua New Guinea. While the numbers of new HIV infections in India declined by 19%, it still accounted for 38% of all new HIV infections in the region.

Key Populations and HIV Response

1. Female Sex Workers

A high HIV prevalence among female sex workers is one of the major factors in the spread of HIV in the Asia region. Given the transient nature of sex work, national averages mask in-country differences. For example, while the national HIV prevalence among female sex workers in India declined, it increased in the states of Assam, Bihar and Madhya Pradesh. A similar pattern was observed in Indonesia and Myanmar. For instance, in the city of Jayawijaya in Indonesia, female sex workers had an HIV prevalence of 25%, while national HIV prevalence among them was nearly 9%. In Vietnam, HIV prevalence among sex workers varied from a high of 22.5% in Hanoi to 6.5% in Lang Son. While in countries with mature epidemics, HIV prevalence among sex workers is stable, rising HIV prevalence in countries such as Indonesia is a cause for concern. Fortunately, a large number of countries have dedicated programs to reach female sex workers. It is estimated that nearly half of all sex workers in the region have access to some form of HIV prevention services, including HIV testing and condoms. As a result, where services are available, HIV prevalence has declined significantly or stabilized. Sex workers also face a high level of stigma and discrimination. In many countries across the Asia region, aspects of sex work are criminalized.

2. Men Who Have Sex With Men (MSM)

UNAIDS estimated that 0.1–4.3% of the adult male population in the region are gay men or other men who have sex with men. A significant proportion of gay men and other men who have sex with men also have heterosexual relationships and/or are married to women. The national HIV prevalence among gay men and other men who

¹ Information in the Introduction is based on: United Nations Programme on HIV/AIDS (UNAIDS). (2014). The gap report. *UNAIDS world AIDS day report*.

have sex with men was between 4–9% in China, India, Indonesia, Japan, Nepal, Thailand and Vietnam, and 10% or higher in Australia, Malaysia, Mongolia and Myanmar. Like elsewhere, national HIV prevalence hides much larger epidemics in local areas. For example, the HIV prevalence among gay men and other men who have sex with men in Bangkok was 24.4% compared to the national HIV prevalence of 7% for this population across Thailand. Similarly, in India's Chhattisgarh state, HIV prevalence among gay men and other men who have sex with men was 15%, which is three times the national figure. In many parts of the region, HIV among gay men and other men who have sex with men is emerging and rapidly accelerating. This, combined with a low risk perception among young gay men and other men who have sex with men and high levels of multi partner sex fueled by other performance enhancing drugs, creates conditions for low condom use, even when people are aware of the risks. Furthermore, HIV testing among gay men and other men who have sex with men is low. In addition, less than half of all gay men and other men who have sex with men have comprehensive knowledge about HIV.

3. People Who Inject Drugs

There are an estimated 3.8 million people who inject drugs in Asia and the Pacific. Around 2.5 million of these people are estimated to live in China. Other countries with more than 30,000 people who inject drugs in the Asia region include Australia, India, Indonesia, Malaysia, Myanmar, Nepal, Pakistan, Thailand and Vietnam. In each of these countries, HIV prevalence among people who inject drugs is several times higher than the HIV prevalence in the general population. Access to HIV prevention and treatment services in the region can be vastly improved if drug use is decriminalized. Currently, 11 countries in the region still practice the compulsory detention of drug users and 15 countries impose the death penalty on drug users. Preventing new HIV infections among people who inject drugs requires a public health approach and an end to punitive laws.

4. Transgender people

Transgender people in Asia and the Pacific are often left behind in HIV-related programs in the region. While many countries have dedicated programs to reach this specific population, there are several barriers such as stigma, discrimination, a lack of recognition of their gender status, violence and abuse, that restrain the success of these programs. In 2014, the Supreme Court of India issued a landmark judgement directing the Government of India to recognize transgender people as a third gender and to formulate special health and welfare programs to support their needs. Similarly, a court case in Nepal previously paved the way to officially recognize a third gender in citizenship documents and, in Pakistan, the Supreme Court directed the National Database and Registration Authority to add a third gender column to national identity cards for transgender people, giving them the right to register to vote. Similar initiatives are needed across the region and, indeed, across the world.

FINDINGS

Legal Environment in 10 Countries

The findings are derived from the information collected from the response on the online survey and data available on the GNP+ Criminalization Scan portal².

Country	HIV Criminalization Possible	Known/reported cases (last 3 years)	Criminalization of Key Populations
Afghanistan	Yes - general law	-	Yes
Bangladesh	Yes - general law	-	Yes
China	Yes - HIV-specific law	-	Yes (PWID)
India	Yes - general law	1 (civil case)	Yes (PWID)
Indonesia	Yes (provincial regulation)	-	Yes
Malaysia	Yes - general law	-	Yes
Myanmar	Yes - general law	-	Yes
Pakistan	Yes - general law	-	Yes
Thailand	Yes - general law	-	Yes (PWID)
Vietnam	Yes - HIV-specific law	-	Yes (PWID)

² Global Criminalization Scan. (2010). *Global Network of People Living with HIV (GNP+)*. Retrieved from <http://criminalisation.gnpplus.net/>

Country Information

Afghanistan

Criminal Law:

- a) Penal Code 1976. Official Gazette No. 347 Published 1976/10/06 (13355/07/15 A.P)
- b) Penal Code 1976 Article 372
(1) *"A person who deliberately commits an act in cases other than that mentioned above which results in the propagation of a dangerous disease shall be sentenced to medium imprisonment of a term of up to three years."*
(2) *"If as a result of commitment of the act mentioned in the above paragraph loss of human life takes place, or permanent disability is caused, the person committing the act shall be sentenced in the light of circumstances to the punishment anticipated for the crime of permanent disability in this law."*
- c) Penal Code 1976 Article 373
(1) *"A person who causes the propagation of a dangerous disease by mistake shall be sentenced to short imprisonment and a cash fine of at least five thousand Afghanis."*
(2) *"If as a result of commitment of the act mentioned in the above paragraph loss of human life takes place or permanent disability is caused, the person committing the act shall be sentenced in light of circumstances to the anticipated punishment for murder or physical torture."*

Court Cases (last 3 years): None

Bangladesh

Criminal law:

- a) Penal Code 1860 (s 269) Negligent act likely to spread infection of disease dangerous to life: *"Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the risk of any disease dangerous to life, shall be punished with imprisonment of a term of up to six months and/or fine."*
- b) Penal Code 1860 (s 270) Malignant act likely to spread infection of disease dangerous to life: *"An individual who malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment with a maximum sentence of two years and/or fine."*

Court Cases (last 3 years): None

China

Applicable law:

Decree of the State Council of the People's Republic of China No. 457 2006

- a) Article 38. People with HIV and AIDS patients shall have the following obligations:
 - Accept epidemiological investigation and direction of agencies of disease control and prevention or inspection/quarantine;
 - Inform the fact of being infected or suffering the disease to their sexual partner in time;

- Inform the fact of being infected or suffering the disease to their medical doctor when they come to see the doctor;
- Take necessary precaution measures to prevent others being infected;
- People with HIV and AIDS patients shall not, on purpose, spread the infection to others by any means.

b) Article 62. People with HIV or AIDS patients who on purpose spread AIDS shall have the legal liability for compensation in accordance with the civil law, and if a crime is constituted/established/committed, an investigation shall be carried out for criminal liability in accordance with the law.

Court Cases (last 3 years): None

Related:

- Chinese Supreme Court standards address prostitution and HIV:
<http://www.sixthtone.com/news/1000572/new-supreme-court-standards-address-prostitution,-hiv>

India

Criminal law:

Penal Code 1860

- a) Penal Code 1860 (s 269) Negligent act likely to spread infection of disease dangerous to life: *“Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to 6 months, or with fine, or with both.”*
- b) Penal Code 1860 (s 270) Malignant act likely to spread infection of disease dangerous to life: *“Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*

Court Cases (last 3 years): 1 case

- Woman takes her husband to court to seek compensation for alleged HIV non-disclosure:
<https://www.hindustantimes.com/ranchi/woman-accuses-hiv-husband-of-hiding-disease-wants-compensation/story-b1RmdwMNR4Julms1oekgQN.html>

Indonesia

No national legislation, but there are a number of provincial and district by-laws on HIV.

Court Cases (last 3 years): None

Related:

- Gay men arrested and forced to undertake HIV test:

<https://www.outinperth.com/gay-men-arrested-indonesia-forced-undertake-hiv-tests/>

Malaysia

Applicable law:

Penal Code 1936 (Act 574)

- a) Penal Code 1936 (s 269) Negligent act likely to spread infection of disease dangerous to life: *“An individual who unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life faces imprisonment for a term of up to six months and/or fine.”*
- b) Penal Code 1936 (s 270) Malignant act likely to spread infection of disease dangerous to life: *“Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment with a maximum sentence of two years and/or fine.”*

Court cases (last 3 years): None

Myanmar

Applicable law:

- a) Penal Code 1860
- b) Penal Code 1861 (s 269) Negligent act likely to spread infection of disease dangerous to life: *“Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.”*
- c) Penal Code 1861 (s 270) Malignant act likely to spread infection disease dangerous to life: *“Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.”*

Court Cases (last 3 years): None

Pakistan

Applicable law:

Penal Code (Act XLV of 1860)

- a) Section 269 Negligent act likely to spread infection of disease dangerous to life: *“Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.”*
- b) Section 270 Malignant act likely to spread infection of disease dangerous to life: *“Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous*

to life, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Court cases (last 3 years): None

Thailand

Applicable law:

Penal Code 1956

Section 59 of the Penal Code provides that *"A person shall be criminally liable only when such person commits an act intentionally, except in the case where the law provides that such person must be liable when such person commits an act by negligence, or except in the case where the law clearly provides that such person must be liable even though such person commits an act unintentionally. To do an act intentionally is to do an act consciously and at the same time the doer desired or could have foreseen the effect of such doing..."*

In addition, it is also an offence to attempt to carry out an offence, per Section 80 of the Penal Code, which provides that *"Whoever commences to commit an offence, but does not carry it through, or carries it through but does not achieve its end, is said to attempt to commit an offence..."*

Vietnam

Applicable law:

Law on HIV/AIDS Prevention and Control (No. 64 year 2006/QH11)

- a) Article 4 - Rights and obligations of HIV-infected people, HIV-infected people shall have the following obligations:
 - To apply measures to prevent the transmission of HIV to other people;
 - To inform their HIV positive test result to their spouse or fiancé (fiancée).
- b) Article 8 - Prohibited acts
 - Purposefully transmitting or causing the transmission of HIV to another person.
 - Threatening to transmit HIV to another person.

Court cases (last 3 years): None

Alarming laws and practices related to HIV criminalization in Nepal and Taiwan

Nepal

Early in 2018 Parliament in Nepal had passed a new provision under criminal code related to HIV transmission criminalization. Under section 5 of the law, it is indicated that no one should transmit infectious disease that is dangerous to health to anyone intentionally and carelessness. If someone involve to transmit such infectious disease then there is punishment of 10 years imprisonment and 100,000 NPR 1 if intentionally. If it is from carelessness then punishment is 5 years of imprisonment and 50,000 NPR and if it is negligence then 3 years of imprisonment and 30,000 NPR.

In Case of HIV and Hepatitis B the new provision stated No one should transmit HIV and Hepatitis B intentionally and carelessness through blood transfusion, unsafe sex and no one (infected person) should insert their organ, blood, saliva, sperm, spit to others organ. If it is intentionally then 10 years of imprisonment and 100,000 NPR and if it is carelessness or negligence then 3 years of imprisonment and 30,000 NPR.

Taiwan

In November 2017 The Taipei District Prosecutors Office 11 HIV positive men were charged of concealing their HIV status and engaging in unsafe sexual practices with other men. They were indicted for violating provisions under the nation's rarely cited HIV Infection Control and Patient Rights Protection Act.

Community Responses

Based on the results of the online survey there are some key points on community involvement in HIV criminalization issues:

- Non-existing community organization/group specialized on HIV criminalization issue.
- Most of the respondents of the online survey expressed an interest to learn/contribute/include HIV criminalization in their program.
- Most respondents have criminalization issues among key populations (MSM, PWID, SW and TG) as part of their current work with intersectionality towards discrimination in healthcare settings.

CONCLUSION AND WAY FORWARD

This report has explored HIV-specific laws in Asia. This includes data available and update on the GNP+ Criminalization Scan Portal. It must be highlighted that this process has allowed the community to gain much knowledge and experience from a topic that they were not familiar with. The present report is being viewed as a work in progress, that the community of PLHIV in this region can use as a starting point to further work on in the future. It became clear that there is lack of knowledge among peers within the countries in this region on the status of their laws and how these might influence and affect HIV responses in their countries.

Recommendations:

1. Capacity building for HIV criminalization issues, tailored with local contexts and priorities.
2. Develop programmatic approach using HJW network's experiences and expertise to help address criminalization against key populations.
3. At regional and global level, to give HIV criminalization issues a broader platform (SDG progress review in 2019 will focus on goal #10 and #16, which would address issues around inclusion and inequalities).

REFERENCES

Global Criminalization Scan. (2010). *Global Network of People Living with HIV (GNP+)*. Retrieved from <http://criminalisation.gnpplus.net/>

United Nations Programme on HIV/AIDS (UNAIDS). (2014). The gap report. *UNAIDS world AIDS day report*.