SEXUAL HEALTH AND HUMAN RIGHTS

A legal and jurisprudential review of select countries in the SEARO region:
Bangladesh, India, Indonesia, Nepal, Sri Lanka and Thailand

Kajal Bhardwaj and Vivek Divan

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THE INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY ....... ERROR! BOOKMARK NOT DEFINED.

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## ABBREVIATIONS

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
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<tr>
<td>AIDS</td>
<td>Acquired Immune Deficiency Syndrome</td>
</tr>
<tr>
<td>ART</td>
<td>Assisted reproduction technology</td>
</tr>
<tr>
<td>ARV</td>
<td>Antiretroviral</td>
</tr>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
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<tr>
<td>CEDAW Committee</td>
<td>Committee on the Elimination of Discrimination against Women</td>
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<td>CESCR Committee</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CRC Committee</td>
<td>Committee on the Rights of the Child</td>
</tr>
<tr>
<td>FGM/FGC</td>
<td>Female genital mutilation/female genital cutting</td>
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<tr>
<td>HIV</td>
<td>Human Immunodeficiency Virus</td>
</tr>
<tr>
<td>HRC</td>
<td>Human Rights Committee</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
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<tr>
<td>IVF</td>
<td>In-vitro Fertilization</td>
</tr>
<tr>
<td>LGBTI</td>
<td>Lesbian, Gay, Bisexual, Transgender &amp; Intersex</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>OSI</td>
<td>Open Society Institute</td>
</tr>
<tr>
<td>SEARO</td>
<td>South East Asia Regional Office</td>
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<tr>
<td>STD</td>
<td>Sexually Transmitted Disease</td>
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<td>STI</td>
<td>Sexually Transmitted Infection</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>UNAIDS</td>
<td>Joint United Nations Programme on HIV/AIDS</td>
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<td>UNGASS</td>
<td>United Nations General Assembly Special Session</td>
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<td>WHO</td>
<td>World Health Organization</td>
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A. BACKGROUND

This report has been written as part of the World Health Organisation’s (WHO) project on legal and jurisprudential research on “Sexual Health & Human Rights.” The Project involved researchers and experts from the different WHO regions who were tasked with reviewing legal and jurisprudential [progress/changes/good practices] from their respective regions related to Sexual Health and Human Rights. This report presents the review of select countries in WHO’s South East Asia Regional Office region.

WHO’s Project on Sexual Health and Human Rights

In 2008 the Gender, Reproductive Rights, Sexual Health and Adolescence unit of the Department of Reproductive Health and Research in WHO established the project on Sexual Health and Human Rights. The aim of the project was to develop a publication/series of publications that can contribute to the recognition, understanding and application of human rights standards related to sexuality and sexual health. The main assumption is that canvassing the authoritative standards articulated under international, regional and national laws and jurisprudence related to sexual health issues, can clarify normative guidance for states, and thus facilitates state efforts to improve protection of rights relating to sexual health. The project, thus, seeks to document and analyze how human rights standards have been specifically applied to sexual health issues in international, regional and national laws and jurisprudence. The project complements other WHO initiatives related to sexual health, particularly through defining state obligations related to sex, sexuality and sexual health.

The WHO experts, commissioned for the Project, organized their reviews of the national legal standards related to sexual health and human rights around eight topics. These topics were chosen, refined and elaborated through extensive discussions during three successive WHO technical consultations with experts who were undertaking research for other regions of the world. While these eight common topics appear in each regional report, the experts were given discretion to develop sub-topics as relevant to their regional and national contexts. The topics were chosen with regard to three criteria: demonstrated causal importance to sexual health and well-being; relevance to core WHO goals of promoting sexual health for all persons, with particular consideration to promote gender equality; to give priority to poor and underserved populations and groups, especially adolescents; and to examine laws and policies that intersect with fundamental questions of human rights.

In choosing these eight topics, and in their ensuing research, the WHO experts identified themes of global significance to rights and health in relation to sexuality, while attending carefully to regional diversity, as well as national and local specificity (including legal, cultural, political, social, economic and historical concerns). In addition, the eight topics are further contextualized within empirical literature on sexuality and sexual health. Moreover, as research into the eight topics progressed in each region, experts were given flexibility in their treatment of each of the topics and sub-topics.

Thus, while there is consistency in the overall framework of the eight topics, readers will notice variation in how laws and authoritative standards relevant to sexual health are treated.

1 The eight topics are (1) Non-discrimination as relevant to sexual health; (2) Penalization of sexual activities; (3) State regulation of marriage and family as relevant for sexual health; (4) Gender identity; (5) Violence as relevant for sexual health; (6) Access to health services in relation to sex and sexuality; (7) Education, information and expression related to sex and sexuality and (8) Sex work.
in the regional reviews. This is a strength of the project, as WHO seeks to ensure that policy makers in many different settings find the materials produced relevant and useful.

The analysis of the eight topics and their importance for sexual health relies on the contemporary understanding that health and well-being are influenced by material and social conditions. Health services and health systems as frameworks organizing and ensuring the appropriate delivery for these services (as well as other key goods and services) are clearly essential for health. However, they are not the only services and systems that matter for health. Legal and educational systems, are clearly part of ensuring the highest attainable standard of physical and mental health. Thus, this project incorporates topics for investigation in light of the understanding that health is shaped by structural conditions, as well as law and policy, and not only by the most obvious physical processes of disease, aging, reproduction, nutrition, exposure to environmental toxins, injury, etc. It is well accepted that the social determinants of health have effects at individual, group and population levels. This WHO report stresses, however, that these social determinants are themselves often produced by state action through law and authoritative policy. Thus, many key material factors affecting sexual health are often not inevitable or unchangeable, but rather represent discrete choices made by legislators, administrators, courts and executives.

The legal frameworks and standards which determine so many of the key factors of health may be in alignment, tension, or contradiction with human rights principles. The promotion of sexual health is inextricably tied to the promotion of fundamental human rights, such as non-discrimination, privacy, protection from violence, access to information, and rights to expression and association, as well as the rights that support meaningful participation in society and politics. In regard to sexual health, states have made legal and political commitments to protect the health of people, including sexual health, through the application of human rights principles, expressed through their national laws, and through commitments to international and regional human rights treaties and consensus documents. This WHO report, therefore, proceeds from the premise that law and policy can have strong effects on sexual health as well as on rights, and that there is a dynamic relationship between the promotion of fundamental human rights and the promotion of sexual health.

For each of the topics and sub-topics, the reports highlight laws which promote sexual health, and note laws which are likely to impede or diminish it. This analysis focuses solely on the formal content of statutes, judicial decisions or other duly enacted laws. This report does not assess their implementation. Therefore, this report does not evaluate which regions or countries have succeeded in promoting sexual health and rights in each of the eight topic areas. Rather, the authors examine contemporary law and policy as representing different paths through which the social and material conditions that promote (or impede) sexual health and rights exist.

Many policy makers concerned with sexual health are accustomed to reviewing laws that explicitly address health (i.e., the regulation and content of health services) for their health and rights impacts. This review addresses these issues in sections on access to health services (Chapter 6), as well as health issues that arise in the context of other rights concerns (mandatory HIV testing, which arises as part of chapter/section1 on non-discrimination, or health status testing, which arise in regulation of marriage and family, Chapter 3.)

In addition, this review analyzes laws affecting rights and material conditions that do not on their face address health, but which, social determinants-based analysis shows, have an effect
on health. These include laws on discrimination (Chapter 1), access to information (Chapter 7), control of expression (Chapter 7), and state responses to violence, whether perpetrated by the state or requiring state response to violence perpetrated by others (Chapter 5). Moreover, this publication highlights several topics where the issues of sexuality and gender are explicitly conjoined in the law, such as the regulation of sexual activity through the criminal law (Chapter 2), and including the specific focus on exchange of sex for money (Chapter 8) or the regulation of gender expression and identity (Chapter 4). Specific chapters further elaborate why these issues are important focal points for policy makers wishing to understand how to use law to promote sexual health.

A rights-based analysis of laws related to each of these eight topics asks questions about the relationship between a law’s focus and scope, as well as its historical development, to analyze the law’s actual or potential implications for the health and rights of a wide range of people. At all times, the concern focuses on the laws’ impacts on the health of all people - with a special concern for children and adolescents. The analyses explore the relationship between specific laws and the workings of social processes (such as inclusion and exclusion, stigma, and barriers created by threats of violence for each topic).

State responsibility is a key aspect of law that is made visible in these analyses. These reports identify laws through which states themselves promote or violate. Laws that expressly provide gender-neutral protection from sexual assault, for example, promote the sexual health of all by recognizing that women, men and children need protection from sexual violence, and break free of historical stereotypes that connect the harm of rape to woman only. They also reinforce the state’s obligation to respect rights, and to protect against the abuse by others. In contrast, laws criminalizing consensual sexual activity between adults, for example, both violate internationally accepted rights of privacy and also drive underground persons afraid to seek information that will protect their health. Law itself may also authorize penalties which under human rights analysis would be deemed arbitrary or excessive acts of violence, such as capital punishment, flogging or amputation or arbitrary imprisonment for non-violent sexual activity (so called morals offenses).

States are also responsible for ensuring that they use due diligence to protect against harms by others. Laws that fail to provide an effective response to coercive sex or marital rape by husbands diminish women’s rights to bodily integrity and decision-making, as well as their control over the conditions of safer and desired sexual activity within marriage. The state’s failure to secure rights leads to bad health outcomes, as coerced sex is often unprotected, with negative results (unwanted pregnancy, HIV, feelings of anger, insecurity, mental health deficits as well as un-remedied physical injuries) for the woman.

A key way in which law can support sexual health is by guaranteeing broad access to effective health care. Analyzing how health care can support (or impede) sexual health for all persons requires, therefore, an examination of the general structure of health services relevant to sexual health (how are they provided, financed and dispensed, with regard availability to all?).

In addition, the analysis of health service laws must also consider the barriers that specific populations and marginalized sub-groups may face: does the law on its face or in practice exclude unmarried women, from accessing contraception, for example? Does the law

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2 [CITE TO international section]
provide for information and distribution in ways that will reach men who have sex with men? Is the privacy of persons seeking information and services protected explicitly or does the law subordinate their rights to police registries of HIV status, for example, of people in sex work? Are there other laws penalizing behaviour, such that a man seeking care would be reluctant to disclose his actual sexual practices?

In sum, there are many topics upon which the law acts which may have relevance to sexual health but this report presents eight issues, with numerous related sub-topics which WHO experts believe are critical to building the best legal frameworks that can sustain sexual health. The analysis is built from a synthesis of the best of public health practice with the insights of international human rights law and best practices across all the WHO regions.

**The SEARO Region and Country Selection**

As noted above, this paper presents the legal and jurisprudential review on “Sexual Health & Human Rights” for the countries in the WHO SEARO region, which consists of Bangladesh, Bhutan, DPR Korea, India, Indonesia, Maldives, Myanmar, Nepal, Sri Lanka and Thailand and Timor Leste.

Based on a preliminary analysis (availability of sources of information, local contacts, feasibility etc.), the researchers identified Sri Lanka, India, Nepal, Timor Leste, Bhutan, Bangladesh, Thailand and Indonesia as countries likely to be selected for the research. Despite attempts to contact local experts and sources and a scan of web-based data, information for Myanmar, Maldives and DPR Korea could not be obtained. Further attempts to obtain credible jurisprudential data from Timor Leste and Bhutan also proved ineffective.

The report therefore focuses on jurisprudence and laws from Bangladesh, India, Indonesia, Nepal, Sri Lanka and Thailand.

**The research countries and human rights law**

The research countries are all bound by Constitutions that recognize fundamental human rights though the extent of rights recognized varies across the countries as is discussed in greater detail in the following chapters. All have ratified the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child* with significant reservations, particularly in the areas of personal and religious laws.

Amongst the research countries, Sri Lanka and Nepal have also ratified the *Optional Protocol to the International Covenant on Civil and Political Rights*, while Bangladesh, Nepal, Sri

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3 For the reservations made by the research countries to the International Covenant on Civil and Political Rights, please see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en

4 For the reservations made by the research countries to the International Covenant on Economic, Social and Cultural Rights, please see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en

5 For the reservations made by the research countries to the Convention on the Elimination of All Forms of Discrimination Against Women, please see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en

6 For the reservations made by the research countries to the Convention on the Rights of the Child, please see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en
Lanka and Thailand have ratified the *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*. Bangladesh, Nepal, India, Thailand and Sri Lanka have ratified both the *Optional Protocols to the Convention on the Rights of the Child* (i.e. on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography). None of the research countries have ratified or signed the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.

The domestic application of these international conventions differs across the research countries. In Nepal, Part 22 of the *Interim Constitution*, mandates legislative approval/ratification of international treaties. Almost identical to its corresponding provision (Article 126) of the 1990 Constitution, Article 156 (1) requires the ratification of international treaties and agreements as prescribed by law (in this case the *Nepal Treaty Act, 1990*) and in accordance with the Article’s further provisions. Clause (2) provides that the prescribed law must provide that unless a treaty or agreement pertaining to “(a) peace & friendship; (b) security and strategic alliance; (c) the boundaries of Nepal; and (d) natural resources and the distribution of their uses” is ratified or otherwise accepted by 2/3 majority in Parliament (unless such treaty relating to (a) and (d) above “is of ordinary nature which does not affect the nation extensively, seriously, or in the long-term” in which case it can be approved by simple majority of Parliament) it shall not be binding on the state.\(^7\) The *Nepal Treaty Act, 1990* contains this requirement and thereafter prescribes a monist approach. It states that once Nepal has ratified an international treaty through its Parliament, if there is a conflict between the treaty and current domestic law then the latter shall be invalid.\(^8\) As noted in the following chapters, this monist approach has been used significantly by Nepal’s Supreme Court in its rulings.

By contrast, in India, Bangladesh, Sri Lanka, Thailand and Indonesia international conventions are not automatically applicable on being ratified. In some cases these countries have enacted specific legislation related to the international human rights conventions they have signed\(^9\) or courts in these countries have relied on these conventions to recognize or expand the understanding of human rights in their judgments. Some of the research countries also have some form of human rights legislation that either establish human rights institutions.\(^10\)

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\(^7\) Article 156, Interim Constitution of Nepal, 2007  
\(^8\) Section 9, Nepal Treaty Act, 1990  
\(^9\) See for instance Protection of Human Rights Act, 1993 (India) and the Law on Human Rights, 1999 (Indonesia)  
\(^10\) See for instance Article 132, Constitution of Indonesia, Protection of Human Rights Act, 1993 (India), Human Rights Commission Act, 1996 (Sri Lanka), and Regulation of the President of the Republic of Indonesian the National Commission on Violence Against Women, Number 65 of 2005.
B. METHODOLOGY

In keeping with the main aim of the Project on Sexual Health and Human Rights to focus on authoritative standards, this review relied on primary legal documents – statutes and judgments from the research countries. This review is based on an exhaustive survey of key country legislations; this includes Constitutions, criminal codes, personal laws, social legislation related to women’s empowerment, health laws and special legislations. Government policies are included in the review only where particularly relevant and reliable as an indication of state practice.

The review also documents and analyses key judicial decisions from the research countries. Thailand was the only country where the researchers were unable to obtain any reliable translations or even summaries of key decisions. While the decisions of higher courts are mostly relied on as representing the highest law of the land, in some cases lower court judgments have been included, where they are particularly demonstrative of a good or [bad] practice or as indicative of disagreements within the judicial system on the content of human rights related to sexual health. To the extent possible, the authors have attempted to have their country analysis cross-checked with local experts, though this was only achieved for the reviews of Bangladesh and Thailand.

It has been important to do some background reading on the different jurisdictions to understand the hierarchy of court structures, the binding nature of decisions and to understand various aspects of judicial review and law reform. For this the researchers relied on academic or research articles, country reports to the various United Nations Treaty bodies and reports of key national and international human rights organisations.

In an attempt to illustrate the positive role that law can play in the context of health generally and sexual health specifically, the report focuses mainly on examples of statutory and case law (and in some situations, policies) that have strengthened sexual health on the basis of a human rights framework. However, in order to describe legal environments that are conspicuous examples of rights violations or to illustrate the progression in jurisdictions towards rights-based law, the report also dwells at times on examples of rights.

It is important to recognise that the research countries as part of the WHO’s SEARO region are grouped together only because of WHO country groupings and not because they share any common historical, cultural, legal or other characteristics. As an example, the research countries even fall into different political regional groupings with Indonesia and Thailand being members of the Association of South East Nations or ASEAN, while India, Nepal, Bangladesh and Sri Lanka are members of the South Asian Association for Regional Co-operation or SAARC. As a result this Report is cautious in (and often refrains from) identifying trends in the “region”.

The researchers were able to obtain official English versions of judgments and statutes from most of the research countries either through official government websites or local contacts and where this was not available, unofficial English translations of judgments and statutes were obtained and cross checked for accuracy to the extent possible. Where the authors have relied on unofficial translations, this has been specifically pointed out in the report.

In particular, key sources for the research countries included:
a. **Bangladesh**: The ‘Information system of the Laws of Bangladesh’\(^{11}\) website of the Ministry of Law, Justice and Parliamentary Affairs of the Government of Bangladesh contains official English translations of Bangladeshi laws till 1986 and a few important subsequent laws. Limited access to judgments of the Bangladesh High Court is available from the Chancery Law Chronicles.\(^{12}\) English translations of more recent laws and of key Bangladeshi judgments were provided by local contacts.

b. **India**: The website of Manupatra,\(^ {13}\) an online legal database provided access to all the required judgments of the Indian Supreme Court, High Courts in different states and most relevant statutory law.

c. **Indonesia**: The website of the Indonesian Constitutional Court has official English translations of some key judgments.\(^ {14}\) However, in terms of English translations of Indonesian laws, among the research countries these were the most difficult to obtain and were acquired from multiple online resources as well as local contacts.

d. **Nepal**: No official website for Nepali jurisprudence or statutory law in English exists, and the authors have relied on the Kathmandu School of Law website or the assistance provided by NGOs such as Blue Diamond Society and Forum on Women, Law and Development who have obtained either official translations of judgments and laws or translated these themselves.

e. **Sri Lanka**: A website under the Ministry of Justice and Law Reforms of Sri Lanka - ‘LawNet – Sri Lanka’s Legal Information Network,’\(^ {15}\) contained all Supreme Court and Court of Appeal decisions until 2005. It also contains key Sri Lankan legislations. Other Sri Lankan legislation is also available at the website of the Commonwealth Legal Information Institute (CommonLII).\(^ {16}\)

f. **Thailand**: English translations of Thai laws are provided by the International Translations Office and printed in the Royal Thai Government Gazette. Copies of these official translations were provided by local contacts. A few key laws however were not available from this source and unofficial translations available at the local legal websites\(^ {17}\) that were cross-checked with local contacts have been relied on.

The countries to be surveyed all have a wide variety of languages and scripts, which has proved a hurdle in being able to obtain legal material and guarantee that English versions of these laws are up to date with all amendments. While every attempt has been made to ensure that laws and cases documented in this Report are accurate and up-to-date, there can be no guarantee that this is actually the case. Similarly, every attempt has been made to include all

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\(^{12}\) Chancery Law Chronicles available at [http://www.clebd.org](http://www.clebd.org)

\(^{13}\) Manupatra available at [www.manupatra.com](http://www.manupatra.com)

\(^{14}\) Official website of the Mahkamah Kostitusi Republik Indonesia (Constitutional Court of Indonesia), available at [http://www.mahkamahkonstitusi.go.id](http://www.mahkamahkonstitusi.go.id)


\(^{16}\) ‘Sri Lankan Legal Materials,’ Commonwealth Legal Information Institute (CommonLII), available at [www.commonlii.org/lk](http://www.commonlii.org/lk)

relevant and key laws and judgments; however there are instances where the authors were aware of key judicial decisions and new laws but were unable to get any official or unofficial translations of these documents. Where relevant these new laws or decisions have been mentioned as an indication for readers of a key gap in the review.

This review covers legal and jurisprudential developments in the research countries till September 2009 and does not reflect changes that have taken place since then.

Further, as the review focuses on legal practice, it presents a significant yet incomplete picture of the progress or otherwise a country has made in advancing sexual health and human rights as it does not comment or report on the implementation of these laws and judgments. Thus, many of the research countries may have laws and judicial decisions representing good or even best practices but their implementation or lack thereof may not result in the actual fulfillment of human rights related to sexual health.
1. NON-DISCRIMINATION

The right to non-discrimination is a fundamental principle in all human rights, as it is the obligation of the state both to ensure equal protection of the law and to take steps to eliminate discrimination by others to achieve equality. This section of the report on discrimination focuses primarily on protections in law and their positive action against discrimination. In addition, this section highlights laws which fail to offer sufficient guarantees to ensure diverse people equal access to the resources and services needed to enjoy sexual health. Later sections of the report address more indirect (but no less causal) forms of discrimination, such as laws that fail to ensure that police respond equally to abuse committed against people in sex work, or laws which fail to respond to marital rape.

This principle of non-discrimination has multiple associations with sexual health. Inequality among and between persons and groups is a strong predictor of the burdens of ill health, including sexual health. Inequalities are manifest through differential access to services and resources, in people's abilities to participate in the policies and laws that govern their lives, as well as to seek remedies for abuses committed against them. Discrimination operates through processes of inequality that are rarely linked solely to one characteristic of a person, but are often fuelled by multiple factors of sex, age, class, race, caste, sexual orientation, marital status, national status, disability as well as health status, including HIV status, among others.

For example, rape laws which exclude women married to perpetrators from protection, or which include or exclude access to health services based on women’s marital status deny women’s bodily integrity and decision-making, including in regard to unwanted sex, all of which contributes to the burden of ill-health many women face. Poor women and girls, as well as ethnic minority members, are often doubly burdened by these exclusions: the law may be sex-specific but in addition, their racial or social status can exacerbate gender discrimination. Poverty often makes seeking assistance and response for gender-based discrimination from authorities—especially remedies found in the law, even harder to reach. Thus, while denial of access to safe and legal abortion affects all women, poorer or minority women with fewer resources are more likely to face the health consequences of unsafe abortion.

Laws which discriminate – or fail to protect against discrimination (on the basis of sexual orientation, marital status, or sex, for example) in access to health services or housing—can result in people being excluded from vital treatment for sexually transmitted infections and other diseases, as well as contributing to the possible homelessness and deprivation of social capital among stigmatized people. These deprivations in turn make breaks in accessing critical sexual health services and treatment more likely.

Laws which both reserve key social relationships like marriage to a specific pool of adults, and then condition core rights (to insurance or social benefits, for instance) on entering into marriage have discriminatory impacts. Persons excluded from marriage, such as same-sex couples, are thereby excluded from social benefits and services, including health care linked to insurance, which are essential to sexual health.

18 WHO, 25 Questions on Health and Human Rights. As noted in the international legal standards, international human rights, humanitarian, criminal and labor law all are premised on principles of equality and non-discrimination.
The inability of many sexually stigmatized persons—rape victims (who may be viewed as dishonoured or complicit), persons in sex work (viewed as criminals or socially unclean)—to participate in assessing and making the laws that affect their lives results in law-making divorced from the needs of those most at risk. Indeed, such laws may exacerbate exclusion and ill-health, as with laws that require extra corroboration for the testimony of rape victims, thus making prosecutions less successful and services for post-assault rape survivors harder to access for many persons.

Research demonstrates that mandatory HIV testing, particularly when separated from therapeutic intervention, is unjustified on public health grounds, as it has not been proven to result in greater access or sustained use of treatment, nor more effective sharing of information with sexual partners. Moreover, such testing also violates rights: to privacy and security of the person, but it is often also discriminatory, as such laws often selectively target marginalized groups believed to be at higher risk of HIV infection, such as people in sex work or prisoners. Because the testing is done in ways that violate privacy (such as when police officials receive results for registered prostitutes) and which do not result in either treatment of the affected persons or good preventive practices more generally, such tests can be criticized as discriminatory.

Beliefs about the appropriate gender roles of women and men, which in turn dictate expected sexual conduct, are significant sources of legal discrimination against women in particular. Other laws discriminate against people who transgress social rules about feminine or masculine social behaviour (gender expression), and women or men whose sexual conduct is deemed unsuitable (sex without reproduction, sex outside of marriage, or gender-non-conformity in regard to sexual practices. Many laws which discriminate against women, for example, follow gender-based distinctions which are often tightly linked to legal and cultural norms about women’s sexuality, as when a women’s marital status is a barrier to accessing family planning or reproductive health technologies (RHT) or to adopt, or when the law treats women with a ‘good reputation’ (i.e., chaste) differently and more protectively than women with a ‘bad reputation’ (i.e., sexually promiscuous.)

Men may also run foul of these rules, when they fail to conform to gender roles of masculinity, confront gender-based dress regulations, or face laws criminalizing their same-sex sexual behavior. These laws tend to produce both stigmatized persons (whose mental health as well as physical health may suffer) and render health services to such persons harder to deliver.

At national and international levels, one of the critical developments in anti-discrimination law is the recognition that sexual harassment (unwanted sexuality-based verbal or physical activities in workplace or educational settings which create a hostile environment) functions as a barrier to equality, and as such counts as a form of discrimination. Sexual harassment can have health effects in two ways: first, the harassment itself can be coercive or abusive enough to have direct mental or physical health effects; second, in driving the harassed workers out of their employment, it may remove them from a key source of health benefits.

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Women are disproportionately the targets of this form of harassment, although men may also face this abuse.

While States are obligated, under the rights to non-discrimination and equality, to treat the similar interests of individuals in the same way, they must also treat their significantly different interests in ways that adequately respect and accommodate those differences in line with principles of autonomy, respect for diversity and regardless of gender or racial stereotypes. The assumption that all persons can be reached by the same public health messages about sexually transmitted infections constitutes one example of failed formal equality: married adolescent girls, unmarried women, and men who have sex with men may all need specific, tailored outreach and actions to obtain equivalent health information.

**Human rights, health and children and young people**

Under international human rights law, states have different responsibilities toward people under 18 years of age from those over the age of 18. This age range in law overlaps with, but functions differently than, the public health/programmatic category of young people (age 15-24.) While tailoring services to young people does not stop at age 18, the specific legal obligation changes, and young people over 18 assert their rights under the full range of rights treaties and national law.

In regard to the access to health services, information and other rights important for sexual health, a rights analysis can highlight the state’s responsibility to ensure these rights to persons under 18 in an age-appropriate, non-discriminatory and effective way. At the same time, the bright line of age 18 does not mean that all persons under 18 are treated identically. Article 5 of the Convention on the Rights of the Child emphasizes that the concept of ‘evolving capacity’ of children. This concept balances the recognition of children as active agents in their own lives, and as rights-bearers with increasing autonomy, while also being entitled to protection in accordance with their vulnerability. In regard to sexual health, it is critical that children be protected from sexual exploitation and abuse, but under 18’s also have specific rights to information about sexuality and sexual health, as well as rights to expression and action contributing to their development.

Thus, distinctions between adults and children are not always prohibited forms of discrimination; however, law must provide sufficient protection while not otherwise impeding other rights held by children, such as rights to information and participation. Moreover, under child rights principles, older teens are understood to have greater autonomy rights than younger children, and a rights lens demands that the law should not create distinctions based on gender stereotypes between girls and boys in determining sexuality-related rights: the age of marriage, for example, should be equal (and 18), while age of sexual consent can be lower than age of marriage, it must be equal for boys and girls. The failure to use law in ways which supports the capacity of girls and boys to be both protected from abuse and empowered to make decisions about sexuality with full information, can increase their vulnerability to preventable health risks and impacts, such as pregnancy as they grow into young adults and leave them unprepared to act as health-literate adults.

1.1 **Non-discrimination based on sex**

[cite Simone Cusack]
Equality irrespective of a person’s sex finds concrete basis in the Constitutions of each of the research countries, which contain clauses that affirm such equality and also an obligation on States to prohibit discrimination based on sex. These constitutional guarantees have been further expounded to varying degrees, particularly in relation to women’s equality, in specific legislation of the research countries including laws ensuring equal pay for equal work, enforcing maternity benefits, etc. The courts of the research countries have used their respective constitutional safeguards of equality to uphold women’s right to equality.

The Constitution of Indonesia was adopted in 1945. However, a Chapter on Fundamental Rights was introduced in 2000, which recognizes, inter alia, the right to equal treatment before the law, to obtain equal opportunities in government (for citizens), the right to receive facilitation and special treatment to have the same opportunity and benefit in order to achieve equality and fairness and the right of every person to be free from, and to protection from, discriminatory treatment based upon “any grounds whatsoever.”

Notably, the introduction of this chapter in the Indonesian Constitution occurred through a unique manner of legislative drafting wherein the clauses specifically bestowed rights on both sexes, thereby categorically signifying women’s equality rights (instead of the standard use of the male gender in legal texts). Thus, while Article 21 of the Indian Constitution states that, “no person shall be deprived of his life or personal liberty except according to procedure established by law” (emphasis added), the corresponding provision in the Indonesian Constitution states, “Every person shall have the right to live and to defend his/her life and existence.” (emphasis added).

The Law Concerning Human Rights 1999, which establishes the National Human Rights Commission of Indonesia further enshrines key human rights in Indonesian law. Discrimination under this law is defined as “…all limitations, affronts or ostracism, both direct and indirect, on grounds of differences in…sex…, that results in the degradation, aberration, or eradication of recognition, execution, or application of human rights and basic freedoms in political, economic, legal, social, cultural, or any other aspects of life.”

Under this law, womens rights are recognized as human rights and the rights of women in marriage are recognized. The law recognizes the obligation of the government to uphold these rights as well as other rights ratified by Indonesia internationally. To some degree, Indonesian legislations reflect these guarantees of equality in the context of women through provisions in their labour law related to maternity benefits or specific legislation on domestic violence.

The right to equality in the Indian Constitution of 1950 is enshrined in Article 14 which states that, “[t]he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” A similar provision is contained in the

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21 See Maternity Benefits Act, 1961 (India), Labour Act 2006 (Bangladesh), Labour Code 2006 (Thailand)
22 Article 28D, Constitution of Indonesia, 1945
23 Article 28H, ibid.
24 Article 28I, ibid.
25 Article 28A, ibid.
26 Article 1(3), Law Concerning Human Rights 1999
27 Article 45, ibid.
28 Article 51, ibid.
29 See Act Concerning Manpower, Act of the Republic of Indonesia, Number 13, Year 2003
30 See Chapter 5 on Violence
Constitutions of Bangladesh\textsuperscript{31}, Nepal\textsuperscript{32}, Sri Lanka\textsuperscript{33} and Thailand\textsuperscript{34}. Article 15 of the Indian Constitution specifically provides that the State shall not discriminate against any citizen “on grounds only of religion, race, caste, sex, place of birth or any of them.”\textsuperscript{35} It further allows the State to make special provisions for women, children, socially and educationally backward classes of citizens and for Scheduled castes and tribes.

Several Indian laws reflect the guarantee of equality based on sex including laws on maternity benefits, equal remuneration, domestic violence, etc. India has also enacted a law related to sex-selective abortions citing sex discrimination concerns. Thus, the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 prohibits sex-selection and regulates the use of diagnostic techniques that detect generic abnormalities to prohibit their use for pre-natal sex determination in order to prevent female foeticide. In 2002, an amendment to the Act to include pre-conception sex selection technologies noted that, “the pre-natal diagnostic techniques like amniocentesis and sonography are useful for the detection of genetic or chromosomal disorders or congenital malformations or sex linked disorders, etc. However, the amniocentesis and sonography are being used on a large scale to detect the sex of the foetus and to terminate the pregnancy of the unborn child if found to be female. Techniques are also being developed to select the sex of child before conception. These practices and techniques are considered discriminatory to the female sex and not conducive to the dignity of the women.”

The Act does not aim to ban the use of pre-natal diagnostic techniques but regulates their use for limited purposes.\textsuperscript{36} The written consent of the woman after she has been informed of all the side effects is required for the use of these techniques.\textsuperscript{37} The law expressly prohibits the advertising and conducting of these procedures for the purposes of sex selection or sex determination and prohibits any persons conducting these procedures from communicating the sex of the child to the family of the pregnant woman.\textsuperscript{39}

\textsuperscript{31} Article 27, Constitution of Bangladesh, 1972
\textsuperscript{32} Article 13, Interim Constitution of Nepal, 2007
\textsuperscript{33} Article 12, Constitution of Sri Lanka, 1978
\textsuperscript{34} Section 5, Constitution of Thailand, 2007
\textsuperscript{35} Article 16 of the Constitution of India guarantees non-discrimination in public employment on the same grounds.
\textsuperscript{36} These techniques may be used only for the detection of certain abnormalities in the foetus. The use of such techniques is permissible only on pregnant women above 35 years of age or if she has had a history of two or more spontaneous abortions or foetal loss, or has been exposed to potentially teratogenic drugs, radiation, injections or hazardous chemicals, or has a family history of mental retardation or physical deformity. India’s Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 also prohibits all persons from encouraging the pregnant woman from undergoing the test except for the prescribed purposes.
\textsuperscript{37} Section 5, Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 (India)
\textsuperscript{38} Section 22, of the Indian Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 prescribes punishment for such advertising with imprisonment that may extend up to 3 years and a fine of up to 10,000 rupees.
\textsuperscript{39} Under Sections 5(2) and 6 of the Indian Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994, any person who provides services in contravention of the Act is punishable with imprisonment for a term that may extend up to 3 years (5 years in the case of subsequent conviction) and a fine up to 10,000 rupees (50,000 rupees in the case of a subsequent conviction). A person seeking such services, including the woman herself, unless under coercion would, upon conviction attract the same sentence. Policy and enforcement matters are looked after by various bodies constituted under this law, such as the Central Supervisory Board, Appropriate Authorities for the States and Union Territories as well as Advisory Committees constituted to assist such Authorities.
The centrality of women’s rights to the right to equality has been expounded by the Indian Supreme Court in successive judgments. Thus, in *Valsamma Paul v. Cochin University*, the Supreme Court held that,

“Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for women including the girl child are inalienable, integral and indivisible parts of the universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social and economic and cultural life are concomitants for national development, social and family stability and growth – cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.”

The *Bangladesh Constitution of 1972*, apart from articulating a general fundamental right to equality for all citizens also specifies that the State shall not discriminate against any citizen on grounds only of sex. It further states that women shall have equal rights with men in all spheres of State and public life and that the State shall not discriminate based on sex in matters of employment or office. These provisions do not prevent the State from making special provisions or reservations. But they also permit the State to reserve for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.

The High Court Division of the Bangladesh Supreme Court, in issuing directives on sexual harassment, has used the guarantees of life and equality in the Constitution and noted that,

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40 In India, the Supreme Court has accordingly found provisions of various laws in relation to employment, sexual harassment, property and some aspects of personal laws discriminatory. The Supreme Court has held that, the meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality. *Vishaka and Others v. State of Rajasthan and others* 1997 (6) SCC 241
41 AIR 1996 SC 1011
42 Article 27, Constitution of Bangladesh, 1972
43 Article 28 of the Constitution of Bangladesh, 1972 states that “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth. (2) Women shall have equal rights with men in all spheres of the State and of public life. (3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, or admission to any educational institution. (4) Nothing in this article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.”
44 Article 29 of the Constitution of Bangladesh, 1972 provides for equality of opportunity in public employment and reads: “(1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic. (2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic. (3) Nothing in this article shall prevent the State from – (a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic; (b) giving effect to any law which makes provision for reservaing appointments relating to any religious or denominational institution to persons of that religion or denomination; (c) reserving for members of one sex any class of employment or office on the ground that it is considered by its nature to be unsuited to members of the opposite sex.”
45 Article 29 (3) (c), Constitution of Indonesia, 1945
“equality in employment can be seriously impaired when women are subjected to gender specific violence, such as sexual harassment at the workplace and educational institutions.”

Apart from guaranteeing a general right to equality, Sri Lanka’s Constitution of 1978 also prohibits discrimination on the grounds of race, religion, language, caste, sex, political opinion, place of birth “or any such grounds”. It also prohibits any restriction to access public spaces on the same grounds. Similar to Constitutions of the other research countries, Sri Lanka’s Constitution permits the creation of special laws for the advancement of women, children or disabled persons.

The Interim Constitution of Nepal, 2007, apart from stipulating the right to equality further recognizes women’s right to reproductive health “and other reproductive rights”; prohibition of “physical, mental or any other form of violence” on women and equal rights to ancestral property for sons and daughters. Some of these rights are available to citizens only. Interestingly, as compared to other Constitutions, such as India’s, where such rights are available against the “State”, which is defined therein, the fundamental rights under Nepal’s Interim Constitution are not circumscribed as actionable only against the State (which is not defined) unless stated specifically. Nepal has also legislated an omnibus law – the Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006, which addresses a gamut of issues (those relevant to this paper are discussed at different stages below) including on marital relations, sexual offences, inheritance etc. in order to remove long-entrenched gender-biased provisions in Nepal’s Country Code (“Muluki Ain”) and other laws. This law has also amended the Country Code to introduce prohibitions on sex identification of the foetus with the intention of terminating pregnancy and carrying out such termination of pregnancy.

To take an example from Nepal on the use of guarantees of equality by the Supreme Court, a public interest litigation was filed challenging the practice of chaupadi, where women were placed in solitary and unhygienic places like cowsheds during their menstrual and delivery periods. The petition contended that the practice that is pervasive in some areas was fundamentally degrading and put women at grave health risk. The Supreme Court directed the government to declare chaupadi illegal through the immediate enactment of a law.

The Constitution of Thailand also adopted in 2007 states that the Thai people, irrespective of their origins, sexes or religions, shall enjoy equal protection under the Constitution. It prohibits unjust discrimination against a person on the grounds of differences in origin, race, language, sex, age, disability, physical or health condition, personal status, economic or

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46 See Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and Others, Writ Petition No. 5916 of 2008, High Court Division of the Supreme Court of Bangladesh, (Date of Decision: 14 May 2009. For further discussion on sexual harassment see sub-section 1.6 below.

47 Article 12, Constitution of Sri Lanka, 1978

48 In 2007 Nepal’s Interim Constitution replaced its previous Constitution of 1990. The Interim Constitution was changed through three amending Acts in 2007. It is to remain in force until a new Constitution is made by the people of Nepal through the Constituent Assembly. As of this writing the Interim Constitution of 2007 continues in force as the supreme law of Nepal.


50 Ibid.

51 Ibid.

52 Sections 28C & 28D, Country Code (Nepal)

53 The authors did not have access to the original text or an English translation of this judgment and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

54 Section 5, Constitution of Thailand, 2007
social standing, religious belief, education or political view not inconsistent with the provisions of the Constitution. The Thai Constitution also provides that measures determined by the State in order to eliminate an obstacle to or to promote a person’s ability to exercise rights and liberties on the same basis as other persons shall not be deemed as unjust discrimination.55

Constitutional frameworks in all the research countries lay down strong legal foundations for equality irrespective of sex. Recent developments suggest that strides are being made to give substance to this constitutional right be it in the area of employment or family and marriage related issues. Notably, the most recent articulation of this is Nepal’s Interim Constitution, which enumerates what may be termed as a ‘new generation’ of constitutional rights including specifying women’s reproductive health rights and protection from violence. Part of this expansive understanding of fundamental rights has also been reflected in developments in statutory law where gender equality has been clearly enunciated, which has great significance in relation to sexual health.56

However, as the discussions in the following sections and chapters demonstrate the content of the right to equality differs in the research countries and particularly in the areas of personal and customary laws, the recognition and enforcement of the right of non-discrimination based on sex has been inconsistent.57

1.2 Non-discrimination based on Sexual Orientation

While all the research countries provide general constitutional guarantees of equality including on the specific ground of ‘sex’, none of them specifically prohibit discrimination based on sexual orientation. However, during the process of the drafting of the Constitution of Thailand in 2007, a letter of intention from the Constitutional drafting committee reportedly stated that the committee felt there was no requirement for the specific ground of ‘sexual orientation’ to be included as a prohibited ground for discrimination as it was covered by the ground of ‘sex’.58 However, a verifiable English translation of the letter of intention was not available for the purposes of this review.

Although none of the countries have specific constitutional prohibitions on discrimination based on sexual orientation, courts in Nepal and India have interpreted their respective Constitutional guarantees of equality to extend to sexuality minorities in certain contexts (recognition of identity rights in Nepal and decriminalization of men who have sex with men in India).

In Sunil Babu Pant v. Government of Nepal,59 the Nepal Supreme Court considered a writ petition by an NGO working with sexuality minorities claiming violation of their equality rights. The petitioner sought full citizenship rights for members of the third gender, the

55 Section 30, ibid.
56 See Nepal’s omnibus Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006
57 See, among others, Chapter 3 on State Regulation of Marriage and Family
59 Writ No. 917 of the year 2064 BS (2007 AD), Supreme Court Division Bench, 2007. The authors have relied on an English translation by the National Judicial Academy, Nepal in the NJA Law Journal 2008 available at http://njanepal.org.np/Anex_2.pdf.
nullification of discriminatory laws against sexual minorities and the introduction of protective legislation\textsuperscript{60}. Nepal’s \textit{Country Code}, a comprehensive legislation that includes criminal law provisions, explicitly criminalizes bestiality but also ambiguously punishes ‘unnatural’ sexual intercourse\textsuperscript{61}. Nepal also has a system of citizenship wherein on the age of attaining majority any male or female in Nepal who satisfies certain domiciliary and ethnic conditions can apply and obtain a citizenship card. This card provides several entitlements including ration, passport, public employment opportunities, and residential rights. However, since the law permits persons to register only as male or female, \textit{metis}, transgendered persons in Nepal, are effectively left out of such basic citizenship entitlements. The petitioner sought an order from the court which recognized the fundamental right to equality for \textit{metis} so that they may obtain citizenship rights. The petitioner argued that transgendered persons are human beings too who should be recognized as such and have access to all rights entitled to males or females. The Supreme Court issued a “show cause” notice to the defendants, the Nepal government, Prime Minister and Council of Ministers, the Ministry of Law & Justice and the Parliament Secretariat. All the defendants responded by raising one main argument: that there was no need for special legal protection of the petitioners since the Interim Constitution guaranteed the right to non-discrimination on the basis of religion, sex, caste, origin, race, language or belief within which the petitioner’s rights were protected as such.

The court relied considerably on international judicial and legislative developments related to the rights of sexual minorities while passing judgment. It also based its reasoning on comparative constitutional and legal provisions recognizing persons of a third gender, scientific evidence about the immutability of sexual orientation, and academic articles on the issue of sexual orientation. The judgment is unclear regarding the distinction between sexual orientation and gender identity. It relied on definitions and articulations provided in several documents, including the \textit{Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity}. It also described observations of the High Court of the UK and the Australian Family Court regarding gender identity, the European Court of Human Rights in relation to transexuality and the South African Constitutional Court in relation to sexual orientation in the case of \textit{The National Coalition for Gay & Lesbian Equality & Others v Minister of Justice & Others}. Traversing case law of the US Supreme Court (\textit{Lawrence v Texas}) and the Constitutional Court of Ecuador, the Court observed:

\begin{quote}
\textit{“… it seems that the traditional norms and values in regards to the sex, sexuality, sexual orientation and gender identity have been changing gradually. It also seems that the concept specifying that the gender identity should be determined}
\end{quote}

\textsuperscript{60} Unlike some other jurisdictions where courts do not have the authority to direct the legislature to enact legislation, in Nepal the Supreme Court exercises such authority, and has done so in the past, such as in a case related to enforced disappearances in July 2007. It is unclear where such authority emanates from – the authors were unable to locate constitutional source for this exercise of power by the Nepal Supreme Court.

\textsuperscript{61} Part 4, Chapter 16 of Nepal’s \textit{Country Code} states: “Sex with animals

No 1: No one may penetrate an animal or make an animal penetrate him/her or may do or make another person do any kind of unnatural sex.

No 2: If someone penetrates a cow among female animals one may be sentenced to two years jail and if not the cow then one year jail or 500 Nrs fine.

No 3: If a woman makes an animal penetrate her, she may be sentenced to one-year jail or 500 Nrs fine.

No 4: In this chapter, not mentioned in other sections, anyone who does or makes someone practice unnatural sex may be sentenced to one-year jail or 5000 Nrs fine.

No 5: All the cases related to the law written in this chapter need to be reported within one year of the act taking place.”
according to the physical condition and psychological feelings of a person is being established gradually. The concept that homosexuals and third gender people are not mentally ill and it is their normal lifestyle is in the process of establishment.”

The court also relied on the Yogyakarta Principles and the 2006 Report of the UN High Commissioner of Human Rights to illustrate the prejudice and violence being faced by sexuality minorities due to the lack of sufficient legal protection.

It pointed out that the Interim Constitution of Nepal has guaranteed equality in Article 13 and is supported by the Directive Principles of State Policy enshrined in Articles 33 & 34 which require the repeal of discriminatory laws and provision of social justice. Together with this were Nepal’s commitments under international treaties such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Racial Discrimination, which are considered national law under the mandate of the Nepal Treaty Act, 1991, which provides for the ratification of international treaties by Parliament thereby making such a treaty prevail over domestic legislation62. The court observed:

“These [transgendered] people have been compelled to appear in the public life with the identity as determined according to their genital instead of their own characteristics and it is very important to rethink the state of affairs in the context of human rights and fundamental rights...We also should internalize the international practices in regards to the enjoyment of the right of an individual, changing world society and practices of respecting the rights of minority gradually. Otherwise, our commitment towards the human rights will be questioned internationally, if we ignore the rights of such people only on the ground that it might be a social stigma.”

And:

“Any provision that hurt the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights' point of view. The fundamental rights of an individual shall not be shrunk on any grounds like religion, culture, customs, values etc.”

The court held that there should not be discriminatory constitutional and legal provisions that restrict people of a third gender from enjoying their fundamental rights; that Lesbian, Gay, Bisexual, Transgender and Intersex people should not be deprived the enjoyment of their fundamental rights only because of their sexuality and the State should make necessary arrangements for people of a third gender. It observed that,

“...people with having third type of gender identity other than the male and female and different sexual orientation are also Nepali citizen and natural person as well, so they should be allowed to enjoy the rights with their own identity as provided by the national laws, constitution and international human rights instruments. The state has the responsibility to ensure appropriate environment and legal provisions for the enjoyment of such rights. It does not mean that only

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62 Section 9, Nepal Treaty Act, 1990
men and women can enjoy such right whereas other people cannot enjoy it only because of their different gender identity and sexual orientation [sic].”

Finally, it issued two directives to the Nepal government. First, after completing a necessary study in this regard, to either make appropriate laws or amending existing laws to ensure legal provisions, which allow people of different gender identity and sexual orientation to enjoy their rights as other people without any discrimination. Second, based on the claim of equality of the petitioners’, to form a committee to carry out a thorough study and analysis of international instruments relating to human rights, values recently developed in the world in regard to same sex marriage, the experience of countries where same sex marriage has been recognized and its impact on society based on the recommendations of which it is ordered to make legal provisions as deemed suitable.

In India, the decision of the Delhi High Court in *Naz Foundation (India) Trust v. Government of NCT of Delhi & others*63 considered, inter alia, whether Section 377 of the *Indian Penal Code*, 1860 which criminalised consensual non-procreative sex between adults violated the equality guarantee contained in Articles 14 and 15 of the *Indian Constitution*. Article 14 is the overarching equality clause that proscribes the State from denying any person equality before the law or the equal protection of the laws. Article 15 more specifically proscribes the State from discriminating against any citizen on grounds only of religion, race, caste, sex or place of birth. While pointing out that although “Article 14 forbids class legislation it does not forbid reasonable classification for the purpose of legislation” the court reiterated the view of many earlier decisions, that the classification ought to have a causal connection with the object sought to be achieved by the legislation. It added that a further test that legislation should pass to fall within the vires of the equality guarantee is that it should not be arbitrary. The court held that the State’s argument that the law was required to protect women and children had no bearing on consensual sex between adults and that it failed the classification test. It held that:

“...it is not within the constitutional competence of the State to invade the privacy of citizens lives or regulate conduct to which the citizen alone is concerned solely on the basis of public morals. The criminalisation of private sexual relations between consenting adults absent any evidence of serious harm deems the provision’s objective both arbitrary and unreasonable. The state interest ‘must be legitimate and reasonable’ for the legislation to be non-arbitrary and must be proportionate towards achieving the state interest. If the objective is irrational, unjust and unfair, necessarily classification will have to be held as unreasonable. The nature of the provision of Section 377 IPC and its purpose it criminalise private conduct of consenting adults which causes no harm to anyone else. It has not other purpose than to criminalise conduct which fails to conform with the morals or religious views of a section of society. The discrimination severely affects the rights and interests of homosexuals and deeply impairs their dignity.”

The court observed that Section 377 effectively targeted homosexual men as a class and criminalised them, although it facially criminalised sexual acts without naming homosexuals. In doing so the court quoted the following passage from the judgment of the South African

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63 Writ Petition (Civil) No.7455/2001 [Delhi High Court], Date of Decision: 2nd July, 2009
Constitutional Court in *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*\(^{64}\):

“When everything associated with homosexuality is treated as bent, queer, repugnant, the whole gay and lesbian community is marked with deviance and perversity. They are subject to extensive prejudice because what they are or what they are perceived to be, not because of what they do. The result is that a significant group of the population is, because of its sexual non-conformity, persecuted, marginalised and turned in on itself.”

The court also held that Section 377 falls foul of the equality guaranteed in Article 15, particularly as regards ‘sex’. It found that “sexual orientation is a ground analogous to sex and that discrimination on the basis of sexual orientation is not permitted by Article 15.” It rooted its decision on a Canadian judgment, *Corbiere v Canada*\(^ {65}\), which held that such grounds serve to permit decisions based on stereotypes, which compromise merit and call attention to personal characteristics that are “immutable or changeable only at unacceptable cost to personal identity.” Importantly, the court held that the discrimination prohibited by Article 15 extends not just to State action but also to action which is perpetrated by one citizen against another. It held that, “In our view, discrimination based on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.”

The court also found that Section 377 violated the right to life contained in Article 21 of the *Indian Constitution*. Discussing the content of the right to life, the court held that it encompasses the right to privacy as well as to human dignity. In discussing the growing jurisprudence around the right to dignity, the court referred to the *Yogyakarta Principles* and their definitions of sexual orientation and gender identity. The court also surveyed developments in international jurisprudence on the subject quoting with approval from judgments from across the world including *Toonen v. Australia* (Human Rights Committee), *Lawrence v. Texas* (US Supreme Court) and *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice* (South African Constitutional Court). The judges also referred to the right to equality enshrined in the *International Covenant on Civil and Political Rights*, the understanding of the right to health in General Comment 14 on Article 12 of the *International Covenant on Economic, Social and Cultural Rights*, the 2001 United Nations General Assembly Special Session Declaration of Commitment on HIV/AIDS and the statement endorsed by 66 states presented to the UN Human Rights Council in 2008 calling for an end to discrimination based on sexual orientation and gender identity.

One of the most interesting sections of the judgment tackles the question of morality as a ground for restricting fundamental rights. The court framed the issue stating that where a state law infringes the right to privacy there must be a compelling state interest and asked whether the enforcement of public morality amounts to a “compelling state interest.” In dealing with this issue, the judges distinguished popular morality from “constitutional morality” holding:

> “Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular

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\(^{64}\) 1999 (1) SA 6

\(^{65}\) (1999) 2 SCR 203
morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of “morality” that can pass the test of compelling state interest, it must be “constitutional” morality and not public morality.”

Ultimately the court determined that Section 377, in so far as it criminalized adult, private, consensual sexual acts violated the rights to equality and life as contained in the Indian Constitution. In doing so the court allowed Section 377 to continue to stay in the law books to tackle child sexual abuse of boys due to the lack of a specific law in this regard in Indian criminal law with a recommendation that the government reform the Indian law related to sexual assault. It also highlighted “inclusiveness” as a constitutional tenet that is the underlying theme of the Indian Constitution and held: “In our view, Indian Constitutional law does not permit the statutory criminal law to be held captive by the popular misconceptions of who the LGBTs are. It cannot be forgotten that discrimination is antithesis of equality and that it is the recognition of equality which will foster the dignity of every individual.”

The decision of the Delhi High Court de-criminalizing adult, consensual, same-sex sexual conduct has resulted in the filing of 14 appeals in the Indian Supreme Court challenging the decision. During preliminary proceedings before the Supreme Court, requests by the various petitioners challenging the decision to stay the order of the Delhi High Court were denied by the Supreme Court. The Indian Government has decided not to challenge the verdict and has left the final decision on the matter in the hands of the Supreme Court. Hearings on the review petitions are yet to commence.

The laws in the research countries do not contain specific equality provisions with regard to sexual orientation.

The aforementioned judgments from Nepal and India are momentous watersheds in the region in advancing the fundamental rights of Lesbian, Gay, Bisexual, Transgender and Intersex persons, with potentially significant fallouts in relation to their sexual health. Their basis in equality is of particular importance in that it recognizes the essential aspect of Lesbian, Gay, Bisexual, Transgender and Intersex citizenship from which emanate varied other rights that can secure their lives, including access to services, and health. The expansive interpretation of ‘sex’ by the Delhi High Court to include ‘sexual orientation’ has created a precedent, which can be adapted for similar situations in other national constitutions. The unprecedented recognition of equal rights for persons of a third gender by the Nepal Supreme Court also opens opportunities to re-examine legal frameworks that fail to recognize or understand sexuality and gender outside the male-female binary and continue to criminalize or victimize alternative gender expressions. Whether they have a positive impact in other jurisdictions remains to be seen.

1.3 Non-discrimination based on gender identity

While all the research countries have constitutional guarantees of equality, none of them specifically prohibit discrimination based on gender identity either through constitutional

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66 The authors have received this information from lawyers appearing in the case.
67 The authors have received this information from lawyers appearing in the case.
69 Laws relating to de-criminalisation are discussed in Chapter 2.
protections or statutory law. There are some regulations and government orders of note, however. These include regulations issued by the Medical Council of Thailand governing sex change surgeries, Government orders in one Indian state to improve the welfare of transgender persons and orders from the Election Commissions in India and Bangladesh for the registration of transgender persons.  

As discussed above in sub-section 1.2 (Non-discrimination based on Sexual Orientation), the Nepal Supreme Court judgment dealt with the rights of transgender persons in the case of Sunil Babu Pant v Government of Nepal while the Constitution Drafting Committee of the Thai Constitution has stated in a letter of intent that “sex” as a prohibited ground of discrimination includes gender identity. The Naz Foundation case, also discussed in the previous section, in determining whether discrimination based on sexual orientation violated the right to equality referred also to discrimination based on gender identity and to the rights of transgendered persons but did not, categorically state that gender identity was also a prohibited ground of discrimination.

1.4 Non-discrimination based on HIV status and mandatory HIV testing

While none of the Constitutions of the research countries specifically mention HIV as a prohibited ground of discrimination, the Thai Constitution does prohibit discrimination based on health status. Thailand has reportedly issued

**Indonesia** has issued Presidential and Ministerial decrees related to HIV. The *Decree of the Minister of Manpower and Transmigration of the Republic Indonesia on HIV/AIDS Prevention and Control in the Workplace*, states that workers with HIV/AIDS have the right to employment opportunity equal to that which other labourers are entitled to. It also prohibits mandatory HIV testing. In detailing this and other provisions related to HIV in the workplace, the decree takes note of several international instruments including the *Declaration of the U.N. General Assembly Special Session No. 526/200, ASEAN Declaration on HIV/AIDS Control, 2001, International Labour Organisation Code of Practice on HIV/AIDS and The World of Work* together with its supplementary description titled *International Labour Organisation Code of Practice on HIV/AIDS in the World of Work of the year 2003* and the National Tripartite Declaration Commitment to Combat HIV/AIDS in The World of Work of the year 2003.

In **India**, a state legislation, the *Goa Children’s Act, 2003* provides that no child shall be denied admission to any school on the ground that the child has HIV or AIDS. The prohibition of mandatory testing for HIV is also reflected in the *National AIDS Prevention and Control Policy 2000*. However, broad provisions in some laws have allowed mandatory HIV testing to be conducted. Thus, India’s trafficking law, the *Immoral Traffic Prevention Act, 1956* states that “any person who is produced before a magistrate… shall be examined by a registered medical practitioner for the purposes of determination of the age of such person,

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70 These are discussed in Chapter 4.
71 Supra n. 52
72 Supra n. 56
73 Section 30, paragraph 2, Constitution of Thailand, 2007
74 Number: Kep. 68/Men/2004
75 Section 4, Goa Children’s Act, 2003 (India)
or for the detention of any injuries as a result of sexual abuse or for the presence of any sexually transmitted diseases.”  

In India, several High Courts have dealt with discrimination based on HIV. The leading judgment is the Bombay High Court decision in *MX v. ZY* where the court struck down the dismissal of a person living with HIV who was otherwise qualified to perform his job and who did not pose a risk of transmitting HIV to others in the workplace, as violating the right to equality. MX was a casual labourer employed on a contractual basis with a public sector corporation. A medical examination that was required to get his employment regularised revealed his HIV-positive status based on which his contract was terminated. MX approached the court, arguing that the rules that allowed his termination based on his HIV status violated his fundamental rights under the Indian Constitution. The High Court ruled that his rights to equality and life were indeed violated and established the rule that no person could be deprived of his or her livelihood (employment) except by procedure established by law and that the procedure must be just, fair and reasonable. It further held that where a person is fit to perform the duties of his or her specific job, is otherwise qualified and does not pose substantial risk of transmission to other workers, he or she cannot be denied employment for being HIV-positive. The public sector company was asked to reinstate MX and pay him back wages.

In *Mr. “X” v. Hospital “Z,“* Mr. X, a doctor approached the Supreme Court over the breach of his right of privacy and confidentiality by Hospital Z in revealing his HIV status. The Supreme Court examined the duty of doctors to respect confidentiality and weighed the right of Mr. X with that of the person with whom he was to be married before the result of his HIV test became known and led to ostracism against him and his eventual departure from his home State. In doing so it noted that the duty to maintain confidentiality has its origins in the Hippocratic Oath, an ethical code adopted as a guide for conduct by the medical profession that states among other things, “...Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken of abroad, I will not divulge as reckoning that all such should be kept secret...” This is further reflected in the International Code of Medical Ethics that states, “A physician shall preserve absolute confidentiality on all he knows about his patient even after his patient has died.” In India, the Court noted that this has been included in the Code of Medical Ethics issued under the Indian Medical Council (Amendment) Act 1964 i.e. “Do not disclose the secrets of a patient that have been learnt in the exercise of your profession. Those may be disclosed only in a Court of Law under orders of the presiding judge.”

The Supreme Court agreed that, “in the doctor-patient relationship, the most important aspect is the doctor's duty of maintaining secrecy. A doctor cannot disclose to a person any information regarding his patient which he has gathered in the course of treatment nor can the doctor disclose to anyone else the mode of treatment or the advice given by him to the patient.”

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76 Section 15(5-A), Immoral Traffic Prevention Act, 1956 (India)
77 AIR 1997 Bombay 406
78 Rulings related to HIV status in the workplace have also been followed by other High Courts in India e.g. by the Andhra Pradesh High Court in relation to armed forces in *Lieutenant Commander KN Reddy v Union of India & others* 2008 INDLAW AP 277
79 AIR 1999 SC 495
However it also noted that every Right has a co-relative duty and is not absolute and found that the present case fell under those exceptions to this right. Examining the exception under the Code of Medical Ethics of the Indian Medical Council, the Court examined the nature of the exception and based on the law in England held that, “Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated above under which public interest would override the duty of confidentiality, particularly where there is an immediate of future health risk to others” and that the proposed marriage of Mr. X “carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.”  

Re-affirming that the right to privacy is recognized under Article 21 of the Indian Constitution, the Court discussed the content of this right while referring to several previous Indian Supreme Court decisions, US court decisions including Roe v. Wade and the European Convention on Human Rights in finding that as one of the basic human rights, the right to privacy is not treated as absolute. Finding that the right to privacy arises out of the doctor-patient relationship and that doctors are, morally and ethically bound to maintain confidentiality, the Court acknowledged that the disclosure of true facts can has the tendency to disturb a person's tranquility, may generate many complexes in him and may even lead to psychological problems and lead to such person having a disturbed life all through. “The right, however, is not absolute and may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.” [Emphasis added]. The Court thus held,

“Thus, the Code of Medical Ethics also carves out an exception to the rule of confidentiality and permits the disclosure in the circumstances enumerated above under which public interest would override the duty of confidentiality, particularly where there is an immediate of future health risk to others. The argument of the learned counsel for the appellant, therefore, that the respondents were under a duty to maintain confidentiality on account of the Code of Medical Ethics formulated by the Indian Medical Council cannot be accepted as the proposed marriage carried with it the health risk to an identifiable person who had to be protected from being infected with the communicable disease from which the appellant suffered. The right to confidentiality, if any, vested in the appellant was not enforceable in the present situation.” [Emphasis added]

In relation to the disclosure of Mr. X’s HIV status the Court found that the right to privacy of Mr. X clashed with the right to life oh his prospective bride. The Supreme Court held that her right to life “would positively include the right to be told that a person, with whom she was proposed to be married, was the victim of a deadly disease, which was sexually communicable. Since “Right to Life” includes right to lead a healthy life so as to enjoy all faculties of the human body in their prime condition,” Hospital Z, “by their disclosure that the appellant was HIV(+), cannot be said to have, in any way, either violated the rule of confidentiality or the right of privacy.” The Court held that where there is such a clash of rights, “the RIGHT which would advance the public morality or public interest, would alone be enforced through the process of Court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay, in the Hail,

80 410 US 113 [US Supreme Court]
known as Court Room, but have to be sensitive, “in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day.” (See Legal Duties: Allen)

However, in coming to this conclusion, the Supreme Court also entered into a discussion of the nature of marriage and of the “right to marry” and examined the right of confidentiality in the context of marriage and stated that, “Marriage is the sacred union, legally permissible, of two healthy bodies of opposite sexes. It has to be mental, psychological and physical union. When two souls thus unite, a new soul comes into existence. That is how, the life goes on and on on this planet. Mental and physical health is of prime importance in a marriage, as one of the objects of the marriage is the procreation of equally health children. That is why, in every system of matrimonial law, it has been provided that if a person was found to be suffering from any, including venereal disease, in a communicable form, it will be open to the other partner in the marriage to seek divorce.[sic]”

Examining various marriage and divorce laws, the Court found that the emphasis in practically “all systems of marriage is on a healthy body with moral ethics” and that divorce on the grounds that one of the spouses was suffering from a venereal diseases is recognized in nearly all such laws in India. Holding that the person suffering from such disease has the moral and legal duty to inform the prospective spouse of the condition, the Court held further that “the right to marry and duty to inform about his ailment are vested in the same person. It is a right in respect of which a corresponding duty cannot be claimed as against some other person. Such a right, for these reasons also, would be an exception to the general rule that every "RIGHT" has a correlative "Duty." Moreover, so long as the person is not cured of the communicable venereal disease or impotency, the RIGHT to marry cannot be enforced through a court of law and shall be treated to be a “SUSPENDED RIGHT”.

Thus, the Supreme Court did not examine situations where the prospective spouse may consent to such a marriage or may him or herself be living with the same disease and instead suspended the right to marry for persons living with HIV and stated that the infringement of such a suspended right cannot be compensated in tort or in law. The Court further quoted provisions of India’s Penal Code that punish the negligent and malignant spreading of disease, and noting that “if a person suffering from the dreadful disease "AIDS", knowingly marries a woman and thereby transmits infection to that woman, he would be guilty of offences” in the Indian Penal Code. Thus, “The above statutory provisions thus impose a duty upon the appellant not to marry as the marriage would have the effect of spreading the infection of his own disease, which obviously is dangerous to life, to the woman whom he marries apart from being an offence.” In such a situation the Court also held that the Hospital’s silence in such a case would have made them party to the offence.

Stating that people living with HIV deserved full sympathy and are entitled to all respects as human beings, the Court re-affirmed that such persons cannot and should not be avoided as this would have a bad psychological impact upon them; nor can they be denied government jobs or service. “But, "sex" with them or possibility thereof has to be avoided as otherwise they would infect and communicate the dreadful disease to others. The Court cannot assist that person to achieve that object.”

A petition requesting a clarification from the Supreme Court on the observations noted above relating to the right to marry was filed. The Supreme Court held that the decision was

81 These provisions are discussed in greater detail in Chapter 2.
concerned with declaring that the hospital was allowed to reveal Mr. X’s HIV status to the relatives of the girl he was to marry and that she had a right to know his status. “If that was so, there was no need for this Court to go further and declare in general as to what rights and obligations arise in such context as to right to privacy or confidentiality or whether such persons are entitled to be married or not or in the event such persons marry they would commit an offence under law or whether such right is suspended during the period of illness.” The Supreme Court accordingly held that the observations related to the right to marry were “uncalled for.”

In Nepal, a leading Supreme Court case dealt with issues related to privacy of women, children and persons affected by HIV. In *Forum for Women, Law and Development v Government of Nepal and others* (2006) the Supreme Court of Nepal passed judgment in relation to the right to privacy and confidentiality in sensitive cases such as those related to persons living with HIV and violence against women or children.

The court referenced the right to privacy as enunciated in several international treaties - Article 12 of the *Universal Declaration of Human Rights*, Article 17 of the *International Covenant on Civil and Political Rights*, Article 16 of the *Convention on the Rights of the Child*. Based on Section 9(1) of the *Treaty Act, 1990*, the court added that as “Nepal has become a party to the international human rights Conventions and accepted the obligations imposed by them, there is no dispute that the State must implement those obligations by incorporating them in the Constitution, statutes, law and rules and also various programmes.” It stated that as Nepal had signed the United Nations General Assembly Special Session *Declaration of Commitment on HIV/AIDS, 2001*, which required countries to make laws to ensure the rights of persons living with HIV, this would also include confidentiality/ privacy measures and even though such declarations did not carry the binding force of treaties they should be implemented in spirit by relating them to the treaties. It also pointed out that this right was enshrined in Article 22 of Nepal’s previous Constitution. The court also noted that this right found expression in relation to judicial proceedings in Nepal’s *Children’s Act, 1992* wherein Section 49 placed limitations on the publication of litigations involving children in the press without necessary authorization. Similarly, recent changes in judicial procedural rules also provided for in camera proceedings in certain circumstances, such as cases of alleged rape and trafficking (although the court expressed grave distress at the non-implementation of these requirements). However, there were no specific provisions to protect the privacy of persons living with HIV who were involved in litigations.

The petitioner sought the issuance of a court order for immediate enactment and enforcement of a law to guarantee the privacy of women, children and HIV-positive persons in legal proceedings including filing of litigations, the carrying on of legal proceedings and publication of judgments. The petitioner contended that if the privacy of these persons is not protected then they would be unable to exercise their right of judicial redressal due to the prevailing stigma surrounding issues related to their cases. While hearing the case, the court

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82 *Mr. ‘X’ v. Hospital ‘Z’ AIR 2003 SC 664*

83 It should be noted that the analysis of this judgment is based on an unofficial English translation provided by the petitioner in the case. The citation of the judgment is unavailable.

84 The case was filed in the public interest under the previous Nepali Constitution of 1990. Overcoming this apparent inconsistency, the court held that although the 1990 Constitution stood repealed at the time of adjudication, since the Interim Constitution provided for the right to privacy under Article 28 and retained the extraordinary jurisdiction of the court to grant remedies in matters of public interest under Article 107, it was feasible for the court to deliver justice on the matter at hand.
sought model guidelines from the petitioners in this regard. The court pointed out that women and children find themselves in unequal social positions in Nepali society and particularly in cases where they have suffered violence they would hesitate to approach the courts for justice unless their privacy was protected. This was also true of persons living with HIV persons who have to deal with severe social stigma. In this regard the court observed:

“At a time when the judicial remedy is required against all kinds of injustice, due to the fear of being a victim of additional neglect and boycott in the event of disclosure of one’s infected physical condition and identity coupled with systemic delay, one may opt for discarding the process of judicial remedy. If such a situation is created, the infected person has not only to face a threat to his/her life rather if such an infected person, who is incurable and dejected, behaves in a way as if s/he was not infected, a vicious circle of infection is created.”

The court pointed out that the rights to equality, personal freedom, opinion and expression and access to justice are inviolable and that the right to privacy is linked to all of these rights in an indivisible manner, thereby prohibiting outside interference in the personal matters of an individual.

Expanding on the notion of access to justice the court framed its role as “a service” and stated:

“By a mere declaration of rights in the law negative social psychology or obstacles existing in the way of enjoyment of the rights may not disappear automatically. If such a reality is ignored, there may be a danger of our findings becoming more technical than substantive. As a result, our services may not be automatically available to the people for whom they have been created or to whom they have been dedicated. If favourable conditions are not created, the parties, despite their willingness, may not have the capacity to accept our services. In that event a situation may arise where our services may not be available to those who need them most whereas those who do not need them may get more benefited by them. Therefore, taking into consideration such a stark reality, it is necessary to, by ensuring an individual’s right to judicial remedy, grant him/her effective and easy access to justice and to guarantee privacy of the personal identity of the parties involved in the judicial process through the protection of the right to privacy. Its main objectives are that the concerned party may not lose his/her courage to seek remedy against injustice and s/he may not be made to experience any additional disqualification or disadvantage in practice for the reason of having raised one’s voice against injustice. It is the belief of this Bench that if in the eyes of the incapacitated sections of the society our services lose attraction or do not carry conviction it shall have to be treated as an indication of the gradual end of the social utility of our services.

In fact, the right to access to justice is a right covering an expansive area which has got various complementary dimensions. Out of them, in addition to other matters, it is clear that the protection of the right to privacy of the victim is an important part. It is essential for the judicial system to always maintain a balance between the obligation to give fair treatment to the parties present in the judicial process and the right of the parties to have access to justice. In this context,
without guaranteeing the personal privacy of the victims and their personal security and without taking into consideration the disadvantages confronted by the victims, justice cannot take a firm and expressive form in the midst of revenge and fear. For arousing this feeling of self-confidence and security among the persons who have come forward to seek justice it is essential to give them guarantee of the privacy of their personal identity or other related information. If viewed in this way, the need and relevance of the protection of the privacy of the personal identity and other related information of the women, children or HIV/AIDS infected persons who have come to be present in the judicial process appears to be clearly important from the viewpoint of the enjoyment of the right to judicial remedy.”

It then deliberated on the right to have a fair hearing in relation to the privacy right. Again, it found basis in international treaty provisions such as Article 14 of the International Covenant on Civil and Political Rights, which provides for the right to a fair and public hearing except, inter alia, when the interest of the private lives of the parties require the exclusion of publicity. The court found that the ‘public’ nature of a court hearing was not lost only due to restrictions imposed on the entry of particular persons or non-disclosure of the identity of particular persons involved in the case. It held that for purposes of fair administration of justice a person should be able to depose before the court without fear of intimidation. Yet, a balance would also have to be found between this right to privacy and the community’s right to information and it has to be seen whether non-disclosure obstructs the delivery of justice in any way.

The court reiterated Article 28 of the Interim Constitution, which protects the privacy of the person in relation to residence, property, documents, records, correspondence, reputation and statistics. It then articulated the notion of “personal introductory information”, which was subject to protection and said that this included the name, family title and address of a woman who is involved in a criminal case in relation to sexual violence, trafficking or abortion or of a child who is involved in criminal litigation before a juvenile court; and all related information regarding the disclosure of the identity of a person affected or infected with HIV/AIDS who is involved in a lawsuit.

In relation to women the court highlighted the guarantee of non-discrimination on grounds of gender in the Interim Constitution (Article 13) and held that “if any woman involved in any specific litigation or placed in a particular situation does not feel the presence of a friendly environment for easy access to justice at par with men, the act aimed at bringing change in such a situation shall have to be treated as a part of the greater process of removing discrimination against women.”

It also equated the protection of privacy of those impacted by HIV/AIDS as a step in mitigating “torture or inhuman behavior against them”, which was germane to the right against torture guaranteed in Article 26 of the Interim Constitution.

Based on its conclusions the court directed the government to present, at the earliest and based on a consultative process with civil society, a Bill before Parliament making law regarding protection of privacy of women, children and persons living with HIV in judicial proceedings. Till such time, the court enunciated certain interim provisions for immediate effect by all judicial bodies and related government entities, based on model guidelines submitted by the petitioner and derived from its extraordinary jurisdiction under Article 88 of
the 1990 Constitution and Article 107 of the Interim Constitution and precedents established by it and borrowing from similar precedents of the Indian Supreme Court.\textsuperscript{85} The guidelines provided for the protection by investigating, judicial and implementing bodies of all personal introductory information of women and children involved in criminal cases in relation to sexual violence, trafficking or abortion or involved in criminal litigation before a juvenile court respectively and persons affected by HIV in any lawsuits. All parties involved in the cases were liable to maintain the privacy of such information. The guidelines also prescribed a procedure for maintaining confidentiality of the information through sealing, coding etc. and stipulated that violations would be subject to contempt of court proceedings and departmental disciplinary action as applicable.

Apart from a few exceptions described above, issues related to HIV, discrimination and mandatory testing in the research countries are left largely as articulations of policy or to be decided by the courts (as the above examples from Nepal and India illustrate), on a case by case basis. Indeed, courts have applied constitutional guarantees to equality to discriminatory acts based on HIV status. However, such constitutional guarantees apply mainly to the public/state sector, leaving the private sector outside their purview and therefore potentially free to discriminate unlawfully against persons living with HIV. To cover this vast gap in the law, the Indian and Nepali Governments are presently considering anti-discrimination Bills relating to HIV aimed at covering the private sector.\textsuperscript{86}

### 1.5 Sexual Harassment

The research countries have adopted different routes to address the issue of sexual harassment. While in India and Bangladesh, the Supreme Courts have laid down extensive guidelines, in Thailand and Nepal the emphasis has been on the use of labour laws and in Sri Lanka through the use of laws related to bribery.

**India** does not have legislation, which addresses the issue of sexual harassment. However, the Supreme Court of India has passed a few significant judgments in this regard. The Indian Supreme Court has evolved principles related to sexual harassment, which were first articulated in Vishaka and others v. State of Rajasthan\textsuperscript{87} and followed subsequently. This case is significant being among the first instances where, in the absence of clear statutory law, the Supreme Court used international treaty commitments to elucidate Indian law. In this case a public interest petition was filed seeking directives from the court in relation to sexual harassment in the workplace in the aftermath of an alleged gang rape of a social worker.

The court anchored its views in the fundamental rights of equality (Article 14), life and liberty (Article 21) and the right to carry on a profession or occupation (Article 19(1)(g)) as provided in the Indian Constitution. It referred to Article 51, a Directive Principle of State Policy, which stipulated that the state endeavour to “…foster respect for international law and treaty obligations…” It also relied on Article 253 of the Indian Constitution which empowers the Parliament to make laws to implement treaties or conventions that India is party to. The court pointed out that in the absence of domestic legislation covering the issue of sexual harassment, the contents of international treaties become significant in interpreting the aforementioned fundamental rights. It held: “Any International Convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions

\textsuperscript{85} The Nepal Supreme Court cited Vishaka v State of Rajasthan AIR 1997 SC 3011
\textsuperscript{86} The HIV/AIDS Bill 2006 (India) and the National AIDS Bill 2066 (Nepal), drafts on file with authors.
\textsuperscript{87} 1997 (6) SCC 241
to enlarge the meaning and content thereof, to promote the object of the constitutional guarantee.”

The court referred to Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women, which obliged states to eliminate discrimination against women in employment, including the right to protection of health and safety in the workplace. It pointed out that the Indian government had ratified all the material parts of this convention and voiced its commitment to ensure gender equality at various fora including the World Conference on Women in Beijing. In light of this, the court stated, it had “no hesitation in placing reliance” on the convention “for the purpose of construing the nature and ambit of constitutional guarantee of gender equality” in the Indian Constitution.

Referring to the fundamental rights in the Indian Constitution it added:

“The international conventions and norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law.”

Thereafter the Supreme Court laid down guidelines for sexual harassment in the workplace and held that until legislation for this purpose is enacted these guidelines would be treated as law. At present India has not legislated on sexual harassment. The guidelines include duties on the employer such as prevention and deterrence of sexual harassment in the workplace and providing resolution mechanisms in the event of complaints. ‘Sexual harassment’ is defined as direct or implied “unwelcome sexually determined behaviour” such as “physical contact and advances, a demand or request for sexual favours, sexually coloured remarks, showing pornography and any other unwelcome physical, verbal or non-verbal conduct of sexual nature.” These guidelines are applicable to the public and private sectors. Onus is placed on the central government to ensure that they are adopted and implemented by the private sector. The guidelines require employers to notify and publicise prohibition of sexual harassment.

Further, rules and regulations of private and public sector bodies relating to conduct and discipline are required to specifically include this prohibition and prescribe penalties for the same and work conditions are to be appropriately provided in a manner that assures women of a non-hostile workplace environment. Where sexual harassment amounts to an offence under the Indian Penal Code, 1860 employers are required to initiate legal proceedings with the appropriate authority. A complaint mechanism is also prescribed in the guidelines. It includes setting up of a complaints committee headed by a woman with half membership being women and third party representation so as to mitigate undue pressure exerted from senior management. The committee is required to make an annual report of its functioning to the concerned government department (in the case of public sector enterprises) and the person in charge of the workplace is also required to submit a compliance report to the concerned government department.

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88 Ibid.
89 Ibid.
90 Ibid.
Following this case, Indian courts have further deliberated on sexual harassment. In *Apparel Export Promotion Council v. AK Chopra* 91 the Supreme Court considered a case where the respondent was removed from employment for having made sexual advances to a woman employee. However, in appeal, the High Court reinstated the respondent on the ground that he had only tried to molest the woman but not actually done so and had failed to make physical contact with the woman. The Supreme Court found that the High Court had ignored the intent of the international conventions and norms which form the basis of its guidelines in *Vishaka’s* case. It reiterated the definition of sexual harassment in that case and found that the respondent’s actions fell squarely within the definition. It held that “in a case involving sexual harassment or attempt to sexually molest, the courts are required to examine the broader probabilities of a case and not get swayed by insignificant discrepancies or narrow technicalities or dictionary meaning of the expression ‘molestation’.” 92 Dismissing the High Court’s ruling, it further pointed out that reduction of punishment in such cases is retrograde and has a demoralizing effect on women employees.

*Arati Gavandi v. Managing Director, Tata Metaliks Limited & others* 93 is a case, which demonstrates the continued non-adherence of the Indian Supreme Court’s guidelines as laid down in *Vishaka’s* case. Here the Bombay High Court considered the case of a woman who was sexually harassed by her manager through lewd remarks, vulgar gestures and attempted physical contact. By not responding to these overtures the petitioner claimed that she was denied a transfer by the manager. This conduct continued over a period of time. She finally submitted a representation to the state Women’s Commission and the District Collector placing the facts before these authorities. Thereafter a complaint was lodged before the police and the management of the company. The commission addressed a letter to the company management stating that, as per Supreme Court directives in *Vishaka’s* case, a complaints committee should be constituted to look into the petitioner’s case. As this was not done the petitioner approached the Bombay High Court seeking directions to the company to institute a committee to look into her grievances. The High Court reiterated the constitutional foundations of gender equality and the inextricable link between this right and the imperative for a safe workplace for women:

“The right to gender equality is intrinsic to the right to life under Article 21 of the Constitution. The right to life comprehends the right to live with dignity. An affront to or the invasion of gender is destructive of the right of every woman to live with dignity. Article 15 of the Constitution which contains a prohibition inter alia against discrimination by the State on the ground of sex is an emanation of that right. The provisions of the Constitution recognize gender equality as a fundamental right. Gender equality in all its dimensions is a basic human right which is recognized by and embodied in the provisions of the Constitution. The broad sweep of the human right to gender equality traverses every facet of the position of a woman in society. The right comprehends the preservation of the dignity of women. At a basic level, gender equality postulates protection of women against all those practices which invade upon the dignity of being and the privacy of the person. A dignified existence includes the right to earn one's livelihood in conditions that are fair and gender neutral. A condition which operates to disadvantage a woman worker on the ground of gender is fundamentally anachronistic to the vision of our constitutional order. Gender as

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91 1999 (1) SCC 759
92 Ibid.
93 2008 (6) Bom CR 1 2008
a concept has wider dimensions than sex. Gender equality postulates the realization of societal values that travel beyond a mere notion of sexual equality. Gender in that sense denotes the realization of every facet of personality that contributes to the fullness of life to which a woman is entitled.\textsuperscript{94}

The court then expressed its displeasure at the failure of the company-employer in complying with Supreme Court directives to set up a complaint committee to investigate and resolve issues of sexual harassment in the workplace. It stated that the appointment of an advocate by the company as an enquiry officer did not constitute adequate compliance with the guidelines issued by the Supreme Court in Vishaka’s case and directed compliance forthwith.

Although none of the Constitutions of the research countries contain specific provisions related to sexual harassment, the Constitution of Thailand provides that “a person shall have rights to the guarantee of personal safety and security at work...”\textsuperscript{95} Thailand’s Labour Protection Act (No.2) B.E. 2551 (2008) also provides that, “an Employer, a chief, a supervisor, or a work inspector shall be prohibited from committing sexual abuse, harassment or nuisance against an employee.”\textsuperscript{96} This provision amends the previous sexual harassment provision of the Labour Act which was restricted to females and children, thus making the law gender neutral.

As in the case of Thailand, the Labour Act, 2006 of Bangladesh provides that, where any female worker is employed in any work of the establishment, irrespective of her rank or status, no one of the establishment shall behave with the female worker in a manner that may be seen to be indecent or repugnant to the modesty or honour of the female worker.\textsuperscript{97} However, the insufficiency of labour law provisions that are applicable only to the workplace was highlighted by the Bangladesh High Court in its decision framing rules for tackling sexual harassment.

In Bangladesh National Women Lawyers Association (BNWLA) v. Government of Bangladesh and Others,\textsuperscript{98} women’s groups approached the High Court over the failure of the government to provide proper guidelines or legislation to address the issue of abuse of sexual harassment. The Court while examining the matter, laid out several different scenarios, often quoting media reports of sexual harassment taking place in different settings including the garment sector, a hospital, a media house, universities, NGOs, etc. The government argued that the existing provisions of the law were sufficient to cover sexual harassment.

In delivering its judgment, the High Court first considered the Constitutional scheme and held that the provisions of the Bangladeshi Constitution were sufficient to cover every aspect of gender inequality. The Court then enumerated the different international human rights treaties Bangladesh had signed and their provisions; these included the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women (including the Optional Protocol that Bangladesh signed in 2000) and the Declaration on the Elimination of Violence Against Women. In particular the Court examined the

\textsuperscript{94} Ibid.  
\textsuperscript{95} Section 44, Constitution of Thailand, 2007  
\textsuperscript{96} Section 8, Labour Protection Act, 2008 (Thailand)  
\textsuperscript{97} Section, Labour Act 2006 (Bangladesh)  
\textsuperscript{98} Writ Petition No. 5916 of 2008, High Court Division of the Supreme Court of Bangladesh, (Date of Decision: 14\textsuperscript{th} May 2009)
definitions of violence and sexual harassment given by some of these agencies as well as judgments of foreign courts. In the application of these in Bangladesh, the Court ruled that,

“Our courts will not enforce those Covenants as treaties and conventions, even if ratified by the State, are not part of the corpus juris of the State unless those are incorporated in the municipal legislation. However, the court can look into these conventions and covenants as an aid to interpretation of the provisions of Part III, particularly to determine the rights implicit in the rights like the right to life and the right to liberty, but not enumerated in the Constitution. In the case of H.M. Ershad v. Bangladesh, 2001 BLD (AD) 69, it is held: “The national courts should not straightway ignore the international obligations which a country undertakes. If the domestic laws are not clear enough or there is nothing therein the national courts should draw upon the principles incorporated in the international instruments.”

Based on this and relying heavily on the Indian Supreme Court’s Vishaka judgment, the Bangladesh High Court gave detailed directions to be applied in all workplaces and educational institutions in the public and private sectors till a law was passed. The judgment provides that it is the duty of all employers and authorities to maintain an effective mechanism to prevent or deter the commission of offenses of sexual abuse and harassment in keeping with their duty to observe the Constitution which ensures gender equality. The directions to a large extent mirror the Indian Court’s guidelines in terms of setting up a complaints mechanism, creating awareness of rights, providing for disciplinary action, etc. One key area where the Bangladesh High Court differed from the Indian directions was in the expansion of the definition of sexual harassment which includes:

“a. Unwelcome sexually determined behaviour (whether directly or by implication) as physical contact and advances;
b. Attempts or efforts to establish physical relation having sexual implication by abuse of administrative, authoritative or professional powers;
c. Sexually coloured verbal representation;
d. Demand or request for sexual favours;
e. Showing pornography;
f. Sexually coloured remark or gesture;
g. Indecent gesture, teasing through abusive language, stalking, joking having sexual implication.
h. Insult through letters, telephone calls, cell phone calls, SMS, pottering, notice, cartoon, writing on bench, chair, table, notice boards, walls of office, factory, classroom, washroom having sexual implication.
i. Taking still or video photographs for the purpose of blackmailing and character assassination;
j. Preventing participation in sports, cultural, organizational and academic activities on the ground of sex and/or for the purpose of sexual harassment;
k. Making love proposal and exerting pressure or posing threats in case of refusal to love proposal;
l. Attempt to establish sexual relation by intimidation, deception or false assurance.
Such conduct mentioned in clauses (a) to (l) can be humiliating and may constitute a health and safety problem at workplaces or educational institutions; it is discriminatory when the woman has reasonable grounds to believe that her objection would disadvantage her in connection with her education or employment in various ways or when it creates a hostile environment at workplaces or educational institutions.”

In 

Rajendra Thapalia v. General Manager (Personnel) T.R. Bhatta, on behalf of the Management of the Royal Casino Royal

99 despite the absence of statutory law the Nepal Supreme Court established sexual harassment at the workplace as punishable through interpretation of the Nepal Constitution and commitments made by its ratification of international instruments. It asked the government to amend the existing labour laws so as to include sexual harassment.

While finding the Appellant guilty of sexual harassment, the judge pointed out the lacunae in Nepal’s Labour Act and drew the attention of the Parliament to the necessity of an amendment to the Act. In this case the perpetrator was charged with having stood very close to a woman employee of a casino, looking at her lecherously, using indecent and offensive words, and behaving indecently with her. The management came to the conclusion that the perpetrator had indeed gone close to the victim and issued a warning letter to him, following which he challenged the same before the court.

The court stated that in Nepal “as attempts have just begun to be made to encourage women to take up outdoor works and as priority is being given to encourage them to economic and professional activities, in order therefore to prevent women being dissuaded due to sexual harassment by colleagues and bosses in workplace, it is necessary to be sensitive and sympathetic for providing legal remedies to them against such acts. The court should also look into these types of cases with sympathy and sensitivity”.

In the absence of any direct law to address the issue, the court recorded that as Nepal is one of the signatories to the Convention on Elimination of All Forms of Discrimination Against Women under the Nepal Treaty Act, 1991, the convention was as good as Nepali law. To support their view, two other Supreme Court cases (Reena Bajracharya and Meera Dhungana, on behalf of FWLD) which had interpreted that the Convention on Elimination of All Forms of Discrimination Against Women “is operational like [any other] Nepali law” were cited.

Pointing out that studies have shown sexual harassment to adversely affect the physical and mental health of women, sometimes compelling them to leave their jobs, the court held that such behaviour was considered criminal under Section 1 of the chapter “Of Indecent Assault” of the Country Code, and a provision for punishment had also been made. However, sexual harassment was not included in the misconducts enumerated in Chapter 8 of the Labour Act, 1991 and only bye-laws included sexual harassment, which could be easily amended. Moreover, only a warning could be given to the perpetrator as per the existing labour law. The court, therefore directed that provisions relating to sexual harassment should be

99 Citation not available. It should be noted that the authors did not have access to this and related judgments, which are discussed in the immediately following paragraphs. This description is based on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
incorporated in the Act itself, and in view of the gravity of the offence, the degree of punishment should also be increased.

In *Sharmila Parajuli et al v. Government of Nepal*\(^{100}\) the Nepal Supreme Court ordered the government to take steps to enact appropriate laws relating to sexual harassment. Consequently, a gender equality law\(^{101}\) was introduced, which amended the Chapter on Intention to Sexual Intercourse in the Nepal *Country Code* in order to penalize sexual harassment against women. The new law stipulates that acts would amount to sexual harassment if any person, without consent of a woman, touches or tries to touch her sensitive organ, removes or tries to remove her undergarment, takes her to any solitary place in an unnatural manner, causes her to touch his/her sexual organ or uses any sexually motivated words or symbols or shows her such photographs or drawings, teases or harasses her with sexual motives or behaves with her in an unnatural way or catches her with the motive to have sexual intercourse. However, this provision does not recognize other forms of sexual harassment such as psychological pressure. It also fails to provide mechanisms by which women feel secure in making complaints about incidents of sexual harassment.\(^{102}\)

*Sri Lanka’s* Penal Code contains a provision that addresses the issue of sexual harassment. It punishes any person who by assault, use of force, or the use of words or actions, causes sexual annoyance or harassment to another person. It further explains that “*unwelcome sexual advances by words or action used by a person in authority*” would be considered an offence.\(^{103}\) The Court of Appeal, however, dealt with this issue in a unique manner in the case of *Kathubdeen v. Republic of Sri Lanka*\(^{104}\). In this case the accused was a senior manager of the security division of a public sector enterprise. The complainant was a security guard working within this division and came under the supervision and control of the accused who was her immediate superior. She requested a transfer to another city where her husband resided. The accused told her that “*she should spend time with him as husband and wife*” in order to help get a transfer, which she refused. Her transfer request was denied. Her case was that the accused refused to give her transfer due to her unwillingness to accede to his demands. She even verbally informed the deputy General Manager of this harassment but was reluctant to make a complaint in writing. The deputy General Manager sent a confidential letter about this situation to the Bribery Commissioner’s Department and investigations commenced.

At this point the complainant made a statement to the Bribery Officers. Thereafter they organized a set up of the accused whereby the complainant introduced the accused to a friend, purportedly a married woman whose husband had left her and was willing to do anything to secure a job. The complainant also expressed her willingness to sleep with the accused in order to obtain a transfer. The accused invited the complainant and her friend to his house where he was willing to discuss the complainant’s transfer application and the friend’s job application. On visiting his house the complainant and her friend were let in by the accused who was dressed in a sarong. He took the complainant into another room and stripped naked.

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\(^{100}\) 2002. Citation not available. It should be noted that the authors did not have access to this and related judgments, which are discussed in the immediately following paragraphs. This description is based on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

\(^{101}\) An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006 (Nepal)

\(^{102}\) Section 11, ibid.

\(^{103}\) Section 345, Penal Code, 1883 (Sri Lanka)

\(^{104}\) 1998. Citation not available, however, authors have access to full text of the judgment.
embraced the complainant and asked her to kiss his genitalia. At this point the Bribery Officers walked in and arrested the accused. The accused was indicted under the Bribery Act for soliciting and attempting to accept a gratification (i.e. sexual intercourse) with the complainant, as a reward or inducement for arranging a transfer.

The accused was found guilty at trial and sentenced to nine years rigorous imprisonment. He appealed to the Court of Appeals. The court observed that Section 90 of the Bribery Act defined ‘gratification’ to include among other things, any service, favour or advantage of any description whatsoever. It held that ‘gratification’ was used in its larger sense as connoting anything “which affords satisfaction or pleasure to the taste, appetite or the mind. The craving for an honorary distinction or for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification which is not estimable in money.” It found the accused guilty of gratification under the Bribery Act and upheld the conviction.

There has been significant progress in recognizing the need for those facing sexual harassment to have legal recourse in the research countries. In particular, the courts have used expansive interpretation and borrowing human rights principles from international treaties such as Convention on Elimination of All Forms of Discrimination Against Women, they have laid down clear, salutary guidelines on sexual harassment, particularly in the workplace. Through the judgment in Vishaka’s case in India, this area of jurisprudence has also witnessed the use of precedent beyond national boundaries, particularly in relation to South Asia. It remains to be seen whether national governments whose high courts have laid down these judicial decisions will follow with concrete legislation, as has been done in Nepal.

1.6 Access to adoption (same sex couples, single persons)

The general law of adoption in Sri Lanka is the Adoption of Children Ordinance, 1941. Although it does not envisage adoption by same-sex couples (Sri Lankan law does not recognise such relationships whether they are marital or not) this law does permit adoption by individual applicants. The limits placed on any applicants (including sole applicants) are that the applicant should be over 25 years of age and at least 21 years older than the child to be adopted. Additionally, a male sole applicant is prohibited from adopting a female child “unless the court is satisfied that there are special circumstances which justify the making of an adoption order.”

Adoption in India, till recently fell within the domain of personal law and was determined based on the religion of the person. Consequently only Hindus in India were allowed to adopt (under the Hindu Adoptions & Maintenance Act, 1956) whereas non-Hindus could only become guardians and wards under the Guardians and Wards Act, 1890. Guardianship confers rights and duties on the guardian to take care of the person and property of a minor until the minor reaches majority and therefore cannot be considered on par with parenthood through adoption and children in guardianship are therefore not accorded the same legal status as biological or legally adopted children. However, the Bombay High Court radically departed from this limitation when it delivered a far-reaching judgment in which it acknowledged that under personal laws the petitioners, as Christians, were not allowed to adopt, but there existed a fundamental right to life of an abandoned child, which included the

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105 Sections 2 & 3, Adoption of Children Ordinance, 1941 (Sri Lanka)
106 Section 3, ibid.
107 Sections 3(2), ibid.
108 Hindus may also become guardians under the Hindu Minority and Guardianship Act, 1956 (India)
right to be adopted by willing parents and to have a home. It held that this right existed and the petitioners, despite being Christians, were entitled to adopt so as to enforce this right of the abandoned child.109

The Hindu Adoptions & Maintenance Act, 1956 also discriminated against women desirous of adopting. Whereas married men are permitted to adopt with the consent of their wives, married women are not allowed to adopt irrespective of their husband’s consent.110 Similarly, only men also have the right to give a child in adoption whereas women may do so only if they are widowed or if their husband’s are declared to be of unsound mind, have renounced the world or have ceased to be Hindu.111 Interestingly, the law permits single or unmarried men and women to adopt thereby bestowing parenthood on single persons.112 However, this does not allow same sex partners of these single persons to claim parenthood.

However, many of the restrictions on persons of religions other than Hinduism and on the ability of unmarried persons to adopt were removed through amendments in 2006113 to the Juvenile Justice (Protection and Care of Children) Act 2000. The amendments introduced a definition of adoption as, “the process through which the adopted child is permanently separated from his biological parents and becomes the legitimate child of his adoptive parents with all rights, privileges and responsibilities those are attached to the relationship.” The amendments also clarify that a court may give a child in adoption:

“(a) to a person irrespective of marital status; or
(b) to parents to adopt a child of the same sex irrespective of the number of living biological sons or daughters, or
(c) to childless couples.”114

Adoption is not permitted in Bangladesh though Bangladeshi citizens may be appointed guardians for minors under the Guardians and Wards Act, 1890. This law does not specify that persons who have to be appointed as guardians must be married and single persons may be appointed as guardians subject to the fulfillment of the conditions of the law.

Under Thailand’s Civil and Commercial Code, a person above the age of 15 who is being adopted must consent to such adoption.115 Although there are further provisions in the Thai law related to adoption, a verifiable English translation of these provisions was not available for this review.

In Indonesia, provisions for the guardianship and adoption of children are contained in the Law on Child Protection, 2002 and the Law on Human Rights 1999. Under the Law on Human Rights 1999, “every child has the right to know who his parents are and to be brought up and cared for by his own parents”; if this is not possible then the child may be fostered/adopted by another person.116 Under the Law on Child Protection, 2002, adoption may only be carried out in the best interests of the child, shall be based on local custom and

109 In the Matter of Manuel Theodore D’Souza 2000 (2) Bom CR 244
110 Sections 7 & 8, Hindu Adoptions and Maintenance Act, 1956 (India)
111 Section 9, ibid.
112 Sections 7 and 8, ibid.
113 The Juvenile Justice (Care and Protection of Children) Amendment Act, 2006
114 Section 41, Juvenile Justice (Protection and Care of Children) Act 2000
115 Section 1598/20, Civil and Commercial Code (Thailand)
116 Article 56, Law on Human Rights, 1999 (Indonesia)
does not sever the ties between the child and his or her blood parents.\textsuperscript{117} The law is silent as to who may adopt (married couples or single persons though it uses the terms “adoptive parents” that may indicate a preference for couples) and only specifies that a child may be adopted by parents of the same religion as the child; where there is lack of clarity on the religion of the child, it is to be assumed to be the majority religion of the area to which the child belongs.\textsuperscript{118} The adopted child must be informed of his or her natural parents and background with due regard to the ability and condition of the child to receive such information.\textsuperscript{119} Similarly the Law on Marriage, 1974\textsuperscript{120} and Law on Child Protection, 2002\textsuperscript{121} also provide for the guardianship of a child but are again silent on whether individuals, couples or married couples may be appointed as guardians.

1.7 Access to In-vitro fertilization (IVF)/Assisted reproduction technologies (ART)

Among the research countries, India and Thailand are the only ones that have regulations relating to IVF and ART. In Thailand, the Medical Council which is empowered under the Medical Profession Act to issue regulations, issued regulations governing the provision of ART services in 1997. However, verified English translations of these regulations could not be obtained by the authors for the purposes of this paper.

While ART remain unregulated by law in India, they are covered by guidelines of the Indian Council of Medical Research, which do not possess legal force.\textsuperscript{122} Although these guidelines dwell largely on requirements for a clinic to provide ART services they also address issues of consent and some legal and ethical issues, including the capacity of HIV-positive women to access ART or be donors or surrogates. However in a recent case related to surrogacy the Supreme Court of India (Baby Manji Yamada v. Union of India and Anr.),\textsuperscript{123} while examining the situation of a baby born to a surrogate mother for a foreign couple who were now separated, held that if there were any irregularities or problems in such cases, the National and State Commissions established by the Commission for the Protection of Child Rights Act, 2005 should investigate complaints. The Supreme Court also discussed surrogacy in detail and made an interesting observation, which did not have particular relevance to the case before it. It stated:

\begin{quote}
“Intended parents may arrange a surrogate pregnancy because a woman who intends to parent is infertile in such a way that she cannot carry a pregnancy to term. Examples include a woman who has had a hysterectomy, has a uterine malformation, has had recurrent pregnancy loss or has a healthy condition that makes it dangerous for her to be pregnant. A female intending parent may also be fertile and healthy, but unwilling to undergo pregnancy. Alternatively, the intended parent may be a single male or a male homosexual couple.” (emphasis added)
\end{quote}

\begin{footnotes}
\item[117] Article 39, Law on Child Protection, 2002 (Indonesia)
\item[118] Ibid.
\item[119] Article 40, Law on Child Protection, 2002 (Indonesia)
\item[120] Articles 50 to 54, Law on Marriage, 1974 (Indonesia)
\item[121] Articles 37 and 28, Law on Child Protection, 2002 (Indonesia)
\item[122] ‘National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India,’ Indian Council of Medical Research, 2005, available at \url{http://www.icmr.nic.in/art/art_clinics.htm}
\item[123] AIR 2009 SC 84
\end{footnotes}
The law is essentially undeveloped in relation to IVF and ART in the research countries, an area which requires regulation. In the context of “an exponential growth of infertility clinics that use techniques requiring handling of spermatzoa or the oocyte outside the body, or the use of a surrogate mother”, in India, for instance, the Assisted Reproductive Technologies (Regulation) Bill is being proposed, which aims to “regulate the functioning of such clinics to ensure that the services provided are ethical and that the medical, social and legal rights of all those concerned are protected.” The bill “details procedures for accreditation and supervision of infertility clinics (and related organizations such as semen banks) handling spermatzoa or oocytes outside of the body, or dealing with gamete donors and surrogacy, ensuring that the legitimate rights of all concerned are protected, with maximum benefit to the infertile couples/ individuals within a recognized framework of ethics and good medical practice.”

1.8 Same-sex marriage

As noted earlier, the Constitutions of the research countries recognize the rights to life and equality and the Supreme Court of Nepal has used these provisions to recognize equality for Lesbian, Gay, Bisexual, Transgender and Intersex persons and has directed the government to conduct a study related to same sex marriage. Some of the Constitutions also refer to families and marriages. Under the Indonesian Constitution, “every person shall have the right to establish a family and to procreate based upon lawful marriage.” The Thai Constitution makes several references to family rights but these are not defined. However these provisions or indeed the broader equality and other rights provisions have not been used in these countries to permit same-sex marriages or civil unions. Marriage laws in the research countries range from secular codes to personal and custom laws. None of these recognize same-sex marriage.

Indeed, in Sunil Babu Pant v. Government of Nepal the Supreme Court of Nepal issued directives to the government related to same sex marriage. Based on the request made by the petitioners with regard to this issue the court observed that it was an inherent right of an adult to have marital relations with another adult as long as there was free will in entering into such a relationship. The court noted that marriage between same-sex persons has been recognized in some countries and it was “essential to carry out a thorough study and analysis of international instruments relating to the human rights, the values recently developed in the world in this regard, the experience of the countries where same sex marriage has been recognized and its impact on the society as well.”

It directed the government to form a committee comprising a physician, sociologist, representatives of the national human rights commission, the ministry of law and justice, ministry of population and police department and the petitioner’s advocate, which would carry out a study on the concerned issues of same sex marriage and marital status of overall Lesbian, Gay, Bisexual, Transgender and Intersex persons as well as the legal provisions of other countries. The government was further directed to make legal provisions after taking a decision in terms of the recommendations of the committee. However, since this judgment there has been no report of progress of the committee’s functioning.

124 See the preamble to the Assisted Reproductive Technologies (Regulation) Bill available at http://www.icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf
125 Article 28B, Constitution of Indonesia, 1945
The potential recognition of same-sex marriage by the Nepal Supreme Court furthers the quest for equality by Lesbian, Gay, Bisexual, Transgender and Intersex persons and could be an important gain for them in the region and elsewhere. Such recognition provides assurance to individuals in a way that enhances their ability to negotiate sexual relations, live securely within such relationships and avail of legal and social benefits that accrue from such relationships. Such an enabling environment facilitates a stable structural context which has inevitable positive consequences on the sexual health of individuals involved.
2. PENALIZATION AND / OR REGULATION OF SEXUALITY / SEXUAL ACTIVITIES

In almost every state, criminal law is used not only to deter and prosecute sexual conduct understood to be violent or otherwise coercive, but it is also applied to a wide range of consensual sexual conduct occurring between adults in private. In the second case, criminal law is used selectively to enforce certain moral, religious or cultural standards, with arbitrary (i.e., not necessary or justifiable in a democratic society) negative impact on rights and grave impact on sexual health. Moreover, police practices regarding consensual adult sexual conduct in private—sometimes under color of criminal law enforcement, but often without actual juridical basis in the law—has grave effects on health and rights, especially of persons who are already socially marginalized. The criminalization of consensual sexual conduct between adults in private constitutes direct state interference with respect to private life; it also violates the right to equality and non-discrimination. Criminalization of consensual conduct between adults can proscribe sexual practices ('sodomy', 'unnatural offenses'), sexual conduct between same-sex partners, sexual conduct between unmarried partners, and sexual conduct outside of marital relationships.

In addition to discrimination on the basis of marital status or the partner's sex, regimes of criminalization often impose penalties on women, though not on men, for the same behavior (departures from virginity or chastity), thus constituting additional discrimination on the basis of gender. Criminal statutes prohibiting sexual conduct are often vague and non-specific in their use of language, often using euphemism instead of clear descriptions of sexual activity, thus making it difficult to know what exactly is forbidden and violating a basic principle of criminal law that laws give clear notice of what actions are prohibited.

Criminalization of consensual, private sexual behavior among adults has many consequences for sexual health. Persons whose sexual behavior is deemed a criminal offense strive to hide their behavior and relationships from agents of the state and others, not availing themselves of sexual health services on offer. Research has documented that those engaged in sexual behavior deemed criminal evade or do not take full advantage of HIV and STI services for prevention and treatment of disease, fearing compromised medical privacy or doubting health providers’ respect for confidentiality. These consequences are often exacerbated by other characteristics of the person, which render them more vulnerable to abuse by authorities under the criminal law such as disfavored sex, gender, race, ethnicity or national status. Many legal systems fail to create remedies that both eliminate immediate barriers (i.e., the stigma that criminalization causes or exacerbates) and reach the underlying basis for abuse (race, national status, sex or gender).

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126 As numerous international rights cases and authorities have noted, the use of the criminal law to impose religious or moral beliefs on citizens in regard to sexual conduct is an arbitrary and discriminatory use of the power of the state which cannot be sustained under rights review. See International human rights §, esp, discussion of Toonan and the Siracusa Principles at>><<<.
127 Definitions of sodomy can include both same-sex and heterosexual anal or oral sex; definitions of unnatural sexual practices are often even broader, but generally capture a range of non-reproductive sexual practices.
128 See, <<< in the International law $ §§
129 Sexual health services include access to health care in regard to sexually transmitted infections, HIV, contraception, abortion, and sexual function and dysfunction, as well as access to comprehensive and accurate information about sexuality. Sexual health services must incorporate principles of non-discrimination, in regard to educational content as well as access.
130 Need cites -- Sex workers, MSM, unmarried women
Similarly, seeking out sex education, contraceptive information and services, or abortion (even when it is legally permitted) is compromised by fear of identification, arrest, and prosecution for engaging in consensual and desired sexual behavior. Furthermore, sexual practices conducted quickly and secretly to avoid detection do not foster safer sex practices or good communication between partners. Criminalization of consensual behavior is a direct impediment and barrier to the ability to access appropriate care and services for sexual health, leading to no care, self-care, or care at the hands of non-professionals, with predictably poor results.

In addition to reduced ability to access existing information and services, persons who do reach services report being ill-treated by medical providers on the grounds of their illegitimate status, should it become known. Refusal to make clinic appointments, refusal to treat, or treatment with gross disrespect, private shaming, or public disparagement are among the abuses reported, along with hurried and inferior care.\textsuperscript{131} Name-calling, violation of medical privacy, and segregation to specific treatment areas removed from other patients are reported. These experiences reduce the likelihood that patients so treated will return for future care. In many contexts, the effect of criminalization of consensual, private adult behavior on sexual health is entirely negative.

Paradoxically, legal and policy reform to remedy discrimination against sexually stigmatized persons in other branches of the law (for example, in administrative law or constitutional equality protections) often coexist with continued criminal enforcement in some nations, leading to incomplete enjoyment of rights and continued ill-effects on health.\textsuperscript{132}

Moreover, the criminalization of consensual sexual conduct has additional consequences beyond its direct effect on access to and quality of care for sexual health. Criminalization intensifies and reinforces stigma against persons engaging in, or imagined to engage in, sexual conduct which is against the law. Persons or groups of persons thus stigmatized are targets of violence (sexual and non-sexual), extortion, and other violations by state and non-state agents. Blackmail is frequently reported, with stigmatized persons afraid to report blackmail to the police or other authorities, for fear of arrest (and because extortionists not uncommonly are police officers operating extra-murally). Those committing 'consensual sexual crimes' are thus targets for a range of abuses, which can be committed against them with impunity. Persons stigmatized through real or imagined violation of laws against consensual sex face reduced enjoyment of the full range of other rights, particularly rights to bodily integrity, education, expression and association, and employment. For example, impunity for police abuse (sometimes reaching the level of torture) has been associated with many criminal laws against same-sex conduct as well as regimes criminalizing prostitution.\textsuperscript{133}

The criminalization of sexual conduct in prison (or other custodial facilities) is complex: in some cases it claims to seek to reduce or eliminate violent, non-consensual sexual relations between prisoners or between prisoners and guards. However, it also functions as a system of control, invasion of privacy and erosion of sexual rights for persons in prison. In addition to protecting detainees from coerced sex, prisons must also create an enabling environment for maintaining sexual health. This includes, at minimum, the provision of sexual health

\textsuperscript{131} cites [See South Africa and equality of marriage cases and same sex sodomy laws.]
\textsuperscript{132} [see International section, § 5 on violence , especially the Special Rapporteur on Torture]
\textsuperscript{133}
information, including information about HIV prevention and safer sex; condoms; and contraceptives (as appropriate). Some prison systems provide for conjugal visits as a way to maintain sexual health and well-being.

The criminalization of sexual conduct between a person deemed sufficiently mature and a person deemed 'below the age of consent' is accomplished in many locations through criminal law regarding 'statutory rape', that is, criminalizing sexual conduct with a person below the age at which the younger person is deemed able to give consent. Legal frameworks regarding statutory rape are complex and vary across national contexts regarding the age at which the young person can give consent, to which sexual practices, and with what age difference between the younger and older partners. In addition, these laws often vary greatly in what sexual conduct is prohibited. Statutory rape laws often have a restrictive effect on health and rights. Their existence is used to justify denying young people their rights to health information and services essential to protecting their reproductive and sexual health, as well as their decision-making capacity. Thus, statutory rape laws must balance the objective of protecting younger persons in situations of vulnerability, while not interfering with their ability to access sexual information and engage in sexual behavior appropriate to their ages and evolving capacities.

While human rights standards set the age of marriage at 18 for men and women, the age of consent for sex is generally understood in international rights standards to be lower than the age of marriage. To avoid discrimination, statutory rape laws must not impose different standards for boy and girls, or for homosexual or heterosexual activities, for differently-gendered partners, or assume a priori that the 'offender' in the case of two young people close in age is the male.

Criminal laws proscribing incest are found in many jurisdictions, but they reflect extremely diverse conceptions of kinship, social appropriateness, and risk. Prohibitions against incest vary greatly regarding the type of kin one must avoid having sexual relations with, reflecting important social principles of proximity and distance rather than degrees of biological relatedness. Indeed, some incest laws prohibit sexual relations between individuals who have no biological relationship whatsoever, although they are legal relatives (like step-parents or in-laws). Some incest laws prohibit sexual contact between adults and young people under the age of consent (in which case the sexual contact could not be seen as consensual), and the law serves as protection against abuse. Other laws more expansively forbid sexual conduct between persons in specified kinship relationships, even if they are all adults and without evidence of abuse.

Specific criminalization of HIV transmission (through sexual and other behavior) has recently become a popular state response to HIV, although a rights and health analysis suggests many problems with this approach and that the appropriate application of existing criminal law (on assault, for example) is more suitable and effective. Criminal statutes vary greatly in terms of what is prohibited: intentional sexual conduct (i.e., intending to cause transmission and infection) or sexual behavior that is deemed reckless. To avoid criminal penalty, some laws require the infected person to announce his or her status to the potential partner prior to sexual relations, while others require taking protective steps (using a

134 CRC and international law section
135 Cite? UNAIDS [see Special Rapporteur on the Rights to Health; 2009 Lancet article by Edwin Cameron and Scott Burris, etc ??
condom). Across such laws, the definition of prohibited sexual practices is often vague, violating basic principles of criminal law (that conduct must be described with sufficient clarity to give notice). Other laws explicitly (or de facto) are used to address only specific populations perceived to be particularly prone to ‘risky behavior’ (for example, persons in sex work or men who have sex with men), such that the laws may be discriminatory in substance or application. Efforts to criminalize reckless or intentional transmission of HIV are often undertaken on the grounds of protecting vulnerable women (especially wives) against infection by male partners. Paradoxically, these laws are often turned against women, particularly those exceeding the bounds of conventional womanhood.\textsuperscript{136} Although laws criminalizing intentional or careless HIV transmission might serve as strong statements of social disapproval about harmful or reckless sexual behavior, the most significant effect on sexual health is that such laws discourage people from being tested and knowing their HIV status.\textsuperscript{137} Weighing the very small number of cases prosecuted under these laws against their impact suggests legislators turn to them as symbolic rather than functional interventions—nonetheless, their negative rights and health consequences, in part through discriminatory policing and associated abuses, are felt by already stigmatized populations.

The criminalization of consensual sexual conduct exists in the research countries to varying degrees.

2.1 (De)criminalization of same-sex sexual conduct

All the research countries other than Indonesia had at one time or continue to have provisions in their laws that criminalize consensual same-sex sexual activity. While these provisions continue to exist in Bangladesh and Sri Lanka, in Nepal and India they have been struck down by courts of law\textsuperscript{138}. This section does not however discuss the situation in Indonesia due to lack of access to verified English translations of Indonesian laws in this regard, although secondary literature appears to suggest that there is a trend of criminalization of same-sex sexual conduct, particularly in certain provinces in Indonesia.\textsuperscript{139}

The government of Thailand adopted an interesting route for removing the criminal provisions related to same-sex sexual conduct. A review of its Criminal Code in the 1950s, of laws that were not used, identified the provision criminalizing same sex sexual conduct as never having been used in a single prosecution. The Penal Code of 1956 accordingly does not

\textsuperscript{136} Criminal statutes against intentional or reckless transmission may have perverse effects, when applied to pregnant women in childbirth, who may be viewed as infecting the newborn.

\textsuperscript{137} CITE: Burris et al and Cameron and Burris above—are there better cites from UNAIDS, Sofia?

SUGGEST THE UNAIDS DOCUMENT ON CRIM BE ADDED HERE AS WELL AND SOME OF THE CITES IN THE OSI STUFF..

\textsuperscript{138} See Chapter 1 on Discrimination

have provisions criminalizing same-sex sexual activity. In 2007, Thailand introduced amendments to its rape laws that recognized same sexual assault.

The extent of criminalization in Sri Lanka is extraordinary. Section 365 of the Sri Lankan Penal Code criminalises “unnatural” offences and provides that any person who “voluntarily has carnal intercourse against the order of nature with any man, woman, or animal” shall be punished with imprisonment of up to ten years. Punishment is enhanced from 10 to up to 20 years in cases where the offence is committed by a person over 18 years of age in respect of another person under 16 years and the court is empowered to grant compensation to the person in respect of whom the offence is committed for injuries (including psychological or mental trauma) caused to such a person. An explanation provides that penetration is sufficient to constitute carnal intercourse.

However, this Sri Lankan law goes on to further penalize acts of “gross indecency between persons” under Section 365A. This provides imprisonment for anyone who commits, participates in the commission of, procures or attempts to procure “the commission by any person of any act of gross indecency with another person”. Punishment is enhanced from to 2 to up to 20 years in cases where the offence is committed by a person over 18 years of age in respect of another person under 16 years and the court is empowered to grant compensation to the person in respect of whom the offence is committed for injuries (including psychological or mental trauma) caused to such a person. Importantly, here penetration is not required to constitute the act of “gross indecency” and nowhere does the law even suggest that a sexual act is meant to be covered. However, the intent of the legislature was to cover sexual acts not covered by Section 365 in order to include lesbians within the ambit of criminalization. Section 365A was legislated for that purpose.

Amongst the research countries only the criminal laws of Indonesia and Thailand contain specific provisions on non-consensual same-sex sexual activity.

The de-criminalization of consensual same-sex sexual conduct is at various stages in the research countries. Those countries that were British colonies (i.e. India, Bangladesh and Sri Lanka) inherited this legal framework from the British and have struggled with its removal. Indeed, the Indian judgment striking down the anti-sodomy law recognizes that the criminalization of same-sex sexual conduct discriminates against homosexuals and its existence has a negative impact on homosexuals’ health. However it remains to be seen if this will lead to further recognition and expansion of anti-discrimination laws based on sexual orientation in India or whether the ruling will have a ripple effect in neighboring

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141 See Thailand Criminal Code Amendment Act (No.19) B.E. 2550 (2007). See also Chapter 5 on Violence.
142 Section 365, Penal Code, 1883 (Sri Lanka)
143 Section 365A, ibid.
144 Section 365A as it stood previously only covered acts between males. It stated: “Any male person who, in public or private, commits, or is party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of an offence, and shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both, and shall also be liable to be punished with whipping.” It was amended in 1995 to remove any reference to male persons thereby covering females as well.
145 See Chapter 5 on Violence
146 Naz Foundation (India) Trust v Government of NCT of Delhi & others, WP(C) No.7455/2001 [Delhi High Court], Date of Decision: 2nd July, 2009
jurisdictions. Nepal, a country without colonial burden, does not have a law unambiguously punishing consensual same sex sexual conduct, yet (as described in Chapter 1 earlier) it’s Supreme Court has clearly enunciated the right to equality for all persons irrespective of gender identity or sexual orientation, thereby making any potential interpretation of law to criminalize same sex sexual conduct irrelevant.\textsuperscript{147} In this regard, Thailand has progressed significantly from de-criminalisation to anti-discrimination laws. As noted in Chapter 1, although the attempt to have sexual orientation included in the new Thai Constitution as a specific prohibited ground of discrimination did not succeed, the note of the Constitution Drafting Committee specifying that this would be covered by the ground of ‘sex’ and the amendments to the Thai criminal law to recognize same-sex sexual assault is testimony to the progressive trend in Thai law in recognizing and enforcing Lesbian, Gay, Bisexual, Transgender and Intersex rights.

2.2 Criminalization of (intentional) transmission of HIV

India, Bangladesh\textsuperscript{148} and Sri Lanka\textsuperscript{149} have similar provisions in their Penal Codes related to spreading diseases dangerous to life. While these laws do not specifically cover the intentional transmission of HIV, they punish the unlawful, negligent or malignant spread of disease. The Indian law is quoted below:

\begin{quote}
Section 269, Indian Penal Code: “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.”
\end{quote}

\begin{quote}
Section 270, Indian Penal Code: “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.”
\end{quote}

Judicial precedent has not interpreted these provisions to make clear for instance, whether a person can consent to being exposed to a disease dangerous to life and whether taking precautionary measures, such as using condoms in the case of safer sex practices in the context of HIV would be considered to be mitigating factors.

Nepal amended its rape laws through the omnibus Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006, whereby it added a clause to its rape provisions, which punishes any person who rapes another having the knowledge that he has been infected with HIV, with an additional one year imprisonment over the sentence imposed for the rape conviction.\textsuperscript{150}

Thailand and Indonesia appear to have no laws on preventing the spread of diseases.

\textsuperscript{148} Sections 269 and 270, Penal Code, 1860 (Bangladesh)
\textsuperscript{149} Sections 262 and 263, Penal Code, 1883 (Sri Lanka)
\textsuperscript{150} Section 12, An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006
Indeed, laws criminalizing intentional transmission of any life-threatening disease are required in order to deter persons from dangerous conduct. With the exception of Nepal it is interesting to note that the other research countries with such laws have provisions which pre-date HIV. Yet, they cast culpability in imprecise, broad terms – “unlawfully”, “negligently” – thereby failing to envisage situations which blur behavior deemed to be responsible or not (the use of a condom or the obtaining of consent in cases of sexual conduct). The fact that there is virtually no judicial decision applying such laws to sexual conduct then begs the question whether such laws are of any value in relation to such conduct. Additionally, it is worth enquiring whether such laws as they relate to HIV (e.g. the Nepal law) are applicable in a context where anti-retroviral treatment has transformed HIV from a life-threatening condition to a chronic illness. Moreover, in the case of Nepal it is unclear why such criminality has only been provided in cases of rape – does this imply that sexual conduct which is consensual assumes that persons involved are well aware that a consequence of such conduct could be HIV infection? Or that information of a partner’s HIV status is not a material fact that impacts free and informed consent? If so, does the law adequately recognize the ability (or lack thereof) of a partner, particularly a woman, to give informed consent to sexual conduct?

2.3 Age of consent/statutory rape

The age of consent for sex differs in the research countries.

In Bangladesh, for an unmarried girl it is 16, whereas if she is married the age of consent for sex is 15. In Sri Lanka the age of sexual consent is 16 years of age for males and females, although for married females it is 12. In Nepal the marriageable age for both males and females is 20 years of age. The age of consent for sex is 16 years.

In India, the age of consent for sex for unmarried girls is 16 and for married girls 15. The age of consent for boys for same-sex sexual activity is 18 as a result of the Delhi High Court judgment de-criminalising same-sex sexual conduct, where the court ruled, “We declare that Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution...By 'adult' we mean everyone who is 18 years of age and above.”

In a few cases before the Indian courts, the matter of consensual sex involving a minor has arisen. In the case of Ramvir v. State the Delhi High Court determined that the girl in question was approximately 15 years old when the incident took place and that the facts and circumstances indicated that she had consented to the sexual intercourse. The court upheld

151 See the Suppression of Violence Against Women and Children Act, 2000. The age of consent for sex for boys is unclear.
152 Sections 363 and 365B, Penal Code, 1883 (Sri Lanka). Notably, clause 3.11 of Sri Lanka’s National HIV/AIDS Policy states that, “… steps shall be taken to prevent persons from willfully and knowingly infecting HIV to other persons.”
153 It should be noted that the authors did not have access to these provisions. This information is based on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
154 Section 275, Indian Penal Code, 1860
155 Naz Foundation (India) Trust v. Government of Delhi and another WP(C) No.7455/2001 [Delhi High Court], Date of Decision: 2nd July, 2009
156 MANU/DE/2795/2009
the conviction of the accused for statutory rape but did not sentence him to the minimum mandatory 7 years imprisonment but to 5 years. The court held, “the evidence that has come on record clearly shows that the prosecutrix had willingly accompanied the appellant to the places visited by them and spent more than six months in his Company. The prosecutrix was more than fifteen and a half years old when she eloped with the appellant. The appellant was a young man of about 23 years when this incident took place. The main circumstance which persuades me to take a lenient view in the matter of sentence and awarding less than the minimum prescribed sentence of seven years is the consent on the part of the prosecutrix, which is more than evident from the facts of the case.” [emphasis added]

However it is difficult to quote this case as progressive case law as the basis on which the judge found that the girl had consented was her not raising an alarm on multiple occasions when she was in a public place, discrepancies in her statements and the fact that the accused took her to his home in front of his relatives. The case is being discussed to indicate that judges struggle in cases where they believe (rightly or wrongly) that the girl has consented to sex but is below the statutory age limit.

In Thailand the age of consent for sex is 15 for all genders. The law recognizes that young persons may have consensual sex below the age of consent and provides that in situations where the offender is under 18 years of age and the child is between the ages of 13 and 15 and the sex was consensual there will be no offence of statutory rape, if the court grants permission for their marriage.

The Indonesian law related to the age of consent and statutory rape makes for an interesting study. Under its Penal Code, a person who has “carnal knowledge” of a woman below the age of 12 shall be punished with maximum imprisonment of nine years. The same punishment is applicable where the woman is below the age of 15 years but prosecution in such cases can only be instituted on a complaint or where the act results in serious physical injury or death or the perpetrator is of the same sex or the act is committed by giving gifts or promises of money or goods or abuse of dominance or deceit or where the woman is the child, step-child or foster-child of the perpetrator.

The laws of the research countries, apart from the wide variations in the age of consent for sex, are of particular concern in their approach to married girls. As noted elsewhere, several of these countries have child marriage restraint laws; the provisions of their criminal legislations however undermine these laws as in the case of India where the age of consent for sex is lowered to 15 for married women, marital rape is recognised only where the girl is under the age of 12 and only a two year punishment is prescribed where the married girl is between the ages of 12 and 15. Of course even in the case of marriage laws there is significant discrepancy in the age of marriage.

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157 See Section 277, Penal Code, 1956 (Thailand)
158 Article 287(2), Penal Code, 1982 (Indonesia)
159 Article 287, ibid.
160 Article 291, ibid.
161 Article 292, ibid.
162 Article 293, ibid.
163 Article 294, ibid.
164 See Chapter 3 on State Regulation of Marriage and Family
2.4  (De)criminalization of sex outside marriage

Sri Lanka, Nepal and Thailand do not criminalise adultery. However, as mentioned later, adultery is a ground for divorce in these countries.\(^{165}\)

The Penal Code of Thailand does not contain a punishment for adultery. Under its Civil and Commercial Code, however, there is an interesting aspect of regulation of sexual activity. Under Thai marriage laws, persons above the age of 17 (or where they are younger with the consent of parents or guardians) may be betrothed.\(^{166}\) This is done based on the man giving the woman some form of property; however, the betrothal does not create an obligation of marriage and any agreement to pay a penalty in breach of a betrothal agreement is void.\(^{167}\) The law provides that if there is an “essential event” that happens to the betrothed woman that makes the marriage to her unsuitable, then the betrothal agreement may be renounced and in such cases the man may claim compensation from another man who has sexual intercourse with the woman knowing or who should have known of her betrothal.\(^{168}\) Thus, the essential event includes sexual intercourse with another man. It may also include rape, as the betrothed man may, without renouncing the agreement claim compensation from a man who had or attempted to have sexual intercourse with the betrothed woman against her will knowing or should have known about the betrothal.\(^{169}\)

Interestingly, where an “essential event” happening to the betrothed man that makes marriage to him unsuitable also allows the betrothed woman to renounce the agreement but the law does not allow her to claim compensation from another woman. Both parties are required to pay compensation to the other person if there is gross misconduct on their part leading to the renouncing of the agreement – this likely includes sexual intercourse with another person.\(^{170}\)

In Indonesia, the Penal Code prescribes a maximum punishment of nine months for married men and women as well as the persons they committed adultery with. However, a prosecution under the law can only be instituted by the “insulted spouse” and the complaint may be withdrawn as long as judicial investigation has not commenced.\(^{171}\) Several reports on a newly enacted law in the Aceh province of Indonesia also note that the law punishes adultery with stoning.\(^{172}\) However, a verifiable English translation of this new law was not available for the purposes of this review.

In India and Bangladesh, adultery is punishable only when the woman commits it. Both countries have identical provisions in Sections 497 and 498 of the Indian and Bangladeshi Penal Codes. Section 497 provides that, “whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.” Thus, a married man who commits adultery

\(^{165}\) Ibid.
\(^{166}\) Section 1435, Civil and Commercial Code, 1925 (Thailand)
\(^{167}\) Section 1438, ibid.
\(^{168}\) Section 1445, ibid.
\(^{169}\) Section 1446, ibid.
\(^{170}\) Section 1444, ibid.
\(^{171}\) Article 284, Penal Code, 1982 (Indonesia).
with an unmarried woman is not punishable under this law. Section 498 further punishes any person who takes or entices away any married woman from her husband or from any person having the care of her on behalf of her husband, “with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman.”

In Bangladesh, there have been increasing instances of local committees issuing “fatwas” in cases of adultery which have resulted in the stoning of women accused of adultery. A recent Bangladesh High Court decision has reportedly banned such fatwas declaring as illegal all extra-judicial punishments. However, the official decision in this case was not available for the purposes of this review.

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3. STATE REGULATION OF MARRIAGE AND FAMILY AS IT IS RELEVANT TO SEXUALITY AND SEXUAL HEALTH

International human rights standards note the fundamental right to ‘marry and found a family’ and reiterate the centrality of the family as a core unit of society. 174 Marriage is an important institution in many societies, although in practice its structure is diverse. While marriage can be the basis of family, it is increasingly recognized that marriage is not the only basis of family; moreover, families can take many forms.175 And while both marriage and family are important institutions, persons wishing not to marry or found a family must be acknowledged as full participants in society and entitled to full rights, including sexual rights.

While marriage and family are often treated as linked institutions in both law and in many social and religious systems, they also need to be considered separately to assess fully their impacts on the sexual health and rights of all affected persons, including parent(s), children, and guardians. Marriage and family law play a major role in promoting or restricting the health and rights, including sexual health, of many people, both married and unmarried, and their children and other dependents. In addition, marriage regulations may promote or be detrimental to physical, emotional or social well-being of the spouses.

In contemporary rights terms, marriage can be generally understood as a voluntary union which creates specific bonds of legal rights and responsibilities, and which, as a consensual union, can also be dissolved by a decision of either partner with due process and respect for the rights of the partners. Importantly, under rights principles, the legal bonds of marriage are created through contracts made by persons endowed by law with equal powers of “free and full consent” to enter marriage.

In human rights, the focus on equal, free and full consent for all persons, female, male and transgender, to decide if, when, and with whom to enter into, or dissolve marriage as an aspect of their dignity and rights, has important consequences for sexual health. Marriage partners have equal rights to determine their sexual conduct in marriage, and should have the means to act on their decisions, including through access to services and with the support of the law, for voluntary sexual conduct. Equality of rights in marriage is an especially important aspect of rights for the sexual health of women, and it is important to note that equality between men and women in marriage may require affirmative actions by the state176. The equal right of women and men to control their fertility, therefore underscores the importance of laws that promote access to sexual and reproductive health information and services; women’s and men’s right to access and use family planning, and rights to legal and other remedies for any abuses that may occur within marriage and on its dissolution.

A health and rights approach has implications for state practices (de jure or de facto) that exclude adults from marriage or conversely allow persons to be coerced into marriage. Mandatory, pre-marital health tests (to determine HIV status, for example) or other tests of

174 UDHR article 16; ICESCR article 10, ICCPR article 23, CRC Preamble, CRPD article 23.
175 Cite to ICPD and other supports for alternative forms of family.
176 CEDAW, for example, notes the importance of temporary special measures to ensure substantive equality between men and women, noting that equality does not mean identical treatment in many areas of public and private life, See, General Recommendation 25, UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 25: Article 4, Paragraph 1, of the Convention (Temporary Special Measures), 2004, available at: http://www.unhchr.org/refworld/docid/453882a7e0.html [accessed 29 March 2010]
physical characteristics (virginity tests, which may be privately administered but tolerated by the state) are unjustified interferences with privacy and impede core rights to bodily integrity. Categorical exclusion from marriage on these or other grounds linked to health and physical characteristics (disability, for example) violates principles of non-discrimination.\(^{177}\) Other laws which allow persons to be coerced into marriage by abuse or disadvantage, such as when an accused or convicted rapist is absolved by marriage to his victim, should be seen to violate non-discrimination rights as well as being harmful to the personal well-being of the coerced person.

The focus on legally meaningful consent of adults as the basis of marriage has important implications for the rights and health of adolescents and young women in particular, as 18 years is now the internationally agreed upon minimum age for marriage.\(^{178}\) Early marriage has been linked to early childbearing, with increased rates of morbidity and maternal death for young women and girls. In addition, married young women lose access to resources, including education, health services, and mobility.\(^{179}\) Using law as a tool for rights and health, states are working toward the elimination of child marriage, with best practices coupling law reform, registration of births and other administrative changes with outreach and strong legal, social and health supports for young married girls and women.

Moreover, while marriage is a key site for sexual activity for many people, rights and health protections must extend to consensual sexual conduct before or outside of marriage (see criminalization of consensual sexual conduct, above). In addition, procreative sex and reproduction are not limited to married couples, with implications for the rights and health of both parents and children born outside of marriage. (See below for discussion of rights of children).

Increasingly, it is clear that a rights and health approach to marriage invalidates constructions of marriage that require sexual activity between spouses as a matter of proprietary right. Obligatory or coerced sex in marriage has many negative health consequences including unprotected and unsafe sex, unwanted pregnancy and HIV transmission, with implications for mental as well as physical health. [see marital rape in §5 on violence]. Rights and health-based approaches support the trend toward laws supporting consensual sexual activity within marriage,\(^{180}\) which is linked with each partner’s ability to negotiate for and use condoms; have access to and the means to use comprehensive family planning, and access to comprehensive and accurate sexual health information.

A wide range of laws may regulate marriage in any given country: family, personal status, and criminal laws, as well as health regulations and customary laws. In addition, an extensive set of legal rights may depend on marital status, such as rights to immigration, social security, healthcare, insurance rights, and access to confidential medical records, as

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\(^{177}\) Advocacy of mandatory premarital HIV-testing as a way of protecting women’s health and rights in marriage is misplaced; interventions are better directed to supporting women’s full and free decision to marry, or when and under what conditions to have sex within marriage.

\(^{178}\) See the discussion of CEDAW and CRC at International section <<>>; See also “ Early Marriage, Child Spouses”, Innocenti Centre Digest, No. 7 (2001) and WHO reports/in public health literature review

\(^{179}\) WHO reports, Innocenti Centre Digest, above et al

\(^{180}\) These include laws such as marital rape laws, equality between women and men and laws providing for services for married women seeking to exercise their rights to speech, association, property etc. See WHO VAW report>>>>><<
well as inheritance, property disposition, custody and control of children, visitation rights, and decision-making for incompetent patients.

These various regimes have grave impacts on the rights and sexual health of marriage partners, and are often gender-specific in their discriminatory effect. Many legal regimes governing entry and exit from marriage operate so that often women are not only denied bodily autonomy but also face conditions which undermine their sexual health: when they are coerced into marriage, or are compelled by custom or law when widowed to re-marry, or conversely when law or custom allows them to be shunned or otherwise socially ostracized after divorce or widow-hood. In places where sexual activity outside of marriage is strongly stigmatized, widowed or divorced women who are constrained from marriage may in effect be excluded from the ability to enjoy sexual relations in the future.

Of particular importance to health are marriage regimes which treat married women as legal minors or dissolve their rights into the rights and privileges of the male spouse, particularly those regimes which disallow women access to healthcare services (through requiring male or spousal consent); which bar in law or in practice prosecution or other intervention against an abusive spouse, including for coercive sex; or which restrict widows or divorced women from equal powers over property, inheritance, or control or decisions over children, etc.\(^\text{181}\)

On a different note, constitutional or family law provisions that recognize or deny access to marriage to same sex couples not only heavily condition the way the state regulates sexuality and sexual life (see above, section 1), but also may either deny or grant specific health-related benefits based on marital status. In many countries, marriage defines the entitlement to a wide range of social rights and benefits; excluding same-sex partners from health benefits or other legal entitlements deprives them of services and conditions essential to the highest attainable standards of health because of relationship status or sexual orientation.\(^\text{182}\)

Moreover, health and rights analyses increasingly highlight the need for recognition of alternative forms of family, as these varied forms of family provide important economic resources and social support to many people. States must ensure that access to appropriate services, as well as conditions of equality, security and freedom necessary for health for all members of the family, are available to all kinds of families. Families formed outside of marital or other intimate partner relationships, such as when a grandparent or other kin cares for children of their extended family, need recognition and support, including appropriate authority to make decisions in the child’s best interest, and access to the means to ensure their sexual health and freedom from abuse.

Because single women are often in this caregiver role in alternative families, sex-based discrimination against the caregiver has negative effects on the well-being of children. Same-sex couples who are raising children and whose relationship is not recognized as a marriage also fall into this concern for alternative families. Conversely, persons in alternative families who face domestic violence or sexual exploitation (as when members of extended families work as domestics, e.g.) also need to be recognized as persons deserving of legal

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\(^\text{181}\) [from S. Fabeni, 5-2009 Concept paper for WHO]

\(^\text{182}\) Notably, some state regimes allocating social benefits conditional to marriage may also deny unmarried, cohabiting heterosexual partners access to benefits; others accept unmarried cohabiting heterosexual partners as akin to spouses (if meeting other conditions such as duration of cohabitation) for the purpose of benefits. Such disparate treatment—particularly in regard to pensions, access to housing and other conditions for health—have been determined to be discriminatory. (see§§§ international human rights and Young v Australia)
interventions and safeguards such as protection or other orders intervening in the family. Such provisions are essential to promoting basic health and rights, as well as specific sexual health concerns.

It is clear, however, that children have full rights regardless of the marital status of their parents. In many circumstances, the health, of the child (including her or his sexual health and protection from abuse) requires respect and equal protection for parents’ ability and right, irrespective of marital status, or different or same-sex partnership to make decisions for and with the child, in his or her best interest, including on access to services, treatment and information.

3.1 Equality in Marriage

Prior to discussing specific issues around the regulation of marriages, it is necessary to understand the complex legal systems that govern marriage and family in the research countries. As will be seen below, the marriage laws in all the research countries discriminate against women albeit to varying degrees. Inequality in marriage laws, for instance regarding divorce and maintenance severely limit the ability of women to choose between staying in a marriage or not. Procedural and substantive inequalities can keep women trapped in violent marriages or marriages they no longer want to stay in. Case law or amendments to make marriage laws more equal therefore also have an important role to play with reference to sexual health.

Marriage and family laws in Bangladesh vary according to the personal laws governing the individuals getting married. The Constitution of Bangladesh was amended to recognize Islam as the state religion of Bangladesh, “but other religions may be practised in peace and harmony in the Republic.” Article 41 recognises the freedom of religion and that, “subject to law, public order and morality…every citizen has the right to profess, practise or propagate any religion.”

For Muslims, the Muslim Family Laws Ordinance, 1961 is the primary law related to marriage that applies to all Muslims and its provisions override all laws, customs and usage. The Ordinance governs various aspects of marriage and family including, succession, polygamy, divorce (talaq), dissolution of marriage otherwise than by talaq, maintenance, dower, etc. For the dissolution of a marriage by a Muslim Woman, the Dissolution of Muslim Marriages Act, 1939 is applicable. Other laws governing the registration of Muslim marriages and the application of Shariat law are also relevant.

Some judgments of the Supreme Court are noteworthy in promoting equality in marriages. These include Md. Hefzur Rahman v. Shamsun Nahar Begum and another184 where the Court held that the liability of a Muslim husband to maintain his divorced wife extends till she loses her status of a divorce by remarrying another person and Kazi Rashed Akhter Shahid (Prince) v. Roksana Choudhury(Sanda)185 where it was held that a husband must comply with the statutory provisions of giving notice for talaq failing which there would be no change in the marital status of the parties.

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183 CRC, articles 1 and 2, plus any WHO health research materials.
184 15 BLD (HCD) 34 (1995)
185 58 DLR (HCD) 271 (2006)
For Hindus, personal law is largely unwritten save for statutes providing for inheritance, removal of certain disabilities and those incorporating women’s rights such as widows, right to residence and maintenance, right to property. Parsis are governed by the Parsi Marriage and Divorce Act, 1936 and Christians by the Divorce Act, 1869. The Special Marriage Act 1872, governs marriages of persons who do not profess any religion or inter-religious marriages; however, Muslims are not allowed to marry persons from another religion or a person who does not profess any religion.

Similarly in India, laws relating to family, marriage, divorce, maintenance and succession differ according to the relevant personal law. Relative equality in marriage for different religions has come either through the staturisation of laws or through court cases. Thus equal rights for women in inheritance for Christians were settled by the Supreme Court in the case of Mary Roy v. State of Kerala. The right to maintenance for Muslim women took over a decade of legal challenges.

Registration of marriages is compulsory for Christians, Parsis, marriages under the Special Marriages Act and foreign marriages, but is optional for Hindus and Muslims.

In Seema v. Ashwani Kumar, the Indian Supreme Court addressed the issue of the compulsory registration of marriages while hearing a matrimonial case and noted that there were a large number of cases where “unscrupulous” persons denied the existence of a marriage. The court noted the reservation that India made to the Convention on the Elimination of All Forms of Discrimination Against Women on the compulsory registration of marriages where India agreed to the principle of compulsory registration but that it, “is not practical in a vast country like India with its variety of customs, religions and level of literacy' and has expressed reservation to this very clause to make registration of marriage compulsory.” The Supreme Court ordered a survey of all States to determine how many had laws related to the registration of marriages and noted that in the responses it received every State and Union Territory had indicated that that registration was desirable.

\[186\] AIR 1986 SC 1011
\[188\] Christian Marriage Act, 1872 (India). Under the said Act, entries are made in the marriage register of the concerned Church soon after the marriage ceremony along with the signatures of bride and bridegroom, the officiating priest and the witnesses.
\[189\] Section 6, Parsi Marriage and Divorce Act, 1936 (India). However, the Act also specifies that non-registration does not affect the validity of the marriage. See Section
\[190\] Under the Special Marriage Act, 1954 which applies to Indian citizens irrespective of religion each marriage is registered by the Marriage Officer specially appointed for the purpose.
\[191\] Foreign Marriage Act, 1969 (India)
\[192\] Under Section 8 of Hindu Marriage Act, 1955, certain provisions exist for registration of marriages. However, it is left to the discretion of the contracting parties to either solemnize the marriage before the Sub-Registrar or register it after performing the marriage ceremony in conformity with the customary beliefs. It further gives State governments the option of making registration compulsory and specifies a fine for non-registration where it is made compulsory. However, the Act makes it clear that the validity of the marriage in no way will be affected by omission to make the entry in the register.
\[193\] Some States in India have provisions for the voluntary registration of Muslim marriages. See Assam Moslem Marriages and Divorce Registration Act, 1935, Orissa Muhammadan Marriages and Divorce Registration Act, 1949, Bengal Muhammadan Marriages and Divorce Registration Act, 1876, Jammu and Kashmir Muslim Marriages Registration Act, 1981
\[194\] 2006 (2) SCC 578
The opinion of the National Commission for Women on the compulsory registration of marriages (which was specifically sought by the Supreme Court) stated that non-registration of marriages affects women the most and would be of critical importance in addressing issues like child marriage, ensuring consent for marriage, checking illegal bigamy/polygamy, enabling married women to claim their right to live in the matrimonial house, maintenance, etc., enabling widows to claim their inheritance rights and other benefits and privileges which they are entitled to after the death of their husband, deterring men from deserting women after marriage and deterring parents/guardians from selling daughters/young girls to any person including a foreigner, under the garb of marriage. Agreeing with the National Commission on Women’s opinion, the Supreme Court held that:

“As is evident from narration of facts though most of the States have framed rules regarding registration of marriages, registration of marriage is not compulsory in several States. If the record of marriage is kept, to a large extent, the dispute concerning solemnization of marriages between two persons is avoided. As rightly contended by the National Commission, in most cases non registration of marriages affects the women to a great measure. If the marriage is registered it also provides evidence of the marriage having taken place and would provide a rebuttable presumption of the marriage having taken place. Though, the registration itself cannot be a proof of valid marriage per se, and would not be the determinative factor regarding validity of a marriage, yet it has a great evidentiary value in the matters of custody of children, right of children born from the wedlock of the two persons whose marriage is registered and the age of parties to the marriage. That being so, it would be in the interest of the society if marriages are made compulsorily registrable…Accordingly, we are of the view that marriages of all persons who are citizens of India belonging to various religions should be made compulsorily registrable in their respective States, where the marriage is solemnized.”

Accordingly the Supreme Court has directed each State to carry out its order by notifying the procedure for the compulsory registration of marriages (after inviting objections from the public to such procedures) which will include the consequences of non-registration. It has also ordered that any Central law on the subject must be placed before the court for scrutiny. Since passing this judgment, the court has periodically accepted and commented on reports by the States on their progress towards introducing laws for the compulsory registration of marriages.  

In Nepal the Interim Constitution guarantees the right to religion – to profess, practice and preserve the same. Minorities such as Muslims do follow their own personal laws but can also use the main Nepali law related to marriage, divorce and related issues i.e. the Country Code, which was introduced in 1854 and went through a significant revision in 1963 (the current version) and was further amended to introduce gender equality standards in 2002 and 2006.

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195 See Seema v. Ashwani Kumar 2008 (1) SCC 180 and Seema v. Ashwani Kumar 2008 (10) SCR 566
197 See ‘Muslim women use Nepalese Family Law to counter ‘triple talaq’ available at http://www.wluml.org/node/3918 for an example of how Muslim women are using civil law to contest the triple talaq system being used by Muslim men to obtain divorce.
The aforementioned reform of the *Country Code* is of significance to sexual health rights of women and children in particular. For instance, the traditional practice of dolaji was repealed in which if parents were unwilling to send their married daughter to the bridegroom’s home they searched for another bridegroom or dole and would marry her to him.

Property rights changes, too, have brought parity between males and females. For instance, the amendment provides that some daughters who were earlier excluded, are also entitled to have inheritance rights to ancestral property. Earlier this was permitted only for unmarried daughters above the age of 35. Furthermore, the law required that if the daughter later married, she had to return half her share in the property. This law therefore forced women to choose between marriage and property entitlements. In the case of *Meera Dhungana for FWLD v. Government of Nepal* the Supreme Court declared this law unconstitutional. The amendment also removes the condition that women must attain 35 years of age and complete 15 years of marriage before they can live separately and claim a share of property from their husband. Another discriminatory aspect of the *Country Code*, which has now been removed is a provision which denies a female the right to property from her parents and her in-laws in the case of divorce. The amendment also requires that partition of property must be made between the husband and wife at the time of divorce. Also, until she remarries a divorced woman is given the choice of obtaining yearly or monthly expenditures to be paid by the husband instead of taking her lumpsum share, on the basis of the husband's property and level of earnings. Further, unmarried daughters are given an equal right to intestate property as unmarried sons, which was not the case prior to the amendment.

Prior to amendments in the *Country Code* a woman who remarried was not allowed to keep custody of her children from the first marriage, thereby making her choose between her children and a second marriage. This provision has now been repealed.

In the case of *Shyam Krishna Maskey v. Government of Nepal*, the petitioner challenged the constitutionality of clauses of the Chapter on Husband Wife in the *Country Code* that require the husband to provide a share of property or maintenance cost to the wife in the event of divorce. The petitioner contended that such provisions of law violate the right to equality of husbands as guaranteed by the *Constitution*, arguing that it was unnecessary to provide such entitlements to a divorced wife, as the relationship of marriage no longer exists. The petitioner claimed that if a woman received a share of property from every husband she

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198 The authors did not have access to the original text or an English translation of the Country Code (ELEventh Amendment) Act. This overview is based entirely on a note prepared by the Forum for Women, Law & Development and available at its website: [http://www.fwld.org.np/11amend.html](http://www.fwld.org.np/11amend.html) and an unpublished study and analysis on sexuality and rights undertaken by the FWLD, which was made available to the authors.

199 Regmi, M.C., “Regmi Research Series, Year 13, No. 6”. Kathmandu, Nepal Regmi Research (Private) Ltd December 1, 1981, p. 83 available at [http://dlxs.library.cornell.edu/cgi/t/text/pageviewer-idx?c=regmi;cc=regmi;q1=dolaji;rgn=full%20text;idno=013regmi;didno=013regmi;view=image;seq=0090;node=013regmi%3A7](http://dlxs.library.cornell.edu/cgi/t/text/pageviewer-idx?c=regmi;cc=regmi;q1=dolaji;rgn=full%20text;idno=013regmi;didno=013regmi;view=image;seq=0090;node=013regmi%3A7)

200 The authors did not have access to the original text or an English translation of this judgment and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

201 The authors did not have access to the original text or an English translation of this provision and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

202 The authors did not have access to the original text or an English translation of this judgment and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
was married to she would acquire immense wealth, which would be unfair and inappropriate. The government argued in support of the laws stating that they were in consonance with a previous court order, which sought to achieve gender equality, especially in the Nepalese context where patriarchy had created severe discrimination against women. The Supreme Court found that the provisions did violate the right to equality but it refused to invalidate the law and instead directed the government to conduct extensive consultations and research on the issue with relevant stakeholders, and thereafter to enact a more appropriate bill.

Nepalese law recognises various types of property that a woman acquires in her capacity as a daughter or wife (known as stri amshadhan) and these include property given to a woman by her parental or maternal relatives (known as daijo) and property given by the husband or his relatives (known as pewa).203 Earlier, a woman had only limited rights in relation to such property - she could enjoy and use all such property but could not dispose of more than half of the immovable property on her own. To dispose of the rest she needed the consent of her husband or children (men did not have such restrictions in disposing of their property). The Eleventh Amendment to the Country Code significantly reformed these discriminatory provisions against women. As a result of public interest petitions filed before it, the Supreme Court found the provisions of law as ultra vires the constitutional guarantee of equality in relation to women.204 The law has been amended since and now allows a woman to act unilaterally to dispose of such property.205

Despite significant improvements in the Country Code that assure rights and protection from women vis-à-vis property, discriminatory provisions continue to exist. For instance, unlike men who have the entitlement, married women are not entitled to a share in their parental property.206 Similarly, in matters of intestate succession the law continues to place married daughters at considerable distance in the line of succession.207

Sri Lanka is governed by multifarious personal laws based on religious and community roots. Kandyan Law applies to ethnic Sinhalese whose can trace their lineage back to the Kandyan provinces during the period of the Kandyan monarchy in central Sri Lanka. (the Kandyan monarchy ceased to exist with the British takeover of central Sri Lanka in 1815). Theswalamai Law is based on customs of Jaffna Tamils in Sri Lanka. It applies to Tamil inhabitants of the Jaffna Peninsula in Northern Sri Lanka or to Jaffna Tamils who live

203 Recognised in clause 4 of the Chapter on Women’s Exclusive Property, Nepal Country Code, 1963. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

204 Prakashmani Sharma v Government of Nepal. The authors did not have access to the original text or an English translation of this judgment and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

205 Clause 2, Chapter on Women’s Exclusive Property, Nepal Country Code, 1963. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

206 Clause 1A, Chapter on Partition of Property, Nepal Country Code, 1963. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

207 Clauses 3,6,7 & 9, Chapter on Intestate Property, Nepal Country Code, 1963. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
elsewhere in Sri Lanka. And Muslim Special Laws apply to all Muslims in Sri Lanka. Apart from these main sources of personal law, Sri Lanka is also governed by English common law and Roman-Dutch law. Sri Lankans can also choose to marry under the Marriage Registration Ordinance, 1907 and would be governed by Roman-Dutch Law in matters relating to marriage, divorce, and interstate succession.\(^{208}\)

The Marriage Registration Ordinance, 1907 (subsequently amended on several occasions) consolidates and governs marriages of all persons in Sri Lanka save Muslims (Kandyans too have a specific statute for this purpose, although they may also marry under this Ordinance). Although it does not make registration of marriages mandatory, it contains provisions for registration of marriages and prescribes a procedure for that purpose. It further stipulates the minimum age of marriage\(^{209}\), prohibited degrees of relationship for those who wish to marry\(^{210}\) and punishes those who violate this stipulation\(^{211}\), and prohibits bigamy.\(^{212}\)

The Kandyan Marriage & Divorce Act, 1952 also stipulates prohibited degrees of relationship for those who wish to marry\(^{213}\) and also prohibits bigamy.\(^{214}\) Although it prohibits marriages below a lawful age, this Act makes exceptions in cases where one or both parties were under age but had cohabited for at least a year after attaining lawful age or if a child is born to them before they attain lawful age.\(^{215}\) Apart from requiring registration of marriages this Act also provides a procedure for registration of divorce. It also provides grounds for divorce, which demonstrate a clear inequity between males and females: whereas a wife can seek divorce from her husband by proving adultery coupled with incest or gross cruelty on his part a husband needs to only show adultery to obtain divorce from his wife.\(^{216}\)

The Marriage Registration Amendment Act, 1995 has brought changes to both the Marriage Registration Ordinance, 1907 and the Kandyan Marriage & Divorce Act, 1952 by stipulating the minimum age of marriage for both males and females to be 18 years. The Muslim Marriage & Divorce Act, 1951, which governs Muslims in Sri Lanka does not stipulate a minimum age for marriage. It requires the registration of all Muslim marriages and lays out procedures for the same as well as registration of divorce. At the same time it stipulates that a marriage shall not be considered invalid merely on the ground that it was not registered.\(^{217}\) The law also stipulates punishment for Muslims who enter into incestuous relationships within or outside marriage.\(^{218}\) However, it recognises the right of Muslim males to enter into polygamous marriages.\(^{219}\)

Higher courts in Sri Lanka have passed several significant judgments related to marriage which impact on women’s rights. In Soosaipillai v Parpathipillai\(^{220}\) the Court of Appeal had

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\(^{209}\) Section 15, Marriage Registration Ordinance, 1907 (Sri Lanka)

\(^{210}\) Section 16, ibid.

\(^{211}\) Section 17, ibid.

\(^{212}\) Section 18, ibid.

\(^{213}\) Section 5, Kandyan Marriage & Divorce Act, 1952 (Sri Lanka)

\(^{214}\) Section 6, ibid.

\(^{215}\) Section 4, ibid.

\(^{216}\) Section 32, ibid.

\(^{217}\) Section 16, Muslim Marriage & Divorce Act, 1951 (Sri Lanka)

\(^{218}\) Section 80, ibid.

\(^{219}\) Section 24, ibid.

\(^{220}\) 1985. Citation not available, however, authors have access to full text of judgment.
to consider the case of a woman seeking maintenance for herself and her child from a man who she claimed was her husband due to the fact that they had undergone a customary Kalam marriage ceremony in the presence of friends and relatives after which they had lived together and were accepted by members of the community in which they lived as wife and husband. The man denied the marriage and paternity. In upholding the right of the woman to maintenance, the court held that where a man and woman are proved to have lived together as man and wife the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage. Additionally, as to what constitutes a valid customary marriage the court held that it must necessarily vary from region to region, community to community and race to race and depending on the affluence of the parties even within the same group there could be varying degrees of elaboration and embellishments in the ceremonies constituting marriage. But some minimum ritual would be necessary by way of constituting the bare essentials of a valid customary marriage. In the present case it was the ceremonial partaking of a common meal of rice and seven vegetables before the relations. It follows that this ceremony of thus bringing together the parties was a ceremony of valid marriage; no ceremony is prescribed for embarking on concubinage.

In *Jonathan Joseph v. June de Silva* the Court of Appeal examined a case related to a claim of damages made by a woman that the appellant man ‘deflowered’ her on the promise of marriage but failed to marry her. Her case was that she was a virgin at the time. The man failed to give evidence in the District Court countering the woman’s case. The court held that a seduction case must be decided on the preponderance of evidence. The failure of the man to refute on oath the testimony of the woman given on oath can be treated as corroboration depending on the circumstance of the particular case, for instance where there is no evidence of sexual promiscuity on the part of the woman.

In *Wijesundera v Wijekoon* the Court of Appeal considered the issue of the presumption of legitimacy of a child born during the continuance of a valid marriage. Here the wife claimed maintenance for herself and her child whereas the husband admitted marriage but denied paternity. The woman’s case was that she resided with the husband from the date of their marriage for 14 months after which she returned to her parents’ home to deliver her child. She gave birth to the child 2 months later. The husband claimed that on the night of the day of their marriage he discovered that she was not a virgin and made a complaint thereafter to the village board. The woman explained how she lost her virginity and soon afterwards was taken back to her village and returned to her parents. The court stated that in such a case, where marriage was admitted and the birth of the child during the continuance of the marriage was proved, the question that arose was whether the man had shown that he had no access to the mother at any time when the said child could have been conceived. Section 112 of the *Evidence Ordinance* would be applicable in such a situation, which provided that it is conclusive proof that the husband is the father of the child because the child was born during the continuance of a valid marriage, unless he shows that he had no access to the wife at the time the child could have been begotten or that he was impotent: The court held that in view of the said presumption created by the section the wife is entitled to rely on it to prove the paternity of the child. The burden would be on the husband to disprove the said presumption. The court went on to state that the presumption of legitimacy was rebuttable only by adducing cogent, clear and convincing evidence. This would in effect mean that the man must

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221 1990. Citation not available, however, authors have access to full text of judgment.
222 1990. Citation not available, however, authors have access to full text of judgment.
prove, on evidence, which would not admit of any reasonable doubt, that he had no access. It pointed out that the word "access" had been the subject of interpretation in several cases – in some it was held to mean "actual intercourse", in others it was interpreted as meaning no more than opportunity of intercourse. It held that the word "access" connoted not only actual intercourse but also personal access under circumstances which raise the presumption of actual intercourse. Mere opportunity of intercourse, under circumstances which do not raise the presumption of actual intercourse, would not be "access" within the meaning of Section 112. Based on the evidence placed before it the court held that the husband could not have had access to the wife at the time the child was conceived. On this basis it denied the wife’s claim of maintenance for the child. Regarding the claim of maintenance for herself the court pointed out Section 2 of the Maintenance Ordinance which provided that a wife living in adultery could not claim maintenance from the husband. Given that the wife in this case had had the child out of wedlock the court held that she was therefore living in adultery and could not claim such maintenance.

Marriage laws in Thailand are governed by the Civil and Commercial Code. The code covers all matters related to marriage including betrothal, age of marriage, nuptial agreements, consent, separation, divorce, property, succession and so on. While the provisions of the code are largely equitable, it does contain some discriminatory aspects including those related to grounds of divorce. Thus adultery by the woman is a ground of divorce but for the man it is only when he has given maintenance or honoured another woman. The code also severely limits the ability of widows to remarry. For certain areas, the Act on the Use of Islamic Law in the Provinces of Pattani, Narathiwat, Yala and Satun, B.E. 2489 (1946) is also applicable.

The right to marry and bear children is specifically recognized in Indonesia’s Law on Human Rights, 1999. This law further recognizes the principle of equality in marriage in its provisions on women’s rights and states that a wife and husband have equal rights and responsibilities with regard to all aspects of marriage, contact with their children (including on dissolution of the marriage subject to the best interests of the child), and rights to joint control of assets (including on dissolution of the marriage without undermining children’s rights.)

The marriage law in Indonesia was largely consolidated through the Law on Marriage, 1974. The Elucidation of the Law on Marriage also states the principle of equality between the sexes in marriage. Indeed the law specifies the same grounds for annulment or divorce by

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223 “Thailand allows the application of Muslim Personal Law in relation to the matters of marriage, divorce and inheritance in the four Muslim majority southern provinces of Pattani, Yala, Narathiwat and Satun through the court. Islamic law is applied in the court through a Muslim judge or Dato Yuthitham who participates in the trial and adjudication on cases and on points of Islamic law and has a power of casting vote. Thai Muslims in the other provinces of the country apply the Muslim personal law either privately or through the provincial Islamic committees.” Many Faces of Islam, Imtiaz Yusuf, Bangkok Post, 10.07.09. Also “Another interesting thing to note is that the Shari’ah Court judge in Thailand is known as Dato’ Yuthitham who is appointed by the Ministry of Justice” Shari‘ah Court Judges and Judicial Creativity (Ijtihad) in Malaysia and Thailand: A Comparative Study http://www.informaworld.com/smpp/1109480985-36036884/content~content=a910443213&db=all. However the authors were unable to obtain a verified English translation of this law to analyse for this paper.

224 Article 10(1), Law on Human Rights, 1999 (Indonesia)

225 Article 51, Ibid.
both parties and deems all marital property to be joint property.\textsuperscript{226} The law states that a married couple have the noble obligation of establishing a family as the principal building block of society.\textsuperscript{227} that the rights and status of the husband and wife are equal “as regards life in the home and social intercourse” and both enjoy legal capacity.\textsuperscript{228} Thus, persons who are minors but are married under this law, acquire majority through the marriage. A couple is expected to have a permanent abode jointly decided on and to, “mutually love and respect each other, to be faithful to each other, and to help and assist each other.”\textsuperscript{229}

However the law also specifies the roles of the husband and wife i.e. “the husband is the head of the family, and the wife the head of the home.”\textsuperscript{230} Further, “a husband shall be required to protect and maintain his wife and provide her with her needs in accordance with his abilities” while a “wife shall be required to properly maintain the home.”\textsuperscript{231} The failure of the husband or wife to fulfill these duties can result in the other spouse bringing an action in court.\textsuperscript{232} As discussed below the law also allows polygamous marriages. It also requires a a woman who has been divorced to wait a specified number of days before she can re-marry though there is no such restriction on men to re-marry.\textsuperscript{233}

According to the Elucidation accompanying the law, the need for a national marriage law arose to provide a legal basis for the marriage practices of various groups as well as to set out the principles of marriage. It further states that the law accommodates elements of religious laws while also taking into account changes in society.\textsuperscript{234} Under the law, marriages are only valid if it is solemnized according to the religion or beliefs of the parties to the marriage. It is unclear if non-religious marriage ceremonies are recognized by this law. All marriages are required to be registered.\textsuperscript{235} The law has detailed procedures to prevent a marriage that is not valid from proceeding allowing the parents, relatives, guardians, siblings and interested persons including a person to whom one of the parties is still married to approach designated officers and courts in this regard.\textsuperscript{236} A marriage registration officer is not permitted to solemnize a marriage where he or she knows that the requirements of a valid marriage including consent, age of consent, etc. are not fulfilled.\textsuperscript{237}

\section*{3.2 Consent for marriage}

Consent for marriage is addressed in the laws of the research countries either by provisions that require the consent of the parties to the marriage or through grounds for declaring a marriage to be void or voidable. It is also addressed through child marriage restraint laws.

Thailand’s \textit{Civil and Commercial Code} states clearly that, “a marriage can take place only if the man and woman agree to take each other as husband and wife, and such agreement must

\begin{flushleft}
\textsuperscript{226} Articles 23, 35 and 39 of the Law on Marriage, 1974. See also the Elucidation on the Law on Marriages which specifies the ground on which a petition for divorce may be presented to a court. \\
\textsuperscript{227} Article 30, Law on Marriage, 1974. \\
\textsuperscript{228} Article 31, Law on Marriage, 1974 \\
\textsuperscript{229} Article 33, Law on Marriage, 1974 \\
\textsuperscript{230} Article 31(3), law on Marriage, 1974 \\
\textsuperscript{231} Article 34, Law on Marriage, 1974 \\
\textsuperscript{232} Ibid. \\
\textsuperscript{233} Article 11, ibid. \\
\textsuperscript{234} Elucidation on the Law on Marriages (Unofficial translation) \\
\textsuperscript{235} Ibid. \\
\textsuperscript{236} Article 14, Law on Marriage, 1974 (Indonesia) \\
\textsuperscript{237} Article 20, ibid.
\end{flushleft}
be declared publicly before the Registrar in order to have it recorded by the Registrar." A marriage in contravention of this provision is considered to be void.

In India, the Hindu Marriage Act, 1955 also provides for consent for marriage but makes the marriage voidable if there is no consent. By contrast, the Parsi Marriage and Divorce Act, 1936 does not provide specifically for the consent of the parties to the marriage nor does it recognize the lack of consent as a ground for divorce or nullification. The Special Marriages Act, 1954 has far more detailed provisions in this regard and requires parties to the marriage to be capable of giving valid consent failing which the marriage is void. It is also voidable if the consent of the party is obtained through fraud or coercion. However, the Act also provides that if after the coercion has ended or the fraud discovered, he or she continues to live with free consent then the marriage is not voidable.

The Law on Human Rights, 1999 in Indonesia provides that marriage shall be entered into only with the free and full consent of the intending spouses, in accordance with prevailing legislation. This requirement is also reflected in the Law on Marriage, 1974.

Age of Consent and Child Marriages: The laws of all the research countries specify the age of consent for marriage. Some have specific child marriage restraint laws or provisions exist in all of the research countries.

In Nepal, in order to discourage child marriage the amendment prescribes increased the punishment for such marriage to up to 3 years. Whereas earlier the Country Code stipulated different ages for marriage for males and females, it now brings parity to the age of marriage. Now both sexes have be 20 years old to marry without parental consent. Those who are 18 years of age can marry but only with the consent of their parents.

In Sri Lanka the Marriage Registration Ordinance, 1907 (subsequently amended on several occasions) consolidates and governs marriages of all persons in Sri Lanka save Muslims and Kandyans stipulates the minimum age of marriage. The Kandyan Marriage & Divorce Act, 1952 although prohibiting marriage below a lawful age, makes exceptions in cases where one or both parties were under age but had cohabited for at least a year after attaining lawful age or if a child is born to them before they attain lawful age. As mentioned earlier, the Marriage Registration Amendment Act, 1995 has brought changes to both the Marriage Registration Ordinance, 1907 and the Kandyan Marriage & Divorce Act, 1952 by stipulating the minimum age of marriage for both males and females to be 18 years.

The Muslim Marriage & Divorce Act, 1951, which governs Muslims in Sri Lanka does not stipulate a minimum age for marriage. However, it does provide that a marriage involving a

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238 Section 1458, Civil and Commercial Code
239 Section 1495, ibid.
240 Sections 5 and 12, Hindu Marriage Act, 1955
241 Sections 3 and 32, Parsi Marriage and Divorce Act, 1936
242 Sections 13 and 15, Special Marriages Act, 1954
244 Article 6(1), Law on Marriage, 1974
245 The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
246 Section 15, Marriage Registration Ordinance, 1907 (Sri Lanka)
247 Section 4, Kandyan Marriage & Divorce Act, 1952 (Sri Lanka)
female who has not attained 12 years of age shall not be registered except at the discretion of the quazi.\textsuperscript{248}

In \textbf{India}, child marriage laws were updated to some extent with the \textit{Prohibition of Child Marriage Act, 2006}. Under the Act, the age of marriage is 21 for males and 18 for females.\textsuperscript{249} The Act, like its predecessor,\textsuperscript{250} does not make a child marriage void even though it prohibits them from taking place. Instead the marriage is voidable at the option of the person who was the child in the marriage.\textsuperscript{251} A child marriage is only void when there is an element of force, deceit, enticing away from lawful guardian or sold into marriage and then trafficked.\textsuperscript{252}

For a voidable marriage, a petition can be filed at any time before the child has completed two years of attaining majority.\textsuperscript{253} A petition has to be filed before a district court which shall direct both parties to return valuables, etc. received on the occasion of the marriage or an amount equal to the value of these gifts.\textsuperscript{254} The Act provides for a district judge to make an order regarding the payment of maintenance to the female contracting party to the marriage till her remarriage and where there is a child, as to the custody of such child.\textsuperscript{255} The Act punishes male adults over the age of 18 years who contract a child marriage, those who perform, conduct etc. the marriage and any a male parent or guardian who allowed or was in negligent in allowing the marriage from happening.\textsuperscript{256} If the guardian or parent is female, she can be punished only with a fine and not with imprisonment. The law also provides for the issue of injunctions to stop a child marriage on a complaint made by any person who has information of the solemnization.

Despite the application of this law to all citizens of India, personal laws still prescribe their own age limits for marriage. The age limit under the \textit{Hindu Marriage Act, 1955} conforms to that prescribed in this law; the punishment under the Act however is also applicable to the woman. While, Muslim law has no specific provision regarding the age of marriage, it does state that a guardian may give a girl in marriage if she is a minor. In such a case, the girl has the right to repudiate the marriage upon reaching majority (unless the marriage has been consummated) in accordance with the \textit{Muslim Marriage Dissolution Act, 1939}. The Indian \textit{Christian Marriage Act, 1872} defines majority at the age of twenty-one. It permits the marriage of a minor provided such a marriage receives the consent of the guardian. The provisions applicable to Indian Christians who are not covered by the Church of England, the Church of Scotland or the Roman Catholics, however, provide that no marriage certificate will be issued unless the age requirement is in conformity with the \textit{Prohibition of Child Marriage Act, 2006}. The \textit{Parsi Marriage and Divorce Act, 1936} does not prescribe any age limit, but specifies that any marriage between persons under the age of twenty-one requires the consent of the guardian. This Act also prevents the enforcement of a suit of marriage by minors (18 years for males and 16 years for females), thus, indirectly deterring marriages of minors.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{248} Section 23, Muslim Marriage & Divorce Act, 1951 (Sri Lanka)
\item \textsuperscript{249} Definition of “child”, Section 2(a), Prohibition of Child Marriage Act, 2006 (India)
\item \textsuperscript{250} Child Marriage Restraint Act, 1929.
\item \textsuperscript{251} Section 3, Prohibition of Child Marriage Act, 2006 (India)
\item \textsuperscript{252} Section 12, Prohibition of Child Marriage Act, 2006 (India)
\item \textsuperscript{253} Section 3, Prohibition of Child Marriage Act, 2006 (India)
\item \textsuperscript{254} Ibid.
\item \textsuperscript{255} Sections 4 and 5, Prohibition of Child Marriage Act, 2006 (India)
\item \textsuperscript{256} Sections 9 to 11, Prohibition of Child Marriage Act, 2006 (India)
\end{itemize}
\end{footnotesize}
Indonesia’s *Law on Marriage* requires the consent of both Parties to a marriage. The age of consent for marriage under the law is 21.\(^{257}\) However, with parental consent parties to a marriage have not attained the age of 21 may be married.\(^{258}\) The law further states that a marriage shall not be considered valid unless the man has attained 19 years of age and the woman, 16 years of age.\(^{259}\) However, persons below these ages may be married with the dispensation of the court or an authorized official agreed to by both sets of parents.\(^{260}\)

**Forced Marriage**: In Bangladesh, in *Dr. Shipra Chaudhary and another v. Government of Bangladesh and others*,\(^ {261}\) the High Court Division of the Supreme Court considered a case of forced marriage before it. The facts of the case involved a doctor practicing in England who was consistently pressured by her family in Bangladesh to get married. On one of her visits to Bangladesh she was confined by the family and was allegedly married by force; a relative along with Ain-O-Sailesh Kendra, an NGO approached the High Court asking for the doctor to be produced in court.

The Court on ascertaining the facts and speaking to the doctor herself when she was finally presented in court determined that she had indeed been “illegally detained without any lawful authority and in an unlawful manner.” While the court did not rule on whether the marriage was valid or not [not a subject matter of the Rule which to produce the woman in court] and asked the parties to approach the appropriate fora, it did rule on the matter of forced marriages. The court held,

“**Forced marriage is not at all permissible in our country. But the line between forced and arranged marriages is often not drawn in our culture with a deeply traditional respect for the family hierarchy.** Article 31 of the Constitution of Bangladesh provides, among other, that no action detrimental to the life, liberty, body reputation or property of any person shall be taken except in accordance with law. Article 32 provides that no person shall be deprived of life or personal liberty save in accordance with law. Those inalienable fundamental rights enshrined in the Constitution cannot not only be taken away by anybody including the parents of the detenu.”

In determining the content of the fundamental rights in the Bangladeshi Constitution, the court noted that it could look to international covenants as an aid to interpretation of these rights, particularly to determine the rights implicit in the rights like the right to lie and the right to liberty but not enumerated in the Constitution. The court thus referred to the *Convention on the Elimination of All Forms of Discrimination against Women*, highlighting in particular Article 16 and the equal right of men and women to “choose a spouse and to enter into marriage only with their free and full consent.” It also referred to the *Declaration on Elimination Against Women*, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social And Cultural Rights* and again

\(^{257}\) Article 6, Law on Marriage, 1974 (Indonesia)

\(^{258}\) Ibid. The provision also specifies who should give consent where the parents are not alive or where consent is not given or there is a difference of opinion among those who have to give consent in which case the courts would step in.

\(^{259}\) Article 7, Law on Marriage, 1974 (Indonesia)

\(^{260}\) Ibid.

\(^{261}\) 29 BLD (HCD) 2009
Article 16 of the *Universal Declaration of Human Rights* recognizing that marriage shall be entered into with the free and full consent of intending parties. Based on these, the court held,

“In this connection it is important to note that the parents, of course, have the right to advise their children but they must not treat their children as their slaves who must have their freedoms particularly when they are adults. The parents must remember that they are not living in old ages, but in the twenty first century where freedom of every human being irrespective of sex is universally recognized. The petitioner’s liberty enshrined in the Constitution shall mean and include her right to make decision concerning her groom free of coercion, violence and discrimination.” [Emphasis added]

3.3 Incest

The laws of the research countries cover different aspects of incest either through their criminal or marriage laws. In Nepal, where incest relates to child sexual abuse, it is dealt with through criminal laws. Sri Lanka’s *Penal Code* punishes incest through Section 364A. Marriage laws may also contain criminal sanctions as in the case of Sri Lanka’s *Muslim Marriage & Divorce Act, 1951*, which governs Muslims in Sri Lanka and stipulates punishment for Muslims who enter into incestuous relationships within or outside marriage. In India, Bangladesh, Thailand and Indonesia incest is not specifically punishable by criminal law (though laws relating to child sexual abuse may apply generally.)

The marriage laws of all the research countries contain prohibited degrees of marriage. The range of prohibition differs. In Thailand for instance, a marriage cannot take place if the man and woman are blood relations in the direct ascendant or descendant line, brother or sister of full or half blood. The said relationship shall be in accordance with blood relation without regard to its legitimacy. Further an adopter cannot marry the adopted.

Under India’s *Hindu Marriage Act 1955*, the prohibited degrees extend beyond the direct ascendant or descendant line. Thus, the prohibited degrees are:

“(i) if one is a lineal ascendant of the other; or
(ii) if one was the wife or husband of a lineal ascendant or descendant of the other ; or
(iii) if one was the wife of the brother or of the father's or mother's brother or of the grandfather's or grandmother's brother of the other; or
(iv) if the two are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;”

The prohibited degrees of marriage also differ according to the personal law. In Indonesia, prohibited degrees of marriage are a combination of those specified in the *Law on Marriage*,

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262 See Chapter 5 on Violence (Child Sexual Abuse)
263 Section 80, Muslim Marriage & Divorce Act, 1951 (Sri Lanka)
264 In Sri Lanka the Marriage Registration Ordinance, 1907 consolidates and governs marriages of all persons in Sri Lanka save Muslims and Kandysans stipulates the prohibited degrees of relationship for those who wish to marry. The Kandyan Marriage & Divorce Act, 1952 also stipulates prohibited degrees of relationship for those who wish to marry. The Muslim Marriage & Divorce Act, 1951, which governs Muslims in Sri Lanka stipulates punishment for Muslims who enter into incestuous relationships within or outside marriage.
265 Section 1450, Civil and Commercial Code (Thailand)
266 Section 1451, ibid.
and those specified by personal laws. Thus, according to Article 8, not only is marriage prohibited among direct blood relatives, relatives in a collateral line, those related through marriage, breastfed by the same woman and in the case of polygamous marriages where the bride is a sister, aunt or niece of an existing wife, it is also prohibited among parties who are “related in some other way so that their marriage is prohibited by their religion or other norms.”

### 3.4 Plural Marriage

In most of the research countries, whether plural marriage is allowed or not, depends on the personal laws applicable to religions or communities.

In Nepal, the secular code applicable to all persons discriminated against women in this regard. Here, bigamy is illegal and punishable with imprisonment but the marriage is not void. Yet, exceptions are made but not for women: a woman can never have more than one husband. However, a man is permitted to have more than one wife, with the consent of the first wife, if the first wife suffers from an incurable venereal disease, is unable to walk, is blind in both eyes, or if a government-recognized medical board proves that the wife is infertile. But the consent of the wife is not required in all cases: if the wife is living apart from her husband and has taken her share of property, the law assumes her consent.

While bigamy is prohibited in India under most personal laws it is not prohibited for Muslims. The Indian Penal Code makes bigamy an offence.

In Sri Lanka while the Marriage Registration Ordinance, 1907 applicable to all persons other than Muslims and Kandyans and the Kandyan Marriage & Divorce Act, 1952 prohibit bigamy, the Muslim Marriage & Divorce Act, 1951, which governs Muslims in Sri Lanka recognises the right of Muslim males to enter into polygamous marriages. The law stipulates that if a man wishes to enter into a second marriage he is required to give notice to the quazis in his area, his wife’s area and his future wife’s area and if this is not complied with the second marriage cannot be registered under the Act. Non-registration does not void the marriage but has penal implications including fines and imprisonment for the bridegroom and others who are foisted with the responsibility of registering the marriage.

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267 Clause 9 of the Chapter on Marriage, Nepal Country Code, 1963. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

268 Clauses 9 & 9A of the Chapter on Marriage, Nepal Country Code, 1963. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

269 See for example, Section 5(i), Hindu Marriage Act, 1955 (India) and Section 5, Parsi Marriage and Divorce Act, 1936 (India)

270 See ‘Marriage (Nikah) Chapter 11 in I. Mulla, Commentary on Mohammedan Law, Dwivedi Law Agency, 2008 and Section 155 in All India Muslim Personal Law Board, Compendium of Islamic Laws.

271 Section 494, Indian Penal Code

272 Section 18, Marriage Registration Ordinance, 1907 and Section 6, Kandyan Marriage & Divorce Act, 1952 (Sri Lanka)

273 Sections 17, 82, 83, ibid.
In Bangladesh, polygamy is allowed for Muslims and reportedly for Hindus with the personal law applicable to the latter based on ancient religious texts. Like Sri Lanka, Bangladesh has also introduced safeguards for a Muslim man to marry more than one woman but these go beyond the minimal procedural safeguards in the Sri Lankan law. It should be noted that these safeguards are not applicable to polygamous marriages by Hindus in Bangladesh.

The Muslim Family Laws Ordinance, 1961 in Bangladesh provides that a man cannot contract another marriage except with the permission of the Arbitration Council, such permission has to be recorded under the Muslim Marriages and Divorces (Registration) Act, 1974. An application with a prescribed fee is required to be submitted along with reasons for the proposed marriage and whether the consent of the existing wife has been obtained. On receipt of the application, the applicant and the existing wife or wives must nominate a representative so that an Arbitration Council may be constituted. This Council if satisfied that the proposed marriage is necessary and just, can give permission subject to such conditions. The decision of the Council is to be recorded in writing which can be appealed before an Assistant Judge whose decision would be final. A polygamous marriage contracted in contravention to these provisions requires the man to pay the entire amount of dower (explain) immediately and imprisonment upto a year or a fine up to 10,000 taka or both on conviction.

Polygamy is allowed in Indonesia and is also subject to safeguards that are far stricter than those in Bangladesh. Indonesia’s Marriage Law, 1974 incorporates the principle of monogamy and states that, “in principle, in a marriage, a man shall only be allowed to have a wife, and a wife shall only be allowed to have a husband.” However, it goes on to allow a court to give permission to a man to have more than one wife. To do so, the man must submit an application to a court which will give permission only if his current wife can no longer perform her obligations as a wife, she has a physical handicap or suffers from an incurable disease or she is incapable of procreation. A man can only submit this application if he has the consent from his current wife/wives, it is certain that he is capable of guaranteeing the living necessities of the wives and their children and that he will give fair treatment to his wives and their children.

These restrictions on polygamy were challenged before the Constitutional Court of Indonesia. In Decision Number 12/PUU-V/2007, the Constitutional Court considered the petitioner’s contention that the principle of monogamy and the provisions related to polygamy reduced his freedom to perform religion observance according to his religion namely to practice polygamy as a religious observance and as violative of his Constitutional right to found a family and procreate, to freedom of religion and to be free from discriminatory treatment. The Constitutional Court considered in depth the teachings of Islam in relation to polygamy and found that in fact the actual principle of marriage adopted by the teachings of Islam is the principle of monogamy and that “polygamy is an exception which may be sought under certain circumstances, both objectively in relation to time and place and subjectively, in relation to the parties (the persons practicing polygamy) within the marriage. Such circumstance may normatively be in the form of reasons and conditions stipulated by law and enforced through certain procedures in the court.”

275 Section 6, Muslim Family Laws Ordinance 1961 (Bangladesh)
276 Article 3(1), Marriage Law, 1974 (Indonesia)
277 Article 3(2), ibid.
The court further held that the objective of marriage is to achieve sakinah or peacefulness and that, “That is the reason why, for the sake of sustaining a sakinah family, it is considered reasonable for a husband wishing to practice polygamy to first ask for the opinion and consent from his wife so that she will not be hurt. In addition, the wife’s consent is required because it is closely related to the wife’s position as an equal partner and as a legal subject in a marriage whose dignity and status must be respected.” [emphasis added]

The examination of Islamic teachings also showed that fair treatment to all the wives and children, which was related to the capacity to provide for current and future wives and children and the capacity to be present during certain times and in certain places, was a necessary condition for allowing polygamy. To ensure such fairness, the court held, the State not only has the authority to regulate polygamy but has an obligation to realise such fairness. Dismissing the petition an detailing the reasons the Constitutional Court held, “Whereas the articles in the Marriage Law which state the reasons, requirements and procedures of polygamy, are none other than an effort to guarantee the recognition of the rights of wives and future wives the exercise of which becomes their husbands’ responsibility as the ones engaging in polygamy in the context of realizing the objective of a marriage.”

3.5 Restitution of Conjugal Rights

The personal laws of some of the research countries allow for the restitution of conjugal rights i.e. enforcing cohabitation in a marriage.

In Bangladesh, provisions for the restitution of conjugal rights exist in the Muslim Family Laws Ordinance, 1961. Under the Family Courts Ordinance, 1985 only a family court may deal with cases related to restitution of conjugal rights. Several cases of the High Court have held the restitution of conjugal rights to be incompatible with the Constitution. Thus, in Nelly Zaman v. Giasuddin Khan, the court held that with the lapse of time and social development,

“the very concept of the husband’s unilateral plea for forcible restitution of conjugal rights as against a wife unwilling to live with her husband has become outmoded and does not fit in with the accepted State and Public Principle and Policy of equality of all men and women being citizens equal before law entitled to equal protection of law and to be treated only in accordance with law as guaranteed in Articles 27 and 31 of the Constitution of Bangladesh.”

The court also commented on the actions of the lower courts (which passed orders in favour of the restitution of conjugal rights) in invoking the common law doctrine of *les pendens* in a suit for restitution of conjugal rights which relates to the transfer of immovable property. “It is difficult to appreciate that the right of conjugal relationship with one’s wife can be compared with the transfer of immovable property unless a woman is considered as

278 While holding that other arguments of the petitioner related to increase in adultery or the number of women outnumbering the number of men were irrelevant in a Constitutional review, the Court noted that polygamy was allowed for the first time in Islam after the Uhud war where a number of men had been killed resulting in an increased number of widowed women and orphans who urgently needed attention. “It was under such a circumstance that practicing polygamy was allowed and legal (halal) for the first time in the history of Islam. Even under such circumstance, the legal practice of polygamy was still followed by certain requirements, one of them being fair treatment.” The Court further held that polygamy does not constitute an act of worship in its special sense and therefore its regulation is not against the teachings of Islam.

279 34 DLR (1982)
immovable property. The above proposition laid down by the courts below on this question must be held to be grossly erroneous and absurd on the face of it.”

Similarly, in Mrs. Shehrin Akhter and another v. Al-Haj Md. Ismat280 the High Court Division rejected the request by a man for restitution of conjugal rights as part of a petition challenging the divorce by his wife. The court held that such directions in matters of the relationship between man and wife, no longer hold good and are opposed to the principles laid down in Articles 27 and 31 of the Constitution.

In India, the restitution of conjugal rights is provided under the Hindu Marriage Act, 1955, the Indian Divorce Act, 1869 and the Parsi Marriage and Divorce Act, 1936 which provide that where either spouse has withdrawn from the society of the other, the District Court on application may issue a decree of restitution of conjugal rights under certain circumstances.281 This provision of the Hindu Marriage Act was challenged in T. Sareetha v. T. Venkata Subbaiah.282 The Andhra Pradesh High Court held that the remedy of restitution of conjugal rights was violative of the wife’s fundamental right to personal liberty and equality guaranteed by Articles 21 and 14 of the Indian Constitution. The High Court explained that by enforcing the right of husband and wife to each other’s company and the right to have marital intercourse, the woman’s right to personal liberty was violated. Further, the fact that the remedy was available to both husband and wife did not satisfy the provisions of Article 14 as the social reality of Hindu society found the maximum usage of this provision by the husband. The Delhi High Court in Harvinder Singh v. Harmandar Singh283 held that the view of the Andhra Pradesh High Court was a distortion of the concept of conjugal rights and that in its right perspective, its object is to restore cohabitation and not merely sexual intercourse between estranged couples and upheld the remedy as a great reconciliatory step.

The debate between the High Courts as to the validity of the remedy was resolved by the Supreme Court in Smt. Saroj Rani v. Sudharshan Kumar Chadha284 where conjugal rights were held as inherent in the very institution of marriage and that Section 9 had sufficient safeguards to prevent it from becoming a tyranny. The Supreme Court upheld the remedy and stated that it was not opposed to Articles 21 and 14 while opining that constitutional law should not be allowed to invade the home.

“One general observation must be made. Introduction of constitutional law in the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and the married life neither Article 21 nor Article 14 has any place. In sensitive sphere which is at once most intimate and delicate the introduction of the cold principles of Constitutional law will have the effect of weakening the marriage bond.”

280 20 BLD (HCD) 159 (2000)
281 Section 9 of the Hindu Marriage Act (India) states that, “when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Explanation-Where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.”
282 AIR 1983 AP 356
283 AIR 1984 Delhi 66
284 AIR 1984 SC 1562
3.6 Virginity testing/other forms of testing conditions placed on marriage (e.g. HIV/STIs)

Although in practice, notions of virginity play a significant role in relation to marriage these issues seldom play out within the legal system except in cases of sexual assault.\textsuperscript{285} The issue did arise in cases in Nepal and India however.

In Nepal, the right to privacy was given primacy in a case decided by the Supreme Court of Nepal, which related to a property dispute.\textsuperscript{286} In this case the lower court ordered a woman to undergo a virginity test to determine if she was married with the reasoning that if the test had revealed that the woman was not a virgin, she would not be entitled to any share of a partition of property. She refused and appealed the case to the Supreme Court. The court invalidated the lower court order, distinguishing between marriage and virginity and finding that the genital examination would violate the woman’s right to privacy. It held that whether a person did or did not have sex with a person of her choosing was a “matter of private conduct of the person.”

In India, virginity testing in the context of marriage has arisen primarily in divorce cases. In these matters, the Courts have examined the issue of whether they can direct a person to undergo a medical exam including a virginity test. In \textit{Sharda v. Dharmpal},\textsuperscript{287} the Supreme Court, while determining whether they could direct a person alleged to be of unsound mind in a divorce petition, laid down the principles that are followed in cases of virginity tests. The primary issue before the Supreme Court in this matter was whether a direction by them to undergo a medical examination would violate the right to privacy that is considered a part of the right to life and personal liberty in Article 21 of the Indian Constitution. The court held that the right to privacy is not an absolute right, particularly where the rights of two parties clash. However, the court, it was held, is not allowed to order a roving inquiry and must have sufficient materials before it to exercise its jurisdiction. The Supreme Court concluded that:

“1. A matrimonial court has the power to order a person to undergo medical test. 2. Passing of such an order by the court would not be in violation of the right to personal liberty under Article 21 of the Indian Constitution. 3. However, the Court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the court, the respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.”

These principles have been used by High Courts in cases related to virginity tests. In \textit{Surjit Singh Thind v. Kanwaljit Kaur},\textsuperscript{288} the Delhi High Court in a case where a woman had filed a case for nullity of the marriage on the ground that it had never been consummated rejected the plea of the husband to have her subjected to a virginity test to prove she is not a virgin. The court noted that the medical examination, “even if it does not prove her virginity would not necessarily lead to the conclusion that the marriage with the husband-petitioner has been consummated. It is trite to state that virginity is not the only proof of non-

\textsuperscript{285} Discussed in Chapter 5 on Violence
\textsuperscript{286} Annapurna Rana v Ambika Raja Laxmi Rana. The authors did not have access to the full text of the judgment or a translation of the same. This information was obtained from an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
\textsuperscript{287} MANU/SC/0260/2003
\textsuperscript{288} MANU/PH/0848/2003
consummation of marriage. The incapacity of the husband in any form, physical or mental, may also be the factor for non-consummation of marriage. Allowing the medical examination of a woman for her virginity would certainly violate her right of privacy and personal liberty enshrined under Article 21 of the Constitution.” The court held this would be a violation of the Supreme Court’s order that no court should order a roving inquiry and that the question of the virginity of the wife was not in issue.

In another case in Andhra Pradesh, however, the court came to a different conclusion on pleas related to the consummation of marriage and directed the wife to undergo a virginity test. It is important to remember that even in the judgment of the Supreme Court, it is clear that the person can refuse the test in which case an adverse inference will be drawn against that person in the case.

4. GENDER IDENTITY/EXPRESSION AS IT IS RELEVANT TO SEXUALITY AND SEXUAL HEALTH

This section examines the way that state regulation of gender identity and expression influences the health of individuals and groups. Gender, gender relations, and gendered characteristics are important features through which health, including sexual health, is mediated. Gender identification can be both assigned or assumed by individuals, the latter in part by acting in socially gendered ways, i.e., by exercising one’s right to expression by means of gendered speech, deportment, or identification/self-naming. When people enact or express gendered conduct, it can conform to or clash with social conventions for male- or female-identified bodies.

To become fully human in society requires the acquisition of gender traits, so that persons are socially recognizable. No one lives untouched or outside of gender systems, yet all human rights are meant to be enjoyed equally by all persons regardless of their sex, and ultimately their gender. The inability to live one’s life fully and with security in accord with one’s preferred gender expression and identity has a negative effect on well being. In addition, state violence, discrimination, and efforts to mandate gender identity and expression exclude or diminish the access of gender non-conforming persons from the social institutions necessary to live a life with dignity: education; regular employment; the social institutions of family and marriage; and access to appropriate and quality health care.

Two streams of rights-based work address gender as a place of rights and health violations. The analysis of gender-based violations tends to focus on girls and women, while the work on gender identity or gender expression tends to focus on persons called ‘gender non-conforming’ and ‘transgender’, i.e., persons whose gender expression differs from that which is socially normative, based on their perceived body characteristics at birth (sex assigned at birth). Both streams of rights work challenge culturally stereotyped thinking, norms, and expectations about men and women, including but not limited to their sexual behavior.

As noted in the chapter on violence (supra), gender-based violence often functions to reinforce gender inequality and discrimination. Violence is directed at non-conforming persons, such as women who transgress local gender norms by enrolling in school or acting sexually outside of marriage, for example, or men who fail to behave in sufficiently masculine ways.

State-sponsored violence and discrimination against gender non-conforming persons, toleration of such acts committed by non-state actors, including relatives and community members, or taking (or failing to) take steps to reduce and prevent discrimination and abuse are ways in which state action in the context of gender expression affects sexual health.

291 Some gender non-conforming persons seek to alter their bodies to conform to a chosen gender (often called transsexuality); others adopt speech, dress, or habits associated with one gender but do not alter or wish to alter their bodies.
292 Normative rules regarding masculinity and femininity (dress, appropriate work, modes of verbal and non-verbal expression, for example) are not uniform but can vary across historical period and culture.
Violence, especially sexual violence, is directed at gender non-conforming persons of all kinds and ages. It is prevalent globally, and committed with impunity, including by the authorities themselves, often but not only when gender non-conforming persons are in detention or state care. Non-sexual and sexual violence produces a host of physical and psychological injuries, as well as death. The harm of this violence is compounded when the sexual assault is not treated in the law seriously or when fear of violence drives gender non-conforming persons away from health services needed to treat the sequelae of violence.

The social rules of gender are codified and maintained in law, so that there are legal consequences—often quite serious, through the criminal law -- in transgressing the rules regulating gender. These laws can in themselves be abusive of rights of privacy, equality before the law, expression and association, with effects on the health of the gender-nonconforming person. For example, laws which provide for the arrest and/or corporal punishment for cross-dressing persons have direct effects on their health through the effects of incarceration, and indirect effects through stigmatizing persons covered by these laws, such that forms of violence—rape and assault are especially frequently documented—are committed against them with impunity by state and non-state actors.

In addition, many gender rules seem to assume a connection between non-conforming gender expression and non-conforming sexual behavior: criminal laws regulating dress for women and men are often conflated with policies against homosexuality. Indeed, it is often wrongly assumed that gender non-conformity—such as cross-dressing, or a desire to take on masculine or feminine characteristics different from those culturally associated with one’s assigned sex at birth—automatically indicates homosexual behavior.

States also regulate gender expression by permitting, mandating, controlling, or forbidding surgeries and medical interventions for the purpose of modifying the bodies of persons to align with specific expectations about gender.

Current rights claims include the freedom to access medical technologies and interventions for bodily modification, to better reflect the person’s perceived or chosen gender, congruent with prevailing standards of professional practice and patient consent. In addition, claims include the ability to transition to a new gender without submitting to compulsory surgeries, particularly sterilization, or other state-mandated procedures that infringe on rights of privacy, and to reproduce and found a family. In addition, basic protections against discrimination in the right to access mental and physical health services must apply.

293 The social rules of gender, called gender systems that organize the assignments and valuations of persons may vary between and within societies, and may also change historically. Nonetheless, they are implemented through powerful rules, incentives, and socialization, operating through social institutions (church, family, state, health and education, e.g.), which assign status, govern behaviour, and determine access to resources and social legitimacy based on conformity to local gender norms. [see Gayle Rubin, Traffic in Women, cite to come]

294 While international human rights law has not fully responded to gender expression as a form of expression, the basic reasoning articulated in the Siracusa Principles [See expression and information chapeau] which constrain the arbitrary use of state power to restrict expression can be fruitfully applied. These principles would protect gender non-conforming non-verbal expression such as cross-dressing, and physical deportment as well as verbal expression of gender variance from state regulation, especially from penalization in the criminal law, as an unjustified and arbitrary interference with fundamental rights. State justification by recourse to broad claims of public health and morality, especially where such claims rest on gender stereotypes forbidden under article 5 of CEDAW, would not be sustainable.
Contemporary rights and health work on gender expression and transgendered persons imply corresponding state obligations, such as providing for the possibility to change one’s name and legal gender, and recognition of the right to marry or to remain married after assuming one’s new gender. Some legal systems simply disallow name changes, or other measures supporting the ability of persons to determine—and change— their gender identity regardless of their sex at birth, through a range of civil administrative laws, including regulations controlling birth registries, state identity cards, passports, and other socially important identity documents.

In many societies, the transgender population is marginalized through discrimination and violence, often pushed to the edges of survival with decreased access to basic health services, housing and employment. This exclusion is compounded for members of lower caste, class, and minority groups. The attempts by transgendered persons to generate income through selling sex or engaging in other criminalized practices renders them more at risk of violence, including sexual violence. Many policing surveillance systems and morals and public decency regulations are used to harass and target them, for false arrest and extortion, sexual favors, and other abuses. Many persons of gender-variant behavior or identities are also highly mobile, in part to escape police surveillance and in part to seek out new communities outside the influence their natal homes and find tolerance or acceptance. In these cases, travel is a resourceful strategy, but at times a risk factor for sexual ill-health, as transgendered persons move outside networks of regular care and information.

Human rights as a system has evolved to address many of the serious rights implications of laws and state practices regulating gender. First, it increased its capacity to address gendered harms to women. More recently, formal human rights practice has recognized police abuse of transgender persons, or the unwillingness of the law to recognize transition from one sex to another, or living with a gender which is not bounded in the fixed binary. In the last decade, many human rights courts at national and regional level have recognized privacy, health and non-discrimination rights in striking down laws which exclude transgendered persons from the basic protection of the law. [See Europe/Westeson and Western Pacific/Cusak, and Diwan and Bhardwaj/SEARO]

Persons under 18 who identify as transgender, seek sexual surgeries or are otherwise gender-variant face particular struggles and abuses. As they are still under the guidance, and in many countries, the legal control of their parents, their desires can be stymied by family; they may face serious abuse within families without access to advocates or intervention. Many face bullying or abuse in education and drop out of school and/or run away from home to escape the abuse and to live their lives in their chosen gender. Youth under these circumstances face additional barriers in seeking shelter or other support services, as they do not conform to the

The term “transgender” is an umbrella term for people whose gender identity and/or gender expression differs from what is normative, given the sex they were assigned at birth, including cross-dressers, pre-operative, post-operative or non-operative transsexuals. Transgender people may define themselves as female-to-male (FTM, assigned a female biological sex at birth but who have a predominantly male gender identity) or male-to-female (MTF, assigned a male biological sex at birth but who have a predominantly female gender identity); others consider themselves as falling outside binary concepts of gender or sex. Transgender people may or may not choose to alter their bodies hormonally and/or surgically: the term is not limited to those who have the resources for and access to gender reassignment through surgery. Transgender is not about sexual orientation; transgender people may be heterosexual, lesbian, gay or bisexual. [from: Global Rights: Demanding Credibility and Sustaining Activism: A Guide to sexuality-based advocacy, 2009]
gender norms which many remand homes and shelters expect, and they may face additional abuse in the very system of juvenile care which is intended to protect them.

Persons born with genitalia or bodies deemed gender-ambiguous or gender non-conforming fall under the broad label of “persons with intersex conditions”. The causes of these developments are diverse, including a variety of genetic anomalies and hormonal over- and under-exposures, during fetal development, many of which are discovered shortly after birth or during childhood. Although most manifestations are not life-threatening, it has become common to alter the infant’s or child’s body, particularly sexual organs, to conform to gendered physical norms, including through (repeated) surgeries, hormonal interventions, and other measures. The rationale for gender-reassignment or “normalizing” surgery for minors includes reducing gender confusion for the child and parents, responding to parental concerns that the child be normal and accepted, and to promote the child’s social integration and happiness.

Until recently, states have generally given minimal attention to these interventions, requiring only parental consent (assumed to be motivated by the ‘best interests of the child’) and in conformity with locally accepted, general standards of medical care. Intersex advocates have emphasized the insufficiency of these conventional standards, highlighting the lack of the child’s consent for drastic interventions that are irreversible; life-long in their consequence for physical and mental health, particularly sexual response; and the absence of medical justification for imposing these interventions in childhood, before the person has the opportunity and mature judgment to determine the advantages and disadvantages of these procedures.

Legally and politically, the claims of persons with intersex conditions engage not only with children’s rights, but also more generally with claims to the highest attainable standard of health, non-discrimination and autonomy-privacy rights around determining one’s own gender.

4.1 Civil status registration/names

The ability for transgendered persons to register to vote and for other services has gradually increased over the years in the research countries. For the past few years, passport application forms in India have also included a third option for applicants who do not wish to identify as male or female. Reports also suggest that India’s Election Commission has given transgender persons the right to vote in elections and stand as candidates as a third gender. In Bangladesh, the Election Commission reportedly announced that transgender persons would be allowed to choose the sex they would like to be registered as for voting in elections. However, the authors were unable to obtain a verified English translation of this Election Commission order for the purposes of this review.

4.2 Transgender


298 “Bangladesh eunuchs to vote in first elections,” Agence France-Presse, 28 December 2008
With reference to transgender rights, the judgment of the Nepal Supreme Court discussed in Chapter 1 on Non-discrimination in the case of Sunil Babu Pant v. Government of Nepal remains the main legal development.

In India, one of the earliest developments in relation to transgender rights occurred through the issuance of a Government Order by the state of Tamil Nadu in 2006, which acknowledged basic citizenship rights for transgendered persons.299 Based on the findings of a committee to examine the status of transgender persons in the state, directives were issued which included several positive aspects: the Health Department together with recognized and qualified counselors were ordered to undertake a programme of counseling and sensitization on transgender issues throughout the state; family counseling by teachers and those sensitized on this issue were made mandatory so that children with gender identity issues were not disowned by their families; transgender persons were prohibited from being banned from educational establishments and if there was such denial of admission suitable disciplinary action was to be taken by the concerned authorities; a survey of transgender persons was to be undertaken throughout the state in order to identify their issues of concern and provide appropriate assistance; the Health Ministry was asked to consider a decision to legalize sex reassignment surgery in government hospitals; special vocational and skills development training was to be provided and small loans to assist transgender persons in taking up vocations were to be provided; and district collectors were to provide opportunities for grievance redressal on a quarterly basis exclusively for transgender persons when their concerns on access to identity cards and social welfare benefits would be taken up.

While Indian jurisprudence in relation to discrimination based on gender identity has not yet evolved, courts have begun to respect transgender individuals as persons deserving of fundamental protection. For instance, in Jayalakshmi v The State of Tamil Nadu & Ors.,300 the Madras High Court was confronted with a case where a transgender man was harassed by the police to the extent that he immolated himself and died. The court held that the State had to pay compensation for the harassment by its police force and also directed the institution of disciplinary proceedings against the officers.

Yet, archaic criminal law continues to provide sanctions against “emasculcation”301 and transgender persons are highly exposed to broad public nuisance laws302, which can be used freely by police to extort and harass.

4.3 Medical/health services (including insurance coverage)

Amongst the research countries, Thailand is the only one which is officially providing and regulating sex reassignment surgeries. Thailand provides several treatment options for sex reassignment surgeries although there is a lack of clarity on rules or guidelines for the same. The Medical Council in 2009, empowered by the Medical Profession Act, issued the Regulations of the Medical Council Concerning Ethics in the Medical Profession Rules for Treatment in Sex Change Operations, 2009. Clause 4 of these regulations provides that “treatment for a sex change procedure” means treatment of an illness or an abnormal state of mind by undergoing an operation to change (the physical characteristics) from a male to a

299 Available at: http://www.tn.gov.in/gorders/social/sw_e_199_2006.htm
300 (2007) 4 MLJ 849
301 Section 320, Indian Penal Code (Grievous Hurt)
302 Section 268, Indian Penal Code (Public Nuisance), Section 110, Bombay Police Act, 1951 (Indecent Behaviour in Public), Section 111, Bombay Police Act, 1951 (Annoying Passengers in the Street)
female or a female to a male. It includes an operation or other treatment intended to permanently change physical characteristics or sex hormones, for example through removal of the testicles in their entirety. Those who can perform sex reassignment surgeries are persons engaged in the medical profession who have passed a training programme for the same or those who “present knowledge, competence, and experience in performing sex change surgery with certification from the Medical Council.” The age at which an “ailing person” may undergo the surgery is if he or she is over 20 years of age. For a person between 18 and 20 years of age, consent from an authorized guardian requires to be obtained. A person desirous of undergoing the surgery is required to pass an evaluation and certification from two psychiatrists that the operation may be performed.

Further, the Directors of the Medical Council issued an *Announcement of the Medical Council Regarding Guidelines for Persons Manifesting Confusion Concerning Their Sexual Identity or Desiring Treatment By Undergoing a Sex Change Operation in 2009*. These guidelines require that a psychiatrist must be consulted “for assessment, diagnosis of the condition, diagnosis for characterizing the condition, and assistance given to the person according to the guidelines of the Psychiatry College of Thailand.” On a positive psychiatric diagnosis “on the ailing person indicating a predisposition for a sex change operation” the person is to be sent for consultation to an endocrinologist to consider the use of hormones in treatment. The psychiatrist is also required “to make recommendations to every person receiving treatment and the person receiving treatment must experience living the life of the desired sex for at least one year” after which a re-assessment is to be made for further treatment by means of a sex change operation. Guideline 5 provides that if there is “a predisposition for treatment by means of a sex change operation, the person receiving treatment must receive approval from at least two psychiatrists. In the event the ailing person is a foreigner and has received approval from a foreign psychiatrist already, at least one Thai psychiatrist must assess and evaluate the person prior to the operation.”

Although isolated, recent years have seen an increased acknowledgment by the law and lawmakers of the marginalization of persons not fitting the male-female gender binary. Consequently, there has been a slow but incremental articulation of rights of gender non-conforming individuals by the courts and lawmakers. Granting essential rights of citizenship – the recognition of a third gender, the ability to participate in electoral processes, to obtain identity documents, to access necessary health services which are sensitive to the needs of alternative gender identities, to access public employment and education – are all signs that the law is increasingly engaging and sensitive to the concerns of transgender and transsexual persons, including their sexual health rights. In an isolated but important case the judiciary has stepped in to make law enforcement officials accountable for the death of a transgendered person. Although basic progress still requires to be made in some of the research countries, neighbouring instances have set important precedents on gender identity and expression.

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303 Clause 5, Regulations of the Medical Council Concerning Ethics in the Medical Profession Rules for Treatment in Sex Change Operations, 2009 (Thailand)
304 Clause 6, ibid.
305 Guideline 1, Guidelines for Persons Manifesting Confusion Concerning Their Sexual Identity or Desiring Treatment By Undergoing a Sex Change Operation, 2009 (Thailand)
306 Guideline 2, ibid.
307 Guideline 4, ibid.
5. VIOLENCE

Violence committed against persons violates and diminishes the fundamental human rights recognized in all international conventions, most notably the right to life and bodily integrity. Persons may be deprived of life or liberty only in accordance with the law. All nations have made formal commitments to protect persons against violence through their national laws and international obligations. All treaty bodies have agreed that states are required to prevent violence by state and non-state actors.\textsuperscript{308} The types of violence considered in this review include sexual violence, as well as non-sexual violence directed at persons because of their real or imagined sexual practices, expressions, associations, or identities.

Forms of sexual violence include rape, coerced sex, child sexual abuse, sexualized forms of domestic and intimate partner violence, FGM, so-called honor crimes, and trafficking into forced prostitution. It is important to recognize that sexual violence can be and is directed at women, men, girls and boys, and at any group in a position of vulnerability, though available data suggest higher incidence of sexual violence directed against women and girls. Sexual violence in its diverse forms impairs sexual health through physical injury, psychological trauma, transmission of disease through unprotected sex, particularly HIV and STIs, unwanted pregnancy and subsequent unsafe abortion or maternal mortality.\textsuperscript{309} Victims of sexual violence are often held responsible, in part or in whole, for the violence, feeling shame, dishonor, spoiled identity, and guilt that make it difficult to report incidents of violence and seek treatment and care for related physical and psychological injuries. Sexual violence is thus responsible for a significant disease burden from the national and global perspective, some portion of which becomes chronic. The extensive social and health system costs stemming from sexual violence, however, may be significantly reduced through prevention and earlier, more effective state intervention.

A comprehensive review of sexual health must also consider violence committed against persons because of their real or imagined sexual characteristics, even though delivered through non-sexual means (i.e., non-sexual assault or injury). These real or imagined sexual characteristics or attributes might include sexual behavior or practices, same-gender sexual partner, lack of virginity, extramarital sex, sexual contact with social 'inferiors' or members of 'enemy' groups, 'bad reputation', 'dishonor' to the kin group, and sexual 'disobedience'. Although the delivery of violence may not utilize rape or sexual injury as its medium, the physical and psychological effects are otherwise similar: injury, reduced ability to access health care for these injuries, and increased disease burden.

In addition to representing an assault on fundamental rights to life and bodily integrity, violence may be both a sign and consequence of gender discrimination. Sexual violence against women and girls reduces freedom of movement, association, and speech, as well as reducing their access to education, work, and the public sphere and political participation. Sexual violence, however, is directed not just at women and girls, but also at men, boys, and transgender persons, who are thought to transgress social norms of appropriate masculine or feminine behavior (in dress, manner, speech, or work). Sexual violence reinforces and stems

\textsuperscript{308} See General Rec 19, Violence against women, treaty body general comments.
\textsuperscript{310} WHO, estimates of GBD related to violence which we may be able to use if it comes soon (Jane).
from other forms of inequality as well, serving to reinforce hierarchies of power based on class, race, ethnicity, caste, or other important social divisions. Sexual violence thus serves as an extra-legal form of punishment and control, which may be administered informally by state agents or by non-state actors (family members, neighbors, or workmates). It is a draconian form of extra-legal punishment, intended to induce shame and diminish the reputation of the victim of violence, resulting in social exclusion, damaged reputation, and diminished life prospects.

In addition, sexual and non-sexual violence directed at sexually stigmatized persons reduce the capacity of persons to access and utilize other rights—the right to health and health services, freedom of movement, expression, political participation, livelihood, and free and unfree marriage. Sexual and non-sexual violence directed at sexually stigmatized persons promotes fear and terror, especially in conditions of conflict and ethnic cleansing, erodes personal agency, and serves as a marker of stigma and subordination. National and international law must provide for effect prevention, investigation, and forms of response. The bodies of law that address law violence more directly include human rights, humanitarian, refugee, and international criminal law.

The right to live a life free from violence flows from the right to life recognised in all relevant international conventions. The Constitutions of each of the research countries detail the right to life (in some available to all persons; in others only to citizens) and provide that persons may be deprived of life or liberty only in accordance with law.

For instance, in Nepal every person is guaranteed “the right to live with dignity” and cannot be deprived of personal liberty except as provided by law. Sri Lanka’s Constitution, on the other hand, does not specify a right to life but couches personal liberty in the context of arrest and detention, providing that if one’s personal liberty is deprived it may be done only as per the prescribed procedure established by law.

In India, Article 21 of the Constitution guarantees not only the right to life but also the right to personal liberty of all its citizens. Personal liberty has been held to mean not only liberty of the person but it means liberty or rights attached to the person. In A. K. Gopalan v. State of Madras, the Supreme Court has discussed the meaning and scope of personal liberties to include, “…next to the freedom of life comes the freedom of the person, which means that one’s body shall not be touched, violated, arrested or imprisoned and one’s limbs shall not be injured or maimed except under authority of law.”

The protection of children, men and women from sexual abuse and exploitation is central to the protection of their personal liberties. Elsewhere in this paper, other aspects of the right to life and liberty are discussed. For the purposes of this section, we focus on the content of the right to life in the context of violence. The right against gender-based violence flows from the right to life and from the recognition of women’s equality.

311 See international law section. Labor law may include some forms of violence in working conditions as well.
312 Article 12, Interim Constitution of Nepal, 2007
314 AIR 1950 SC 27. See also Kharak Singh v State of U.P. AIR 1963 SC 1295
While the Constitutions of all the research countries recognize the right to life and the right to equality, three make specific reference to violence against women and children. Thus, Article 20 of Nepal’s Interim Constitution prohibits, “physical, mental or any other form of violence” on women while Article 22 recognises the right of children “not to be subjected to physical, mental or any other form of exploitation.”

Section 40(6) of the Thai Constitution, in its enumeration of rights in the judicial process includes that, “a child, youth, woman, senior person or disabled or handicapped person shall have the right to appropriate protection in judicial process and shall have the right to appropriate treatment in cases relating to sexual violence.” Section 52, paragraph 2 states that “children, youth, women and family members shall have the right to receive protection against violence and unfair treatment from the State and shall have the right to medical treatment or rehabilitation upon the occurrence thereof.”

The Indonesian Constitution recognises the right of every person “to live and to defend his/her life and existence.” Article 28B(2) of the Indonesian Constitution states, “Every child shall have the right to live, to grow, and to be protected against violence and discrimination.”

5.1 Domestic/intimate partner violence

Laws relating to domestic or intimate partner violence in the research countries take different forms. They are addressed through general family laws that include physical and mental cruelty as a ground for divorce, general and specific criminal laws relating to murder, assault, hurt, etc. and specific domestic violence laws that provide protection measures, civil remedies or mechanisms of settlement. While five of the six research countries have specific laws on domestic violence with Bangladesh still considering a bill on domestic violence, some of the countries also have laws relating to dowry deaths.

Specific domestic violence legislation: Among the research countries, Indonesia was the first to introduce specific legislation on domestic violence in 2004. The preamble of the Law of the Republic of Indonesia regarding Elimination of Violence in Household lays out the considerations for the law as follows:

“a. whereas each citizen shall be entitled to get a sense of security and shall be free of all forms of violence in accordance with the philosophy of the Pancasila (the five basic principles of the Republic of Indonesia) and the 1945 Constitution of the Republic of Indonesia;

b. Whereas all forms of violence, particularly violence in household, constitutes violence against human rights and crime against human dignity as well as form of discrimination that must be eliminated;
c. Whereas victims of violence in household, that are mostly women, must get protection from the state and/or the public so that they can be avoided and freed from violence or threat of violence, torture, or treatment degrading human degree and dignity;

d. Whereas in fact there are many cases of violence in household, whilst the legal system in Indonesia has not guaranteed protection of victims of violence in household;"322

Thus, the law is gender-neutral while recognising at the same time that victims of violence in the household are mostly women. The principles based on which violence in the household is to be eliminated under this law are respect for human rights, justice and gender equality, non-discrimination and victim protection.323 The intent of the law is the prevention of violence while at the same time maintaining the “intactness of harmonious and prosperous household.”324

Using the household as the site of violence, the law includes in the scope of the household,325 husband, wife and children, other people in the household related to them through blood, marriage, “suckling at the same breast”, care and guardianship, and, interestingly, also to “the individual working to assist the household and living in the household.”326

Article 5 of the law prohibits physical,327 psychic328 and sexual violence329 as well as negligence of household.330 The law entitles “victims” to protection of the family, law enforcement, courts, health services, social workers and spiritual guidance and specifically notes that he or she is entitled to confidentiality.331 The law also creates various obligations on the government332 which has the responsibility of preventing violence in the household.333 The law also creates obligations on persons who hear, see or know of violence in the household including to make efforts within their capability to prevent the continuation of crime, provide protection to the victim, provide emergency assistance and assist in the process of submission of application for protection ruling.334

322 Preamble, Law of the Republic of Indonesia regarding Elimination of Violence in Household, 2004
323 Article 3, ibid.
324 Article 4, ibid.
325 Article 2(1), ibid.
326 People working to assist in the household are considered by the law to be a family member during the period while living in the household in question. See Article 2(2), ibid.
327 Article 5, ibid, which provides that physical violence shall be an act bringing about pain, sickness, or serious injury.
328 Article 5, ibid, which states that psychic violence shall be an act bringing about fear, loss of self-confidence, loss of capability to act, hopelessness, and/or serious psychic suffering on someone.
329 See discussion in sub-section 5.3 on marital rape below
330 “(1) Anyone shall be prohibited to neglect an individual within the scope of the household, whilst in fact according to the law prevailing on him/her or on account of acceptance or agreement he/she shall be obliged to provide livelihood, treatment, or care for the individual. (2) The negligence referred to in paragraph (1) shall also apply to anyone bringing about economic dependence by limiting and/or prohibiting an individual to work properly inside or outside the house thereby the victim is placed under the control of the individual.” Article 9, Law of the Republic of Indonesia regarding Elimination of Violence in Household, 2004
331 Article 10, ibid.
332 This includes formulating policies, organise information, advocacy, training etc. The government may also make efforts like providing special service rooms at police stations, provision of officials, health personnel, arrange for the protection of witnesses, family, etc. See Articles 12 and 13, ibid.
333 Article 11, ibid.
334 Article 15, ibid.
Within 24 hours of knowing or receiving a report on violence the police are required to provide temporary protection (which may extend up to 7 days) and within the next 24 hours to request for a “protection instruction ruling” from a court. They must, among other things, conduct investigations immediately and inform victims of their rights and that violence in the household is a crime against human dignity. The law also details the services and information to be provided by health workers, social workers, volunteer companions, spiritual mentors and advocates. Separate provisions are also included for the “recovery of victim” through access to various services.

The law attempts to minimise procedural obstacles that might discourage victims from reporting violence including allowing a report to be made by victims themselves or to delegate authority to another person; to make the complaint where the violence took place or where the victim is located; to allow requests for a protection ruling to be filed by the victim, a family member or a friend as well as the police, the companion volunteer or spiritual mentor; and allow the request to be made verbally or in writing. For children, the complaint can be made by the parent, guardian, caretaker, or the child concerned.

A court receiving a request for protection must rule within 7 days. Protection rulings last for a year and may be renewed if necessary. The law also details the powers of the court where a protection ruling is violated including detaining the perpetrator of the violence for up to 30 days.

The law also criminalises acts of violence in the household and specifies punishments for each act and for the different circumstances in which they may take place. It is unclear from the provisions of the law whether prosecution and trial is mandatory or discretionary depending on the actions of the court in promoting the “intactness of the household.” In addition to these sentences, the court can also direct the perpetrator of violence to undergo counselling.

According to the report of the Indonesian National Commission on Violence Against Women to the Committee against Torture, reporting on domestic violence increased significantly since the enactment of the law, reaching more than 20,000 in 2007 and that the law was being actively used by women’s groups, police units and courts. The Commission noted, however, that nearly 30-40% of domestic violence cases are being addressed through religious
According to the Commission, obstacles in the implementation of the law, “originates from limited regulations and protocols for implementation, low levels of understanding of law enforcement agents on this new law, insufficient allocation of Government funds to provide the necessary support system and capacity building requirements.”

In 2005, Sri Lanka introduced the *Prevention of Domestic Violence Act 2005*. Like the Indonesian law, this Act is also a gender-neutral legislation. “Domestic violence” is defined as extortion and criminal intimidation as understood in the Sri Lankan Penal Code, all offences contained in Chapter XVI of that law and any emotional abuse (which is “a pattern of cruel, inhuman, degrading or humiliating conduct of a serious nature”) either caused within the home or outside and arising out of the “personal relationship” between the aggrieved person and the “relevant person” (or perpetrator). “Relevant person” includes, spouses, former spouses, co-habiting partners, parents, siblings, grandparents, grandchildren, step-parents, step-children, half-siblings, aunts, uncles, nephews, nieces and cousins of an aggrieved person. It is important to note that this law, distinct from its counterparts in other research countries such as Nepal and India does not require that the aggrieved and relevant persons require to be sharing a household for an incident of domestic violence to take place, as long as they have a link by way of a “personal relationship”, a term that is undefined.

The applicant who seeks to prevent an act of domestic violence that has already been committed or is likely to be committed can be the aggrieved person, or where such a person is a child, the parent or guardian of the child, or a person with whom the child resides, or a person authorized in writing by the National Child Protection Agency under the *National Child Protection Authority Act, 1998*, or a police officer on behalf of the aggrieved person. The court may, if it thinks there is a need to urgently prevent domestic violence and to ensure the safety of the aggrieved person, make an Interim Protection Order on hearing the application and shall hold an enquiry within 14 days of the application being made. The court can also prohibit the perpetrator in various ways – to desist from committing further domestic violence; entering the residence (shared or otherwise), school, employment, temporary shelter of the aggrieved person; preventing the aggrieved person from entering, residing or occupying the shared residence; preventing the aggrieved person from having contact with his or her child; preventing the aggrieved person from having access to shared resources (these are defined to mean “moveable or immovable property which both the aggrieved person and respondent have used or have had access to”); contacting or attempting to contact the aggrieved person; causing violence against any other person who may be assisting the aggrieved person; causing a nuisance to the aggrieved person by following the person; and selling or transferring the matrimonial home in order to place the

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350 Indonesia’s Compliance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: Issues for Discussion with the Committee Against Torture, Submitted by National Commission on Violence Against Women (KOMNAS PEREMPUAN), Jakarta, April 2008, available at [http://www2.ohchr.org/english/bodies/cat/docs/ngos/Komnasperempuan_Indonesia40th.doc](http://www2.ohchr.org/english/bodies/cat/docs/ngos/Komnasperempuan_Indonesia40th.doc).


352 This chapter relates to “Offences Affecting the Human Body” including rape, criminal force and assault, causing hurt, murder, culpable homicide, wrongful confinement and/or restraint, kidnapping, abduction, slavery and any attempt to commit the said offences.

353 Section 23, *Domestic Violence Act, 2005* (Sri Lanka)


355 Section 2, *ibid*.

356 Section 4, *ibid*.

357 Section 23, *ibid*.
aggrieved person in a destitute position. The law also punishes any person who prints or publishes any information that reveals the identity of the aggrieved person or respondent.

The law also permits the court to pass further directions in the best interests of the aggrieved person, including providing a shelter or temporary accommodation, counselling services to parties involved in the case, and appointing a social worker, family counsellor, or probation officer to monitor observance of the court order. This legislation imposes criminal liability (imprisonment up to 1 year) on the perpetrator in the event that a Protection Order has been violated by him or her.

India’s domestic violence law, the Protection of Women from Domestic Violence Act, 2005 is a civil law. The law defines “domestic violence” as any act, omission, commission or conduct which harms, injures or endangers the health, safety or well-being, whether mental or physical, of an aggrieved person, including physical, sexual, verbal, emotional and economic abuse; which harasses, harms, injures or endangers an aggrieved person with the intention to coerce her or her relative to meet an unlawful demand for dowry or other property or security; or which threatens the aggrieved person or her relative by any conduct described above. The meanings of physical, sexual, verbal, emotional and economic abuse are also defined in the Act. “Sexual abuse” includes any conduct of “a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity” of a woman. An “aggrieved person” is defined as a woman who has been in a domestic relationship with the respondent and who alleges to have been subject to domestic violence by the respondent, therefore making this legislation gender-specific, unlike its counterparts in Sri Lanka and Indonesia.

A “respondent” is considered to be any adult male person who has been in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought relief under the Act and includes a relative of the adult male. A “domestic relationship” is one between two persons who live or have lived together at any point of time in a shared household, when they are related by consanguinity, marriage or in a relationship like marriage, adoption or are family members living together as a joint family. A “shared household” is one in which the aggrieved person has lived with the respondent in a domestic relationship and includes a household whether owned or tenanted by either or both of them wherein either of them have any right, title or interest. This includes a household belonging to respondent’s joint family, irrespective of whether the respondent or aggrieved person has any right, title or interest. The law recognizes a woman’s right to reside in the shared household and provides for injunctive relief (such as protection orders, residence orders, maintenance and compensation orders and temporary custody orders) for women facing domestic violence in a domestic relationship.

358 Sections 5 & 11, ibid.
359 Section 20, ibid.
360 Section 12, ibid.
361 Section 18, ibid.
362 Domestic violence against married women is also a punishable offence under Section 498A of the Indian Penal Code.
363 Section 3, The Protection of Women from Domestic Violence Act, 2005 (India)
364 ibid.
365 ibid.
366 Section 2(a), ibid.
367 Section 2(q), ibid.
368 Section 2(f), ibid.
369 Section 2(s), ibid.
The Act provides for the appointment of Protection Officers to assist women in accessing court-mandated relief and to assist the court in discharging its functions. Protection Officers are appointed by State Governments and are usually appointed at the district level. A Protection Officer is meant to record a “Domestic Incident report” on receiving a complaint of domestic violence and forward this report to the Magistrate. The Act also provides for the registration of service providers, defined to be any voluntary association or company registered as such under respective laws, with the objective of protecting the rights of women including legal medical, financial or other aid, which registers itself as such under the Act. The registration of a service provider under this Act, protects the bona fide actions of service providers in assisting women facing violence within the home. A service provider is also authorized to record a domestic incident report and submit the same to the concerned Magistrate and Protection Officer, obtain a medical examination of the aggrieved person and submit the report to the concerned police station and ensure the provision of shelter to the aggrieved person if required. The Protection Officer is further expected to make an application to the Magistrate, if so desired by the aggrieved person, to claim relief for issuance of a Protection Order; to ensure that the aggrieved person receives legal or medical aid and safety in a shelter home; to maintain a list of service providers as defined under the Act; and to ensure that an order for monetary relief issued under the Act is complied with.

A Magistrate is empowered to issue a variety of orders under the Act. These include Protection Orders prohibiting a respondent from committing an act of domestic violence or aiding the same; entering the place of employment or education of the aggrieved person, attempting to communicate with the aggrieved person; alienating the assets held either singly or jointly by the aggrieved person or the respondent without permission of the Magistrate; and causing violence to the relatives of the aggrieved person or any other person who is assisting the aggrieved person. Residence Orders can also be issued, which include restraining the respondent from dispossessing or disturbing the possession of the shared household from the aggrieved person or disposing off the shared household; ejecting the respondent from the shared household; restraining the respondent or any relatives of the respondent form entering any part of the shared household where the aggrieved person resides; and directing the respondent to provide the aggrieved person with alternate accommodation on par with the shared household or provide rent for it. Apart from Compensation Orders against the respondent for mental and emotional injuries caused, the Magistrate is also empowered to issue monetary reliefs in favour of the aggrieved person whereby the respondent is required to pay for expenses met by her and her children as a result of the domestic violence including loss of earnings, medical expenses, loss caused due to damage or removal of any property from her control and the maintenance for her and her children. The Magistrate may also issue Custody Orders, which grant temporary custody of any of her children to the aggrieved person or anyone acting on her behalf and may restrain the respondent from visiting the children if found necessary.
Notably, this Act only provides penalties in the form of fines and imprisonment (up to 1 year) when a respondent fails to comply with any protection or interim protection orders issued by a Magistrate.\textsuperscript{377}

A few noteworthy cases have been adjudicated by the Indian courts, some of which are of particular relevance. Most judgments that have considered the Act have given primacy to the beneficent nature of the legislation thereby liberally interpreting its substance and procedural requirements. For instance, in a case where a woman alleged that she was being harassed for dowry by her husband and his family, which led to her being driven out of the shared household with her child in June 2006, the court dismissed the argument of the husband that a complaint could not be entertained under the Act, since it had not come into force at the said time. The Madras High Court found that this case fit squarely within the notion of ‘economic abuse’ under the Act and that this abuse continued well after the Act came into force. The court pointed out that the Act was created in order to protect women from violence and its social benefits must outweigh any technicalities that may come in the way of its implementation. It found the Magistrate’s order to protect the woman to be appropriate even though the application was “not in proper form and the respondent [woman] has not sought for any particular relief, the relief can always be moulded by the court…”\textsuperscript{378}

Another High Court in India held similarly, finding that only because an application of the aggrieved person was not filed in the precise prescribed manner under the law, procedural inconsistencies did not vitiate the social purpose of the legislation.\textsuperscript{379} In a case where it was contended that the procedure for serving notice on the respondent under the Act was not correctly followed, the court held that, “it is a beneficent piece of social welfare legislation aimed at promoting and securing the well-being of the aggrieved persons and the court will not adopt a narrow interpretation which will have the effect of defeating the very object and purpose of the Act.”\textsuperscript{380}

This liberal interpretation of the Act has also been demonstrated by the courts in relation to other aspects. In Razzak Khan & others v. Shahnaz Khan\textsuperscript{381} the Madhya Pradesh High Court considered a case of a woman who had divorced her husband and sought a protection order to reside in the ancestral home of the ex-husband, which was their place of residence while married. The court examined the definition of “shared household” under the Act and held that a protection order granting her such residence was permissible since the right to reside in such a household was clearly enunciated by Section 17 of the Act and included a house where an aggrieved person lives or has had at any stage lived in a domestic relationship with the respondent. In Azimuddin v. State of Uttar Pradesh and another\textsuperscript{382}, the Allahabad High Court reiterated that the law also protected women who had left their husbands and had gone to live in their maternal home and not just those who were residing with the husband when an application for protection was made under the Act. In P. Babu Venkatesh and others v.

\textsuperscript{377} Section 31, ibid.
\textsuperscript{378} Saravankumar v Thenmozhi (2007); citation not available, however, authors have access to full text of judgment. See also Dennison Paulraj & others v Mrs. Mayawinola (2008); citation not available, however, authors have access to full text of judgment.
\textsuperscript{379} Milan Kumar Singh v State of Uttar Pradesh & others 2007 CriLJ 4742
\textsuperscript{380} Amar Kumar Mahadevan v Karthiyayini 2007; citation not available, however, authors have access to full text of judgment.
\textsuperscript{381} 2008 (4) MPHT 413
\textsuperscript{382} 2008; citation not available, however, authors have access to full text of judgment.
It was held that a shared household included one in which a couple resided even if it was thereafter alienated by the husband to another family member.

The Madras High Court expanded the notion of “shared household” in Vandana v. Jayanthi Krishnamachari. In this case the aggrieved woman had a temple marriage with the respondent, which was to be followed by a ceremonial wedding 4 months later. But just prior to the latter function the respondents filed a complaint in the police station alleging that the woman and her parents had trespassed into the respondent’s house a few days earlier. The aggrieved woman sought a right to reside in the “shared household” under the Act. The respondent contended that since she had never lived or at any point lived there, theirs was not a domestic relationship and she could not claim that his home was a shared household within the meaning of the Act. The court held that such a construction would not be in tune with the object sought to be achieved by the Act and citing the Convention on The Elimination of All Forms of Discrimination against Women, it pointed out that as per precedent, any interpretation of a statutory provision ought to be in conformity with international conventions – in this case the Convention on the Elimination of All Forms of Discrimination against Women, pursuant to which the Act was legislated in India. The court recognized that in the Indian context there were many cases in which a woman does not enter into the matrimonial home immediately after marriage as was true in the present case. In such cases a woman would be considered not to live or at any point have lived either jointly or singly in the “shared household”, if a narrow interpretation was to be given to the phrase under the Act. This would leave the woman remediless despite a valid marriage and defeat the purpose of the Act. The court held that:

“a healthy and correct interpretation to Sections 2(f) and 2(s) would be that the words ‘live’ or ‘have at any point of time lived’ would include within their purview ‘the right to live’. In other words, it is not necessary for a woman to establish her physical act of living in the shared household, either at the time of institution of the proceedings or as a thing of the past. If there is a relationship which has legal sanction, a woman in that relationship gets a right to live in the shared household…. A marriage which is valid and subsisting on the relevant date, automatically confers a right upon the wife to live in the shared household as an equal partner in the joint venture of running a family… She is definitely in ‘domestic relationship’ within the meaning of Section 2(f) of the Act and her bodily presence or absence from the shared household cannot belittle her relationship as anything other than a domestic relationship.”

The implications of such an interpretation are positive for women dispossessed of or denied residence to their matrimonial homes. However, its application to relationships in the nature of marriage requires scrutiny since the interpretation is pegged on the existence of a relationship which has legal sanction.

In Aruna Parmod Shah v. Union of India the Delhi High Court considered a writ petition challenging the constitutional validity of the Act. It was contended that the law violated the equal protection guarantee under Article 14 of the Indian Constitution as it excludes men from protection from domestic violence and the distinction made on grounds of sex was

383 2008; citation not available, however, authors have access to full text of judgment.
384 2007; citation not available, however, authors have access to full text of judgment.
385 Ibid.
386 2008; citation not available, however, authors have access to full text of judgment.
unreasonable and arbitrary. Further the definition of “domestic relationship” was objectionable as it placed persons in relationships akin to marriage on par with those within marriage – this derogates from the sanctity of marriage and such relationships should not be treated equally in the eyes of the law. On the first ground the court held that a statute does not fail the constitutional test required by the equality guarantee if it is based on creating an intelligible differentia between categories of persons, which bears a nexus with the objective sought to be achieved by the law.

The court held that in the present case the difference was made between persons on the basis of sex i.e. male and female, which was justified since women bore the overwhelming brunt of domestic violence and the Act sought to remedy this by justifiably protecting women from this vice. On the issue of common-law marriages the court found “no reason why equal treatment should not be accorded to wife as well as woman who has been living with a man as his common-law wife or even as a mistress. Like treatment to both does not, in any manner, derogate from the sanctity of marriage since an assumption can fairly be drawn that a ‘live-in relationship’ is invariably initiated and perpetuated by the male.” Although coming to an admirable conclusion in recognizing relationships outside of marriage, the assumptions on which the court arrived at its ruling are questionable.

The key Indian Supreme Court judgment in relation to the Indian domestic violence law has demonstrated a narrow interpretation of the term “shared household” as is evident in the case of SR Batra and another v. Taruna Batra. In this case the aggrieved person claimed the right to reside in a house owned by her husband’s mother where she had resided with her husband in the past. Failing to capture the broad scope of the definition of “shared household” under the Act, which stated that it would include one in which the aggrieved person and respondent live or have at any stage lived in a domestic relationship irrespective of ownership or any other interest, the court held that a shared household could only be one which belongs to or is taken on rent by the husband or one which belongs to the joint family of which the husband is a part. Such an interpretation is at odds with the clear words of the section and significantly defeats the purpose of the legislation.

Thailand introduced the Act on Protection of Domestic Violence Victims B.E. 2550 in 2007 and defines domestic violence, as “any conduct performed with the intention to inflict harm on a family member’s physical, mental or health condition, or with the intention that is likely to cause harm on a family member’s physical, mental or health condition, or any use of coercion or unethical domination which compels a family member to commit, omit or accept any unlawful act, except for an act committed through negligence.”

The Thai Act is gender neutral in its application with a family member defined as, “a spouse, former spouse, person who lives and cohabits, or used to live and cohabit together as husband and wife without registering marriage, legitimate child, adopted child, family member, including any dependent person who has to live in the same household.”

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387 2007 (3) SCC 169
388 The authors are using the only available English translation of this law which is available on the website of the United Nations High Commissioner for Refugees (UNHCR) at http://www.unhcr.org/refworld/category,LEGAL,,,THA,4a5460692,0.html
389 Article 3, Act on Protection of Domestic Violence Victims B.E. 2550 (Thailand)
390 Ibid.
The Act specifies imprisonment of 6 months or fine of 6000 baht for a person convicted of committing a domestic violence offence.  

The law obligates a victim or a person encountering domestic violence to notify a competent official. It further states that if the domestic violence victim does not make a notification or complaint within 3 months of being able to or having the opportunity to do so, the case is deemed to expire. However the victim can still claim safety protection from Juvenile and Family Court.

Once a complaint is filed, investigations must be carried out without delay and the file and perpetrator must be sent to a court within 48 hours of the perpetrator being apprehended.

Safeguards in the Act include allowing complaints to be notified verbally, in writing, by telephone, by electronic methods or other methods; for competent officials to assist victims in launching prosecutions and arrange for medical exams, treatment or counselling services; the presence of a psychiatrist, social worker or person requested by the victim during the questioning of a victim unless there is a compelling reason not to wait for their presence which must be recorded in writing, a prohibition on dissemination of any information that will harm the perpetrator or the victim once the complaint is filed.

Under the law, a competent official may issue temporary relief measures including sending a domestic violence perpetrator to receive medical examinations and treatment from a physician, requiring a domestic violence perpetrator to repay the initial financial relief assistance amount as appropriate for his/her financial status, forbidding a domestic violence perpetrator from entering his/her family’s residence or coming closer to any family member, as well as specifying childcare arrangements. Any such measures are to be presented in court within 48 hours for the court to approve them. During the investigation or trial, the court also has the power to issue relief measures and a violation of the court order is punishable. Such orders may be altered, revoked or additional measures included where there is a change in circumstances.

If a person is found guilty of committing an act of domestic violence, the court, instead of punishment, has “the power to specify methods of rehabilitation, treatment, probation to be used for the offender, or to impose conditions requiring the offender to repay the financial relieve assistance amount, to undertake public work, to refrain from actions which cause domestic violence, or placing the offender under bond of performance according to the methods and duration specified by the court.” At all stages of the trial, the court is bound to be vigilant. Thus, it can still order relief measures if there is a withdrawal or settlement and set conditions for such settlement; if these are not met prosecution will continue.

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391 Article 4, ibid.
392 Article 5, ibid.
393 Article 7, ibid.
394 Article 8, ibid.
395 Articles 6, 8 and 9, ibid.
396 Article 10, ibid.
397 Article 10, ibid.
398 Article 12, ibid.
399 Article 12, ibid.
The law encourages settlements by providing that at any stage the judge shall try to attain a settlement; however this must be done on the basis of certain principles which are:

“(1) Rights protection for domestic violence victims.
(2) Preservation and protection of marriage status as the center between a man and a woman who voluntarily live and cohabit together as husband and wife. If the marriage status cannot be maintained, a divorced shall be fairly made with the least damage, taking into consideration their children’s safety and future.
(3) Protection and assistance for the family, especially while that family has to be responsible in providing care for a juvenile family member.
(4) Assistance measures for husband, wife and family member to live together in harmony, and measures for relationship improvement between the husband and wife and their children.”

To reach such a settlement, the judge can also appoint a mediator and if the mediation is successful and a settlement agreement is drawn up, the court must assess that agreement not in violation of laws, public order or good morals.

The Ministry of Social Development and Human Security is responsible for the implementation of the Act and is required to report to the Cabinet and to Parliament, on an annual basis the number of cases, of orders specifying relief measures or methods, number of violations and the number of settled cases.

In 2008, Nepal passed the Domestic Violence (Crime & Punishment) Act. The law is gender-neutral and applies to any person who has been subject to violence within a domestic relationship irrespective of that person’s gender. Under this law ‘domestic violence’ is defined as any form of physical, mental, sexual, emotional and economic abuse perpetrated by one person against another where both persons are in a domestic relationship. A ‘domestic relationship’ is defined as one between two persons who live or have lived together in a shared household and are related by consanguinity, marriage, adoption or are family members living together as a joint family, or have a relationship of a nature where one person is a dependant domestic help living in the family. Apart from causing bodily harm, injury or pain ‘physical abuse’ also includes holding a person captive. ‘Mental abuse’ is defined to include any act threatening physical torture, reprimanding a person, false accusations, forceful eviction from the house and discrimination carried out on the basis of thought, religion or culture and customs and traditions. ‘Sexual abuse’ is defined as any conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of any person and any act that hampers safe sexual relations. ‘Economic abuse” includes deprivation of

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400 Article 15, ibid.
401 Article 16, ibid.
402 Article 17, ibid.
403 The authors have been able to access the only available English translation of this law, which is an unofficial one by the Forum for Women, Law & Development, Nepal from fwld@fwld.wlink.com.np.
404 Section 2 (a), Domestic Violence (Crime & Punishment) Act, 2008 (Nepal). The translation available to the authors uses the term ‘family relationship’ and not ‘domestic relationship’. This appears to be inaccurate since the former term is not used again in the statute whereas the latter is defined in sub section 2(b). Therefore the authors have taken the liberty to assume that the correct term would be ‘domestic relationship’.
405 Section 2 (b), ibid.
406 Section 2 (c), ibid.
407 Section 2 (d), ibid.
408 Section 2 (e), ibid.
property jointly or separately held by an aggrieved person who is entitled to the same under law or deprivation of or access to employment opportunities, economic resources or means. A ‘perpetrator’ under this law not only means the person alleged to have subjected the aggrieved person to an act of domestic violence but also any person who is involved in the violence as an accomplice, abettor of the crime.

This statute is a criminal legislation which provides punishment for a perpetrator of domestic violence including fines and imprisonment. Additionally, the statute empowers the court to direct the perpetrator to pay compensation to the aggrieved person.

An aggrieved person or any person suspecting the commission of an act of domestic violence under this law has the option to file a written or oral complaint before the concerned police station, local body (which includes Ward Committees, Village Development Committees and District Development Committees) or the National Women’s Commission. It allows for immediate protection of an aggrieved person and his or her dependents while investigations are underway.

The court is empowered to grant an interim protection order under this statute if it feels the aggrieved person requires immediate protection, pending the final decision in the case and such orders include a gamut of directives such as allowing the aggrieved person to continue living in the shared household; provide him/her with food and clothes; ordering the perpetrator from desisting causing physical injury to, insulting or threatening the aggrieved person or aiding and abetting such acts or harassing by entering the aggrieved person’s place of separate residence or employment, or in public places including through the media; requiring the perpetrator to provide treatment or money for treatment of the aggrieved person in cases of physical or mental injury; and to make arrangements for the separate living of the perpetrator in cases where it is not conducive for parties to live together, and make necessary arrangements for the maintenance of the aggrieved person.

Court proceedings under this Act are required to be held in camera if the aggrieved person so requires. For the immediate protection of aggrieved persons, the government is given the discretion to establish Service Centres which are to provide legal aid, psycho-social and economic aid services.

It is evident that this region of the world has seen a spurt of activity to legislate on domestic violence in the last few years. All the research countries have a substantive framework, which is broadly similar although there is some variance in detail. For instance Nepal and Indonesia include domestic servants within the ambit of persons who could be aggrieved by an act of domestic violence whereas other countries do not. All the countries have similar redressal options – courts are empowered to issue interim orders when they see fit and these include injunctions against the perpetrator and protective orders for the aggrieved. Indeed, the implementation of such orders is key to the success of such statutes. For instance, orders to

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409 Section 2 (f), ibid.
410 Section 2(h), ibid.
411 Section 13, ibid.
412 Section 10, ibid.
413 Section 4, ibid.
414 Section 4, ibid.
415 Section 6, ibid.
416 Section 7, ibid.
417 Section 11, ibid.
provide protection through shelter homes is one of the manners in which all the laws attempt to halt continued violence. However, whether such infrastructure has been set up is worth examining. Some countries, such as India and Sri Lanka have possess civil legislation, which does not make domestic violence a crime but a civil wrong, thereby lowering the evidentiary standards required for ascertaining fault/guilt. This is a largely positive aspect, especially in a country like India, where the criminal justice system is heavily burdened and ineffective in coping with cases before it in a timely and credible manner. Of the research countries, India has the only gender-specific legislation. At the time of its making a concern was expressed that making it gender-neutral would allow for its misuse by males in an otherwise highly patriarchal society where they possess far greater access to the justice system. It is unclear yet, how the gender-specific laws of the other research countries have played out and whether the concerns related to India have played out in any manner.

Dowry related legislation: In some of the research countries, the practice of payments made by the bride’s family to the groom’s in consideration of the marriage have been the basis of violence and the practice of “bride burning” where the consideration is not given or is not considered sufficient. Laws in these countries prohibiting the practice of dowry are considered important laws related to the prevention of domestic violence.

In India, the Dowry Prohibition Act was passed in 1961 to curb the demanding and giving of dowry. The practice of dowry is considered particularly discriminatory as it not only reinforces patriarchal values of male superiority, it also lends itself to a strong son preference particularly amongst economically weaker sections of society who can seldom meet dowry demands at the time of marriage of their daughters. The burden, which this social practice imposes on a family leads to discrimination against the girl child that lasts through her lifetime in the form of demands before, during and after her marriage. Unmet dowry demands often result in the physical and mental abuse of the woman in her marital home at the hands of her husband, his parents and their relatives.\(^{418}\)

The provisions of this law are accordingly complemented and strengthened by the provisions of the Indian Penal Code, the Indian Code of Criminal Procedure and the Indian Evidence Act to provide a strict legal framework for the protection of women against this practice. While the provisions of the Dowry Prohibition Act, prohibit the demanding and giving of dowry, the provisions of various criminal laws provide specific punishment for cruelty and harassment by the husband or his relatives and also provide for the presumption, in the case of the death or suicide of a married woman, of a dowry death.

The law makes the giving and taking of dowry\(^ {419}\) and the abetment of such acts punishable with a minimum mandatory sentence of five years and a minimum mandatory fine of 15,000

\(^{418}\) The Supreme Court in State of Himachal Pradesh v. Nikku Ram 1995 (6) SCC 219 commented on the prevalence of the practice as follows: "Dowry, dowry and dowry. This is the painful repetition, which confronts, and at times haunts many a parents of a girl child in this holy land of ours where in good old days the belief was...where woman is worshipped, there is abode of God. We have mentioned about dowry thrice, because this demand is made on three occasions: (I) before marriage, (ii) at the time of marriage and (iii) after the marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some."

\(^{419}\) Section 2 of the Dowry Prohibition Act defines dowry as: “Any property or valuable security given or agreed to be given either directly or indirectly (a) by one party to a marriage to the other party to the marriage or (b) by the parents of either party to a marriage or by a other person, to either party to the marriage or to any other person; at or before or after the marriage as consideration for the marriage of the said
rupees or the amount of the dowry whichever is more. Any agreement to take dowry is considered void. It also makes provision for the recovery of dowry by the wife as the law is intended for the benefit of the wife whose property is illegally detained. Thus any dowry received before, at or after the marriage is to be returned to the wife within three months of the marriage or the date of its receipt. In case the woman dies before the property is transferred to her, her heirs are entitled to it except where death occurs within seven years of the marriage in which case the property transfers to her children if any or else to her parents.

The Supreme Court of India has interpreted the provisions of the Dowry Prohibition Act, liberally to include several scenarios in which dowry may be demanded for instance after the marriage and at times as consideration for a proposal of marriage as families attempt to circumvent the provisions of the law through different means. For instance, the court has held that the furnishing of a list of ornaments and other household articles at the time of the settlement of the marriage amounts to a demand of dowry and in keeping with the objective of the law ordered the High Court to ensure that all the articles were restored to the wife. In S. Gopal Reddy v. State of Andhra Pradesh the Supreme Court stated that,

"The alarming increase in cases relating to harassment, torture, abetted suicides and dowry deaths of young innocent brides has always sent shock waves to the civilised society but unfortunately the evil has continued unabated. Awakening of the collective consciousness is the need of the day. Change of heart and attitude is needed. A wider social movement not only of educating women of their rights but also of the men folk to respect and recognise the basic human values is essentially needed to bury this pernicious social evil."

Apart from the general provisions in the Indian Penal Code relating to murder and bodily harm, specific provisions relating to cruelty, harassment, suicide and death relating to dowry have been introduced in the Indian Penal Code. Thus, Section 304B provides for punishment in the case of a dowry death. The section is attracted where the death of a woman is caused by burns or bodily injury or occurs other than under normal circumstances within seven years of her marriage and where it is shown that prior to her death, she was subjected to cruelty or harassment by her husband or his relatives in connection with any demand for dowry. This provision is complemented by the Evidence Act, which creates the presumption of a dowry death when it is shown that prior to her death the woman was subject to cruelty or harassment in connection with a dowry demand. This shifts the burden of proving that the death was not related to a dowry demand to the accused. A dowry death is punishable with a minimum mandatory sentence of seven years, which may extend to a life sentence and is a non-bailable offence. A person may be convicted simultaneously under the general criminal provisions regarding murder (in which case the punishment may also extend to a death sentence) and abetment of suicide as well as the special provisions relating to dowry deaths and cruelty.

The courts have thus, admitted letters written by the deceased to her father pointing out dowry demands and instances of cruelty, prior to her death as circumstantial evidence in such cases, considered the fact of cruelty and harassment by the mother and sister-in-law of the parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies”

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420 Madhu Sudan Malhotra v. Kishore Chan Bhandan 1988 (Supp) SCC 424
421 1996 (4) SCC 596
422 Section 113-B, Indian Evidence Act, 1872.
423 Kailash Kaur v. State of Punjab 1987 (2) SCC 631
victim and her hurried cremation after death without informing her parents as sufficient evidence for a conviction under Section 304B of the Indian Penal Code424 and have also convicted based only on the dying declarations of the victim.425 The provisions of the Indian Penal Code and the Evidence Act which provide a presumption in case of the suicide of a woman within seven years of her marriage426 have also been invoked in cases where dowry demands and harassment have led to the woman committing suicide. In State of Punjab v. Iqbal Singh & Others427 the Supreme Court held that,

"Then we have a situation where the husband or his relative by his wilful conduct creates a situation which he knows will drive the woman to commit suicide and she actually does so, the case would squarely fall within the ambit of Section 306, IPC. In such a case the conduct of the person would tantamount to inciting or provoking or virtually pushing the woman into a desperate situation of no return which would compel her to put an end to her miseries by committing suicide."

The courts have looked upon dowry deaths with severity and in the context of sentencing. In Paniben v. State of Gujarat428 the Supreme Court stated that,

"Sympathy is what is pleaded at our hands. We are clearly of the opinion that it would be a travesty of justice if sympathy is shown when such a cruel act is committed. It is rather strange that the mother-in-law who is herself a woman should resort to killing another woman. It is hard to fathom as to why even the 'mother' in her did not make her feel. It is tragic, deep rancour should envelope her reason and drown her finer feelings. The language, deterrence must speak is that it may be a conscious reminder to the society. Undue sympathy would be harmful to the cause of justice. It may even undermine the confidence in the efficacy of law."

However, while courts are strictly implementing the provisions of the various laws relating to dowry, investigation and police action in this area remains deficient. The courts have on several occasions pulled up the police and investigating authorities for their lax and casual approach to such cases.429 Thus in Khimibehn v. State & Another,430 the High Court of Gujarat noted the apathy of the investigating authority with dismay and directed the State Government to frame rules for the proper implementation of the Dowry Prohibition Act in the state of Gujarat. The High Court while making observations and suggestions regarding police action in dowry related deaths, noted that,

"At least 24 women die of burns in the State daily...From January 1989 to June 30, 1991, nearly 18,000 members of the second sex have lost their lives by fire. Even police records reveal that more than 3,000 women have attempted to commit suicide by self-immolation in different parts of the State during the past two and a half years...The most shocking fact revealed by the statistics,

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426 Sections 306, Indian Penal Code and 113-A, Indian Evidence Act
427 1991 Cri LJ 1897
428 1992 (2) SCC 474
429 Bhagwant Singh v. Commissioner of Police, Delhi 1983 (3) SCC 344 and Ashok Kumar v. State of Rajasthan 1991 (1) SCC 166
430 VII-1992(2) Crimes 849
however, is that, of the 10,000 deaths on record with the Government, only 95 have been recorded as dowry deaths. The rest have been registered either as cases of simple suicide or accidental death. Rampant corruption among the police, judiciary, executive magistrates and doctors, apathy on the part of the police investigating the cases and the lack of forensic science expertise in the police department ensure that the anguished cries of thousands of bereaved parents go unheeded.“

In 1980, Bangladesh enacted the Dowry Prohibition Act which provides penalties for giving or taking dowry, for demanding dowry and provides that any agreement to give or take dowry is void. Provisions related to dowry are also contained in the Suppression of Violence Against Women and Children Act, 2000. The Act provides penalties for causing death or hurt to a woman for dowry and identifies not only the husband as the possible perpetrator of a dowry related crime but also his father, mother, guardian, any relation or any other person on his behalf.

In Dipak Kumar Roy v. State, the High Court Division of the Bangladesh Supreme Court held that the term ‘dowry’ is not restricted only to mean property or valuable security agreed to be given at the time of or before or after the marriage but also property what is demanded after marriage for which there was no previous agreement. Accordingly, a husband or his relative who causes grievous hurt to a woman would be guilty of a dowry related offence over the demand of dowry even though there was no previous agreement to pay the same.

General marriage and criminal laws: Laws related to marriage and family also address some aspects of domestic violence. For example, the Civil and Commercial Code of Thailand recognises, “serious harm or torture to the body or mind of the other” as a ground of divorce. Divorce laws and provisions in the other research countries recognise similar grounds of violence for divorce. Apart from general criminal laws that may be invoked in the case of domestic violence, some countries have provisions in their criminal laws specific to domestic violence. Thus, Section 498-A of the Indian Penal Code, 1860 punishes with imprisonment up to three years and a fine a husband or his relative who subjects his wife to cruelty. This includes, “willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health whether mental or physical) of the woman” and “harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her meet such demand.”

5.2 Sexual violence: rape

Laws relating to sexual violence in the research countries are mostly found in their general criminal legislations. In some cases specific laws have been enacted as in Bangladesh. Where the operation of laws relating to sexual violence has been restrictive or violative of the rights to life, equality, etc., courts have stepped in to expand their scope or provide procedural safeguards for their appropriate use. Thus in India, the Supreme Court has laid down guidelines for trials in cases of child sexual abuse.

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431 50 DLR 603 (1998)
432 Section 1516(3), Civil and Commercial Code, 1925 (Thailand)
433 See for instance, Section 13, Hindu Marriage Act, 1955 (India) and Section 2(viii)(a), Dissolution of Muslim Marriages Act, 1939 (Bangladesh).
Nepal’s *Country Code* contains a chapter covering the offence of rape.\(^{434}\) Recent amendments define rape as sexual intercourse with any woman without her consent, or sexual intercourse with a girl below the age of sixteen years with or without her consent. The law now also includes slight penetration of the penis into the vagina as constituting rape.

Another recent change to the law has brought marital rape within the ambit of the crime. This change was spurred by a constitutional challenge to Nepal’s rape laws for not recognising marital rape, which is discussed further below. Another progressive change in Nepal’s jurisprudence on sexual offences is that the law now equates the rape of a sex worker on par with the rape of any other person. Earlier the law provided a lesser punishment for rape of a sex worker. In a case which challenged the constitutional validity of a provision, which differentiated punishment for a sex worker as compared to other women who were raped\(^{435}\) the Supreme Court held that rape is a crime, which exerts physical and psychological torture on a woman irrespective of her status; a sex worker is also a woman and is entitled to enjoy all the protections granted to a human being. Thereby it declared the impugned provision unconstitutional.

It has been noted that some other aspects of the amended law are unsatisfactory. For instance, a woman is provided the defence of chastity to use deadly force against the attacker to prevent being raped. It has been argued that this protection should be provided as a right to self-defence simpliciter and not be couched in terms of chastity.\(^{436}\)

Notably, and much like other countries in the region, sexual offences laws are gender-specific, thereby not envisaging situations where adult males can be raped or sexually abused.

*Sri Lanka’s Penal Code* contains a chapter on Sexual Offences. Section 363 of the Sri Lankan *Penal Code* criminalises “rape”, which is committed when a man has sexual intercourse with a woman without her consent (even if she is his wife but is judicially separated), through consent obtained under coercion (while she is in detention or under threat of detention) or when she is intoxicated or of unsound mind, irrespective of consent if the female is under 16 years of age (unless she is his wife over 12 years of age and not judicially separated), or knowing that he is not her husband, obtains her consent by making her believe that he is.\(^{437}\) By way of explanation, the section states that “Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.” Rape is punishable with up to 20 years imprisonment.\(^{438}\) A gamut of provisions related to sexual abuse of minors and acts of sexual intercourse not covered by the rape provision are discussed in subsequent sections of the report or have been discussed in prior sections.

Other than a few judgments related to rape, the Sri Lankan Supreme Court has not passed judgments related to other sexual offences. In the case of *Inoka Gallage v. Kamal*

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\(^{434}\) The authors did not have access to the original text or a conclusive English translation of rape law in Nepal and therefore relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

\(^{435}\) *Sapana P. Malla for FWLD vs. HMG/Nepal*, Writ No. 56/2058. The authors did not have access to the original text or an English translation of this judgment and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

\(^{436}\) Forum for Women, Law & Development, A study and analysis on sexuality and rights, unpublished

\(^{437}\) Section 363, Penal Code, 1883 (Sri Lanka)

\(^{438}\) Section 364, ibid.
Addarachchi\textsuperscript{439} the court considered the issue of consent. The court stated that in cases where there are opposing contentions on the presence of consent before sexual intercourse, it becomes a matter of inference to be drawn from prior and contemporaneous acts and other attendant circumstances to decide whether consent did exist. The court noted that there was an absence of injuries on the female, that a doctor had testified that she was still a virgin and that there was reason to doubt her creditworthiness based on her conduct subsequent to the alleged incident, when she met a friend and described an interaction with the accused without mentioning the incident of rape. In Piyasena et al. v. The Attorney General\textsuperscript{440} an 18-year old female was abducted and gang raped by three men, three times each, once in her own house and two more times elsewhere in the course of a day. The court considered whether these were each separate acts of rape each forming distinct offences by each of the accused or constituted a continuing incident, which should be subject one charge of rape against each of the accused. The court held that they were "a series of acts in one continuing transaction" and that it would be fair to bring a single charge against each accused for one activity even though that activity may involve several acts.

Sexual violence in India is addressed by provisions of the Indian Penal Code, 1860. The Protection of Women from Domestic Violence Act, 2005\textsuperscript{441} also covers the issue of sexual abuse although it is applicable only to women in domestic relationships.

Possibly the most commonly used provision to address sexual violence in the Indian Penal Code is Section 375. This provision defines the offence of rape as sexual intercourse by a man with a woman against her will, without her consent, with her consent but when such is obtained under threat of hurt or death, through fraud by making her believe that the man is her lawful husband, or in circumstances where the woman gives consent due to unsoundness of mind, intoxication etc. The provision sets the age of consent to sexual intercourse at 16. Section 376 of the Indian Penal Code provides punishment for the offence of rape. As Section 375 is limited to penile-vaginal penetration, rape as described in Section 375 is a gender-specific offence where only a male can be a perpetrator and only a female can be a victim.

Section 377 of the Indian Penal Code punishes ‘carnal intercourse against the order of nature’.\textsuperscript{442} In the context of the limitations of Section 375, this provision is used to penalize acts of rape that are not penile-vaginal such as non-consensual oral, anal or object rape; sex where penetration takes place and do not fall under the rubric of Section 375\textsuperscript{443}, such as cases of child abuse, which do not meet the definitional requirements of Section 375.

Indian courts have entertained a host of cases in relation to rape, some of which are worth traversing for the purposes of this paper. For instance, in Bodhisattwa v. Ms. Subhra Chakraborty\textsuperscript{444} the Supreme Court of India held "rape" to be an offence that was violative of a person’s fundamental right to life guaranteed under Article 21 of the Constitution. The court opined that:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{439} 2002. Citation not available, however, authors have access to full text of judgment.
\item \textsuperscript{440} 1986. Citation not available, however, authors have access to full text of judgment.
\item \textsuperscript{441} Further discussion on India’s Protection of Women from Domestic Violence Act is in the preceding part of this chapter.
\item \textsuperscript{442} For further discussion on Section 377 see Chapter 2 on Penalisation/ Regulation of Sexual Activities/ Sexuality
\item \textsuperscript{443} Brother John Antony v State 1992 Cr LJ 1352 (Mad)
\item \textsuperscript{444} AIR 1996 SC 922
\end{itemize}
\end{footnotesize}
“Rape is a crime not only against the person of a woman, it is a crime against the entire society. It destroys the entire psychology of a woman and pushes her into deep emotional crisis.... It is a crime against basic human rights and is violative of the victims most cherished right, namely, right to life which includes right to live with human dignity contained in Article 21.”

The ratio in this judgment was relied upon in a subsequent decision of the Supreme Court in *The Chairman, Railway Board & Ors v. Chandrima Das*.⁴⁴⁵ In this case the Supreme Court granted a non-citizen compensation for rape that was committed on her by railway employees. In reaching its decision the court noted that rape has been interpreted as being violative of the right to life under Article 21. It held that, “according to the tenor of the language used in Article 21, it [the right to life] will be available not only to every citizen of this country, but also to a ‘person’ who may not be a citizen of the country.” In its reasoning the court relied upon a number of international human rights treaties and particularly on the definition of violence against women provided in the *UN Declaration on Violence Against Women* and Article 3 of the *Convention on the Elimination of All Forms of Discrimination against Women*.⁴⁴⁶ It held the State to be vicariously liable for the tortuous act of its employees and ordered the payment of compensation for the violation of the fundamental right that resulted.

On procedural aspects, previously Section 155(4) of the *Indian Evidence Act* linked the credibility of the prosecutrix with her ‘general immoral character’. This provision was, however, deleted in 2003 pursuant to the Law Commission of India’s recommendation. This provision had been used to destroy the credibility of the prosecutrix. However, even before this amendment, the Supreme Court, in the *State of Maharashtra v. Madhukar*⁴⁴⁷ held that unchastity of a woman does not make her “open to any or every person to violate her person as and when he wishes” and that she was entitled to the equal protection of laws.

The Indian Supreme Court has, in numerous judgments, allowed convictions for the offence of rape based on the uncorroborated testimony or sole testimony of the prosecutrix.⁴⁴⁸ This is important as oftentimes the prosecutrix is the only person who can testify to the offence of rape. However, the court also clarified that it must be established that the sole testimony is credible, and that the court will have regard to the surrounding circumstances to decide on the credibility of the evidence of the sole witness.⁴⁴⁹

In *State of Punjab v. Gurmit Singh*,⁴⁵⁰ the court held that trials for rape ought to be held in camera as a rule, and open trials can only be the exception. As in the case of sexual

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⁴⁴⁵ AIR 2000 SC 988
⁴⁴⁶ Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women states that women are entitled to the equal enjoyment and protection of all human rights, which would include, inter alia, the right to life, to equality, and to liberty and security of person.
⁴⁴⁷ 1991 (1) SCC 57
⁴⁴⁸ See e.g. *Madho Ram v State of Uttar Pradesh* AIR 1973 SC 469. In *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* AIR 1983 SC 753, it was held that the “absence of corroboration notwithstanding...if the evidence of the victim does not suffer from any basic infirmity, and the ‘probabilities factor’ does not render it unworthy of credence, as a general rule, there is no reason to insist on corroboration”. Lawyers Collective, Handbook on Law of Domestic Violence, 2009
⁴⁴⁹ See Lawyers Collective; ibid.
⁴⁵⁰ 1996 (2) SCC 384
harassment, the Indian Supreme Court laid down broad parameters to assist victims of rape in *Delhi Domestic Working Women’s Forum v. Union of India*[^451]. These are as follows:

1. The complainant of sexual assault should be provided with legal representation, it being important to secure continuity of assistance by ensuring that the same person who looked after complainant’s interest in the police station represents her up to the end of the case.
2. Legal assistance should be provided at the police station as the victim would be in a state of distress.
3. The police should be in a duty to inform the victim of her right to representation before any questions are asked of her and the police report should state so.
4. Victims who do not have their own lawyers should be provided with a list of advocates at the police station.
5. The advocate shall be appointed by the court upon application by the police at the earliest convenient moment.
6. In all rape trials anonymity of the victim must be maintained as far as necessary.

In addition, a witness protection programme must be put in place intended to provide support to the woman during the trial. Such a programme will also prevent the perpetrator from getting to the woman and forcing her to withdraw her complaint.

Rape is covered by Sections 375 and 376 of *Bangladesh’s Penal Code*. Rape under the Bangladeshi Penal Code is sexual intercourse by a man against a woman when it is against her will, without her consent, when her consent has been obtained by putting her in fear of death, or of hurt or when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married, with or without her consent, when she is under fourteen years of age. Penetration is sufficient to show rape. The provision exempts marital rape as discussed below. The punishment for rape is life imprisonment or imprisonment that may extend to 10 years and fine.

In *Al-Amin v. The State*[^452] the High Court Division held that corroborative evidence was not an imperative component of judicial credence in every case of rape and that the testimony of the victim of sexual assault was vital and unless there were compelling reasons which necessitated looking for corroboration of her statement, the court should find no difficulty in acting on the testimony of the victim of a sex crime alone to convict an accused where her testimony inspired confidence and was found to be reliable. In *Badal and another v. The State*[^453] the court also held that the absence of injury marks was not necessary to prove rape. From the oral evidence and from the facts and circumstances, it was clear that the informant was raped on the night of occurrence by the appellants. Though on medical examination of the victim no sign of rape was found and though no mark of violence was noticed on the body of the victim, in view of the entire evidence on record it appeared that the victim was raped by the appellants.

In *State v. Shahidul Islam alias Shahid and others*[^454] the High Court Division of the Bangladesh Supreme Court held that complete penetration was not essential to constitute

[^451]: 1995 (1) SCC 14
[^452]: 19 BLD (HCD) 307 (1999)
[^453]: 19 BLD (HCD) 527 (1999)
[^454]: 58 DLR (HCD) 545 (2006)
rape. Even partial or slightest penetration with or without emission of semen and rupture of
hymen or even an attempt of penetration was sufficient to prove rape. Nor was the presence
of spermatozoa necessary to prove rape if there were other evidences including injuries on
genitalia and signs of violation and other symptoms were found.

The *Suppression of Violence Against Women and Children, 2000* introduces harsher
punishments for rape and increases the age of consent from fourteen to sixteen. Where a
woman or child dies as a result of the rape, the perpetrator may be punished by death or life
imprisonment and a fine of one hundred thousand taka. The law also specifies punishment
for each member of a gang in cases of gang rape and for attempts to cause hurt or death by
committing to attempting to commit rape. Persons instigating or abetting offences under
this Act are punishable with the same terms of imprisonment and fine as the perpetrators.

Apart from the new offences and increased punishments in this law, it also introduces
institutional and procedural provisions. Offences under this Act can only be tried by the Anti-
Woman and Children Oppression Tribunal established in each district. Hearings are
required to be held on a daily basis and trials completed within 180 days of the receipt of the
complaint failing which the accused can be given bail. Trials can be held in camera and the
case will continue from the same point under a new judge if the sitting judge is transferred
with no obligation to re-examine witnesses. Trials can also be held in the absence of the
accused under certain circumstances. The law also makes procedures for recording
statements, calling witnesses and for actions against negligent investigation and delayed
medical examinations. The law makes access to the tribunals simpler for victims and the
tribunal can issue a safe custody order if necessary and provide for a woman or child to be
kept at a specified place and in making such order is required to consider the opinion of a
woman or child in securing their welfare and interest.

Under the *Indonesian Penal Code*, the use of force or threat of force, to force a woman
to have sexual intercourse is punishable with maximum imprisonment of 12 years. Where the
woman is unconscious or helpless, the punishment is nine years. Where the rape results in
death, the maximum punishment is enhanced to 15 years.

Thailand’s law relating to sexual assault was amended in 2007 to broaden the scope of
sexual assault beyond male-female sexual assault. Thus, “whoever has sexual intercourse
with another person, being in the condition of inability to resist, by committing any act of
violence or by making such another person misunderstand himself or herself as another
person,” is punished with imprisonment between four and twenty years and fine. The
amendments also clarify that the “sexual intercourse” referred to means “committing for

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455 Section 9, Suppression of Violence Against Women and Children, 2000 (Bangladesh)
456 Ibid.
457 Section 30, ibid.
458 Section 26, ibid.
459 Section 20, ibid.
460 Ibid.
461 Section 21, ibid.
462 Section 18 and Section 32, ibid.
463 Section 31, ibid.
464 Article 285, Penal Code (Indonesia)
465 Article 286, ibid.
466 Article 291, ibid.
467 Section 277, Penal Code (Thailand)
doer’s sexual desire by using doer’s sexual organ for committing against other person’s sexual organ, anus or oral cavity, or using any other things for committing against other person’s sexual organ or anus.”

The punishment is enhanced where the offence is committed using a gun or explosive in the nature of destroying “a woman or a man.”

Provisions covering same-sex sexual assault range in the research countries from being covered by provisions that also criminalise consensual same-sex sexual conduct as in Bangladesh to specific provisions recognizing same sex sexual assault. In Thailand, coverage of same-sex sexual assault was introduced through gender-neutral provisions on sexual assault in 2007 (see above).

In Indonesia, under Article 292 of the Penal Code, “any adult who commits any obscene act with a minor of the same sex whose minority he knows or reasonably should presume, shall be punished by a maximum imprisonment of five years.” Article 297 punishes trade in women and minors of the male sex.

5.3 Sexual Violence: Marital Rape

The research countries have taken different paths to address marital rape. While some continue not to recognise marital rape, others have criminalised it or provided civil remedies for it. In Nepal, the non-recognition of marital rape in the country’s criminal laws was challenged before the Supreme Court.

Marital Rape and Equality: In Forum for Women, Law and Development v Government of Nepal the constitutional validity of Section 1 of the chapter on Rape of the Country Code was challenged as violative of Article 11 of Nepal’s then Constitution (1990), which guaranteed the right to equality. The Supreme Court of Nepal also considered the Nepal government’s commitments under the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women observing that Nepal had ratified the same without reservation thereby accepting the responsibilities that arose from such ratification. The impugned section provided that rape was an act of sexual intercourse with a girl, widow or other’s wife below 16 years of age with or without her consent or with any of the above who is over 16 years of age without her consent by using force, threat or undue influence. The petitioner argued that by implication this meant that having sexual intercourse with one’s own wife without her consent had not been included as rape and this violates the rights to equality and equal protection of law (Article 11) and individual liberty (Article 12) guaranteed under the Constitution.

The petitioner further argued that various international human rights instruments recognized marital rape as both a form of violence against women and a violation of their human rights and Nepal was duty bound to abide by these instruments having signed and ratified them. It stated that the present provision failed to satisfy the equality guarantee in Nepal’s Constitution as it made an unreasonable distinction between married and unmarried women by considering rape against the latter punishable but a similar act by a husband on his wife as

466 Ibid.
467 Ibid.
470 Section 377, Penal Code, 1860 (Bangladesh)
471 Criminal Code Amendment Act (No.19) B.E. 2550 (2007) (Thailand)
472 2002; citation not available. However, authors have access to full text of judgment as translated by the petitioners.
not on par. On the other hand the government pleaded that equality was guaranteed only between equals under the Constitution and married and unmarried women could not be treated as alike since the social position and family responsibilities of married women differ greatly from those of unmarried women. It claimed that the law was drafted with the understanding that marriage was a permanent consent expressed for having sexual relations. It further stated that in any event if a man caused pain or suffering to his wife against her will the option of divorce and the offence of battery were available to her as remedies. It further claimed that it was against the Hindu religion and traditions to posit that consent was required for a husband to have sexual relations with his own wife. The government also argued that the petitioner did not have locus standi to file the case. Citing Indian case law which expanded the notion of locus standi in the context of public interest litigation, the court rejected this position.

Observing that the act of rape did violate a woman’s right to individual liberty, the court held that its legal interpretation had to be made in the context of international law including international instruments and treaty obligations. It noted that Article of the Universal Declaration of Human Rights recognized the right of every human being to live with self-respect, Article 4 recognised the right against servitude. Similarly, it identified the right to self-determination and protection against slavery and servitude under Articles 1 & 8 of the International Covenant on Civil and Political Rights respectively. It observed that these rights are guaranteed under the international human rights framework to all human beings, including women irrespective of marital status. It pointed out that such inalienable rights cannot be considered lost to women on them entering into marriage. It stated that any act “which results in non-existence of women, adversely affects on self-respect of women, infringes upon right of women to independent decision-making or which makes women slaves or an object of property id not compatible in the context of the modern world, rather it is a stone-age thought.” In light of these international principles of human rights, the court held that marital rape is not permissible. It pointed out Article 1 of the Convention on the Elimination of All Forms of Discrimination Against Women, which defines the term ‘discrimination against women’ and that Article 2 of the UN Declaration of Elimination of Violence Against Women which includes marital rape within its rubric.

On Nepal’s international obligations the court pointed out Section 9 of the Nepal Treaty Act, 1991, which required that international treaties and instruments to which the country was a party have to be accepted as law within Nepal and such instruments would prevail in case of conflict with national laws.

Regarding religious and traditional beliefs, the court pointed out that those such as polygamy have been now made punishable. Similarly, practices of untouchability had also been prohibited. In this context it pointed out that there had been great change in the idea that marriage was a permanent commitment what with developments in law such as divorce and alimony. It stated that “bringing timely change in laws is to proceed towards globalization with the concept of universal values and traditions. The main basis of globalization is reciprocal international relations and the values and traditions determined by treaties and conventions. It is in this context that laws are being made in the national level according to the provisions of international treaties and instruments to which Nepal is a party.”

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473 The unofficial translation of this law has been taken from the website of the UN Refugee Agency and is available at www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=printdoc&docid=3ae6b51724
In holding that there was no justification in differentiating between women who are wives and other women, the court observed that “if an act is an offence by its very nature, it is unreasonable to say that it is not the offence merely because of difference in person committing the act.” Such discrimination, it held, would be in violation of the provisions under the Convention on the Elimination of All Forms of Discrimination Against Women and the Constitution of Nepal. It further observed that consent was the basis of a marital relationship and by extension mutual consent was required for sexual intercourse between a husband and wife.

It pointed out that on a literal interpretation of Section 1 of the chapter on rape in the Country Code there was no categorical exclusion of marital rape from the definition of rape. However, through other language in the provision it could be suggested that only rape of another’s wife or a widow would be considered rape and by implication, therefore, marital rape could be understood to be excluded from the meaning of rape. However, the court held, it is appropriate and reasonable to define marital rape too as a criminal offence.

As a result of directives issued by the Supreme Court, the government enacted an omnibus legislation – An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006, which included a penal provision for marital rape. The same law allowed marital rape to be a valid ground for divorce. Despite this decision of the Supreme Court in 2002, when changes were made subsequently to the Nepal Country Code through the aforementioned omnibus law, although marital rape was criminalised, the punishment applicable was only a jail term of 3 to 6 months, far less than that prescribed for cases of rape outside marriage. Currently cases challenging this are pending before the Nepal Supreme Court.

Criminal remedies for marital rape: Thailand has introduced amendments to its Penal Code to recognise marital rape. The changes to the law were brought in after intense public debates on mass media and through a sustained campaign by women’s groups. As noted above, the provision on sexual assault is now gender specific; it also removes any reference to exceptions for marriage that existed in the previous law. The application of the provision to marital rape is also clarified by the inclusion of a new sub-section that states:

“If the offence according to the first paragraph has been committed between spouses and the spouses desire to cohabit, the court may punish by the punishment lighter than that described in the law as it may be considered or determine some conditions for behaviour control instead of punishment. In case of the punishment with imprisonment according to the judgment provided by the court and any party of the spouses does not desire to cohabit any more and desire to divorce, that party shall inform the court and the court shall inform the public prosecutor to proceed with suing for divorce for them.”

Criminal remedies for marital rape in Indonesia have been introduced through the Law on Elimination of Violence in the Household, 2004. The law includes sexual violence in its definition of violence in the household which includes “forcing sexual intercourse carried out against an individual living within the scope of the household” which is punishable with up to 12 years in prison and/or 36 million rupiah or “forcing sexual intercourse against one of the individuals within the scope of the household for commercial purpose and/or a certain

474 Also discussed in sub-section 5.2 on Rape laws
475 Section 277, Penal Code (Thailand)
“purpose” which is punishable with a minimum of four years extending up to 15 years in prison and a minimum fine of 12 million rupiah extending up to 300 million rupiah. The law further stipulates that in the case of the former offence, if it is committed by the husband against the wife then that will be an offence warranting a complaint.

Bangladesh and Sri Lanka have the lowest level of protection against rape for married women, recognizing it only where the wife is below a certain age. Thus, in Bangladesh, marital rape is only recognised if the wife is below the age of thirteen; the punishment for marital rape in such cases is even more perplexing with the law specifying that if the married girl is between the ages of twelve and thirteen then the punishment shall only extend to two years or fine or both. Although Sri Lanka has a domestic violence legislation, its definition of offences is linked to its Penal Code which continues to exempt marital rape. In 1995, Sri Lanka amended its Penal Code to increase, in relative terms, the scope of its rape law. Thus, while under the earlier law, marital rape was only recognised where the wife was below the age of 12, the amendments increased the age limit to 16 and also recognised the rape by a man of his wife when they are judicially separated.\(^{476}\)

Civil remedies for marital rape: India’s criminal law, like those of Bangladesh and Sri Lanka exempts all non-consensual sexual intercourse within a marriage from punishment unless the woman is below the age of fifteen, which is a year less than in cases of non-marital relationships or where the husband and wife are separated.\(^{477}\) Where the wife is between the ages of twelve and fifteen, the punishment prescribed is only two years.

While this lacuna in the law needs to be addressed, the Protection of Women from Domestic Violence Act, 2005 recognizes sexual abuse within domestic relationships as a civil wrong.\(^{478}\) “Sexual abuse” is broadly defined to include “conduct of a sexual nature that abuses, humiliates, degrades or otherwise violates the dignity of a woman.” This broad formulation allows for the provision of civil relief in cases of marital rape and introduces the standard of dignity for adjudicating cases on sexual violence.

5.4 Sexual Violence: Custodial Rape

With regard to custodial rape, some of the research countries have introduced specific provisions in their criminal laws.

In the 1980s India’s Penal Code was amended in this regard following protests against the Supreme Court’s decision in the Mathura case.\(^{479}\) As a result, custodial rape was introduced as a separate offence of “sexual intercourse not amounting to rape” to penalize superintendents or persons of authority in custodial situations who take advantage of their official position to

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\(^{476}\) Section 363, Penal Code (Sri Lanka)

\(^{477}\) However, Section 376A on punishment for offences of rape penalizes a man who has non-consensual sexual intercourse with his wife at a time when she was living separately from him under a legal decree of separation or custom. This exception to the rule makes it clear that all other instances of marital rape on women over the age of 15 are not punishable under the existing criminal law on rape.

\(^{478}\) Further discussion on India’s Protection of Women from Domestic Violence Act is in the preceding part of this chapter.

\(^{479}\) Tukaram v State of Maharashtra 1979 (2) SCC 143. In this case, regarding the rape of a minor in custodial circumstances, the Supreme Court, while acquitting the defendants, noted that “no marks of injury were found on the person of the girl after the incident and their absence goes a long way to indicate that the alleged intercourse was a peaceful affair, and that the story of a stiff resistance having been put up by the girl is all false.”
coerce or induce female inmates to have sexual intercourse with them. Custodial situations mentioned in these provisions include jails, remand homes as well as orphanages, or homes / institutions for the care of women and children, and hospitals or any other institutions meant for the reception and medical treatment of people during convalescence and rehabilitation. Rules of evidence for such forms of rape were also changed to facilitate proof of rape. However, these provisions are limited to the act of penetrative sexual intercourse and do not cover all forms of sexual violence.

Safeguards for safety of female prisoners have been provided in some of the state prison laws. Thus, the West Bengal Correctional Services Act, 1992 provides for the separate accommodation of female prisoners, for searches to be conducted only by female warders, for footprints, measurements etc. to be made by a police officer only in the presence of a high ranking officer and a female warder, for all staff inside the female section of a correctional facility to be female and for male officers to enter the area only for the performance of their duties and in the presence of the female warder or matron and if the visit is at night, only in unavoidable circumstances with a record of the time of entry and exit. In correctional homes where there are no other female prisoners, a female warder is required to be present in the ward. If the lone female prisoner is to be transferred to another correctional home that houses other females, again they must be accompanied by a female warder. For medical services, a separate wing is to be provided for females under the medical supervision of a female medical officer. Male warders accompanying a visitor are required to stay outside the female ward and a visitor entering the female ward may only do so in the presence of two high ranking officers.

In Bangladesh, where a woman is raped in police custody, the Suppression of Violence Against Women and Children Act, 2000 provides for a minimum mandatory rigorous imprisonment of five years extending up to ten years and a minimum fine of taka ten thousand for the person or persons in whose custody the woman was, “for their failure to ensure proper custody.”

In Nepal the omnibus law – An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006 – introduced an amendment in the Miscellaneous Provisions of the Country Code which punishes a government employee who has sexual intercourse with a woman in prison or custody, a person providing protection who does the same with a woman in his protection, a person in a rehabilitation centre with a woman in such centre or a doctor or healthcare worker in a centre where a woman is being provided health services.

5.5 Sexual Violence: Child Sexual Abuse

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480 Sections 376B, 376C & 376D, Indian Penal Code
481 S. 19(1), S. 32(2), The West Bengal Correctional Services Act, 1992 (India)
482 S. 18(2), ibid.
483 S. 68(3), ibid.
484 S. 66(2), ibid.
485 S. 67(2), ibid.
486 S. 18(2) and S. 68(3), ibid.
487 S. 64(3) and 64(5). See also S. 64(7), ibid.
488 S. 40(2), ibid.
489 S. 68 (3), ibid.
490 S. 9(5), Suppression of Violence against Women and Children Act, 2000 (Bangladesh)
491 Section 14, An Act to Amend Some Nepal Acts for Maintaining Gender Equality, 2006 (Nepal)
Section 364A of Sri Lanka’s Penal Code criminalises having or attempting to have “carnal intercourse” (“defilement”) with a female between the ages of 12 and 14 years of age which is punishable with a jail term up to 2 years. This is in stark contrast to the offence of rape where punishment can be up to 20 years. If the accused can demonstrate that he or she had “reasonable cause to believe” that the female was above 14 years of age, the law recognises this as a sufficient defence. Further, an exception is made if a male has sexual intercourse with his wife or a female he lives with as his wife if the female is above 12 years of age and he has obtained the consent of her parents or guardian.

In order to address issues of cyberspace abuse, the Penal Code requires a person who provides any service by means of a computer to take necessary steps to ensure that such a facility is not used for the commission of an offence relating to the sexual abuse of a child. Such a person, who has knowledge of the facility being used for the commission of the offence, is obligated to inform the police and provide information that he may know of about the identity of the alleged offender. Not fulfilling this obligation attracts imprisonment up to two years. Further, the code imposes a duty on a person who is aware that premises are being used for abusing a child to report the same to the police or face imprisonment up to two years. It also punishes sexual exploitation as discussed below.

Sri Lanka’s International Covenant on Civil and Political Rights Act, 2007, has been legislated “to give effect to certain Articles in the International Covenant on Civil and Political Rights relating to human rights which have not been given recognition through legislative measures”. It includes a guarantee that every child has the right, inter alia, to “be protected from maltreatment, neglect, abuse or degradation” and be given legal assistance by the State at its expense in criminal proceedings affecting the child, if lack of such representation would result in substantial injustice. This law provides an efficacious remedy directly before the High Court in cases where there has been an alleged or imminent infringement of a human right stipulated in the Act, due to executive or administrative action.

Sri Lanka also has a National Child Protection Authority Act, 1998 aimed at formulating a national policy to prevent child abuse, protect and treat children subject to such abuse and to coordinate and monitor action against child abuse. The Authority has members representing, inter alia, the mental health profession, physicians, police, and civil society representatives from the fields of education, law and child welfare. The Authority is vested with several functions, including a policy-making role (formulating policy, recommending law reform, creating awareness, monitoring implementation of laws and investigation of cases etc.) However, it is also vested with enforcement functions, which include taking measures to secure protection of children who are involved in criminal investigations, to receive complaints of child abuse and refer them to the appropriate authority, maintain a national data base of child abuse cases and empowering officers to enter, inspect and seek information from premises where child abuse or illegal adoptions, are suspected to be occurring and seize

492 Section 364A, Penal Code, 1883 (Sri Lanka)
493 Section 286B, ibid.
494 Section 286C, ibid.
495 Section 5, International Covenant on Civil and Political Rights Act, 2007 (Sri Lanka)
496 Section 7, ibid.
497 Section 3, National Child Protection Authority Act, 1998 (Sri Lanka)
498 Section 14, ibid.
material or detain any person for this purpose.\textsuperscript{499} Persons who fail to provide or provide false information to officers are liable to imprisonment.\textsuperscript{500}

Child sexual abuse is addressed in \textbf{India} primarily through Sections 375 and 377 of the \textit{Indian Penal Code, 1860}. Section 375 provides that sexual intercourse with a girl under the age of 16 is rape regardless of her consent. In \textit{Sakshi v. Union of India & others}\textsuperscript{501} the Supreme Court of India deliberated on procedural aspects in child sexual abuse and rape cases and held that in trials of such cases the identity of the victim or witnesses for the prosecution should be able to attend and participate in the trial in a manner that prevents the disclosure of their identity to the accused. Further questions put by the accused to the victim or witnesses should be given in writing to them in a clear manner which is not embarrassing.

As discussed in the Chapter 2 on de-criminalisation of same-sex conduct, the Delhi High Court was asked to determine the constitutionality of Section 377 in so far as it covered adult, consensual, same sex conduct.\textsuperscript{502} The reason for this limited plea by the petitioners (instead of asking for the entire provision to be struck down) was the fact that Section 377 is the only provision available in Indian law to address the sexual abuse of boys and non penile-vaginal sexual abuse of girls. Accordingly, the Delhi High Court only took adult, consensual same-sex conduct out of the purview of Section 377 while urging the government to implement the Report of the Law Commission to update India’s law in sexual violence and provide for a proper provision related to child sexual abuse.

\textit{India’s Information Technology Act, 2000} specifically punishes publication, transmission, browsing, downloading, exchanging or promoting of material in electronic form which depicts involved in sexually explicit acts or conduct. In 2008, the Act was amended to include, among other things, offences related to child pornography and child sexual abuse. The law punishes any person who cultivates, entices or induces children into an online relationship for purposes of indulging in a sexually explicit act or facilitates the abuse of children online. In relation to child pornography, the law punishes not only the transmission of material depicting children in sexually explicit conduct but also whoever “collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes,” such material. An exception is carved out for publication which is proved to be justified for public good as it is in the interest of science, literature, art or learning or for bona fide heritage or religious purposes. A child is defined to be any person below the age of 18 years.\textsuperscript{503}

Goa is the one state in India that has brought a child rights legislation into force, and its popularity as a tourist destination has played no small part in creating the impetus for this law, the \textit{Goa Children’s Act, 2003}. This law is expansive in its coverage and touches on issues of, inter alia, sexual abuse, exploitation, and HIV. It lays down in broad terms the rights of the child and declares that the provisions of the \textit{Convention on the Rights of the Child} which has been acceded to by the Indian government are now the law in the state of

\textsuperscript{499} Sections 34, 35, ibid.
\textsuperscript{500} Section 37, ibid.
\textsuperscript{501} AIR 2004 SC 3566
\textsuperscript{502} Naz Foundation (India) Trust v Government of NCT of Delhi & others, WP(C) No.7455/2001 [Delhi High Court], Date of Decision: 2nd July, 2009
\textsuperscript{503} Section 67B, Information Technology Act, 2000 (India)
The law criminalises ‘sexual assault’, ‘grave sexual assault’ and incest, all of which are terms defined in the Act.

‘Sexual assault’ includes “sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language,” grave sexual assault is defined as “different types of intercourse: vaginal, oral, anal, use of objects, forcing minors to have sex with each other, deliberately causing injury to the sexual organs, making children pose for pornographic photos or films,” and ‘incest’ means “commission of a sexual offence by an adult on a child who is a relative or is related by ties of adoption.”

In Bangladesh child sexual abuse is dealt with under provisions of the Bangladesh Penal Code which specifies that sexual intercourse with a female below the age of 16 is rape. However, as noted earlier, the situation for minor girls who are married remains dismal. The law is also unclear on the position of minor boys who face sexual violence. In such cases, the provision in the Suppression of Violence Against Women and Children Act, 2005 on “sexual oppression” may provide an avenue but there is nothing in practice or through judgments that makes this clear. (See section below on other forms of sexual violence.) Its provision on rape of a woman and child, however affords no protection for minor boys as the law adopts the definition of rape from the Penal Code which is only restricted to male-female rape. It is possible that as in the case of India, child sexual abuse involving boys would be dealt with under Section 377 of the Bangladesh Penal Code which criminalises voluntary carnal intercourse against the order of nature but again there is no indication of this in the practice of the law.

Clause 9A of the Nepal’s Country Code deems the commission of “any kind of unnatural sexual intercourse” with a minor as an aggravated form of rape. It provides that such an act is subject to imprisonment of one year over and above that provided for the offence of rape generally.

5.6 Sexual violence not amounting to rape

For sexual violence not amounting to rape, the laws of the research countries tend to be weak. Very few of the countries have incorporated the concept of graded sexual assault within their laws.

Thus, in India, the lacuna in the existing laws on rape under Section 375 and ‘unnatural offences’ under Section 377 is that the coverage under both the provisions is limited to acts of penetration. Hence other forms of sexual violence not involving penetration are not explicitly defined or penalized under the Indian Penal Code. Therefore, provisions of the Indian Penal Code such as Sections 354 and 509 that penalize assault or the use of criminal force on a woman with the intent to “outrage her modesty” are sometimes used to address non-

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504 Section 3(5), Goa Children’s Act, 2003 (India)
505 Section 8(2), ibid.
506 Section 2(y)(i), ibid.
507 Section 2(y)(ii), ibid.
508 Section 2(y)(iii), ibid.
509 Section 9A of the Chapter on Rape, Country Code (Nepal)
consensual sexual activity with young persons. These provisions are also used to address sexual harassment against adult women.\textsuperscript{510}

*Rupan Deol Bajaj and another v. KPS Gill and another*\textsuperscript{511} considered a situation where a woman was slapped on her rear by a man in a public social setting after he had repeatedly attempted to intimidate her through physical proximity and overtures. In this case the woman filed a police complaint under Sections 354 and 509 of the *Indian Penal Code*, relating to the ‘modesty’ of women. Section 354 penalises any person who assaults or uses criminal force to any woman with the intention or knowledge that it will outrage her modesty. Section 509 penalises any person who uses language, gestures or objects with the intention of insulting a woman’s modesty by such use. The court examined dictionary definitions and judicial precedents to come to an understanding of ‘modesty’. It concluded that “the ultimate test for ascertaining whether modesty has been outraged is the action of the offender such as could be perceived by one which is capable of shocking the sense of decency of a woman.”\textsuperscript{512}

The respondent attempted to use the defence provided by Section 95 of the *Penal Code*, which provides that an act is not an offence if it causes harm so slight that it would be considered trivial by an ordinary person. The court cited precedent in determining that the ‘harm’ caused would include mental injury and its triviality would depend on the nature of the injury, the position of the parties and the intent or knowledge behind the action but not merely on the measure of physical or other injury caused.

Although the word ‘modesty’ is not defined in the *Indian Penal Code*, in this case the Supreme Court emphasized that the ultimate test for ascertaining whether modesty has been outraged is if the action of the offender is such as could be perceived as capable of shocking the decency of a woman.

To fill in the lacunae in the law, in 2000 the Law Commission of India suggested replacing the offence of rape under Section 375 with a new offence of graded sexual assault. The new definition of sexual assault would include not only penile penetration but also penetration by any other part of the body (like finger and toe) or by any other object\textsuperscript{513}. Additionally, this report recommends the inclusion of a new section to penalize ‘unlawful sexual contact’ and to cover a wide variety of offences including sexual harassment at the workplace.

This lacuna was brought to the notice of the Supreme Court of India in *Sakshi v. Union of India & others*\textsuperscript{514} wherein the petitioners had sought a declaration from the court that apart from penile-vaginal penetration ‘sexual intercourse’ as contained in Section 375 should be read to include all other forms of penetration such as penile-oral, penile-anal, digit-vaginal, digit-anal and object-vaginal, object-anal. The court held that prosecution of an accused under Section 375 on a radically enlarged meaning of it would violate the guarantee enshrined in Article 20(1) of the Indian Constitution - that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act

\textsuperscript{510} For a discussion of the use of these provisions in addressing sexual harassment against women see Chapter 1 on Non-Discrimination

\textsuperscript{511} 1995 (6) SCC 194

\textsuperscript{512} Ibid.

\textsuperscript{513} The Law Commission of India Report (No. 172 of 2000), p. 19. The recommendation of the Law Commission Report was supplemented by the report of the Justice Malimath Committee on Reform of the Criminal Justice System (Volume 1, March 2003) that recommended that “other forms of forcible penetration including penile/oral, penile/anal, object or finger/vaginal and object or finger/anal be made a separate offence prescribing punishment broadly on the lines of Section 376 of the Indian Penal Code.”

\textsuperscript{514} AIR 2004 SC 3566
charged as an offence. It stated that alteration to the definition of rape by a process of judicial interpretation, could result in confusion in the minds of the prosecuting agency and the courts and therefore desisted form doing so. As noted above, the Delhi High Court has urged that the government of India implement the report of the Law Commission.

In India, the *Goa Children’s Act 2003* is the first to include the idea of graded sexual assault (see discussion above).

In **Bangladesh**, the *Suppression of Violence against Women and Children Act 2000* introduces the offence of “sexual oppression” which is defined as, “any person with a view to illegally satisfying his sexual lust by any of his organ or matter touches genital organ or any part of body if a woman or child or violates her modesty such act of that person shall constitute offence of sexual oppression.” A minimum rigorous imprisonment term of 3 years which may extend to 10 years and a fine are prescribed as punishment.

In **Sri Lanka** Section 365B of the *Penal Code* criminalises “grave sexual abuse”, an act of sexual gratification by the use of one’s genitals or any other part of one’s or another’s body or any instrument or any orifice, which does not amount to rape under Section 363, and is done without the consent of the other person, with the consent of the person obtained coercively or when the other person was of unsound mind or intoxicated. Punishment is prescribed as rigorous imprisonment up to 20 years and compensation as determined by court to the injured person. Where the abuse is committed against any person below 18 years of age the punishment shall be rigorous imprisonment between 7 and 20 years.\(^{515}\)

5.7 **Hate crimes (both state sanctioned and state excused)**

In Bangladesh and India there have been increasing incidents of acid attacks on women. The frequency of the incidents led to the enactment of the *Acid-Offences Prevention Act, 2002*\(^ {516}\) in **Bangladesh** with a view to “make provisions to prevent acid-offences strictly.” The Act imposes severe penalties, including the death penalty or rigorous life imprisonment with a fine of one lakh rupees for causing death by throwing acid or bodily injury where, “his/her sight or ear is damaged fully or partly or face or breast or sexual organ is disfigured or damaged.”\(^ {517}\) For bodily injury where a joint/member of the body is disfigured, damaged or injured, a minimum punishment of seven years that may extend to and a fine of 50,000 taka is prescribed.\(^ {518}\) Punishments for throwing or attempting to throw acid even where there is no injury are prescribed and persons abetting any of these offences are punishable to the same extent.\(^ {519}\)

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515 Section 365B, Penal Code, 1883 (Sri Lanka)
516 Act II of 2002. The English version of this statute available to the authors is an unofficial translation obtained from the website of the Asia Pacific Forum on Women, Law and Development (APWLD) at [http://www.apwld.org/pdf/acidoffences2002.pdf](http://www.apwld.org/pdf/acidoffences2002.pdf). The unofficial translation was cross-checked with local lawyers in Bangladesh who noted that the translation was missing the complete Section 5(b) which reads as follows: “Any part or joint of his/her body is disfigured or damaged or injured, he shall be punished with, imprisonment for either description that may extend to fourteen years but not less than seven years of rigorous imprisonment and in addition he will also be punished with fine not exceeding 50 thousand taka.”
517 Section 5, Acid-Offences Prevention Act, 2002 (Bangladesh)
518 Ibid.
519 Sections 6 and 7, ibid.
The fined amount is to be given to the survivor or successor as the case may be. Fines can be realised by selling or auctioning any movable or immovable property of the convict. There are strict provisions regarding investigations including timelines for investigation and for legal action for negligent investigations. Bail is possible in very limited circumstances and strict timelines are imposed also for the trial with daily hearings and completion within 90 days. Where an accused person is absconding trial may also be possible ex-parte with certain conditions.

Bangladesh also passed the Acid Control Act, 2002 to regulate the sale and use of acid by requiring businesses selling acid to obtain a licence and provide treatment for acid victims, rehabilitate them and provide legal assistance. This law sets up a National Acid Control Council with district committees and establishes a Fund to provide treatment to victims. However, a verified English translation of this law was not available for the purposes of this report.

Several cases related to acid-throwing have made their way into Indian courts. An ongoing matter in the Supreme Court has drawn considerable attention with the court coming down heavily on the government for its lack of action and also suggesting the enactment of laws similar to those in Bangladesh. A judgment is awaited in this case.

In State of Karnataka by Jalahalli Police Station v. Joseph Rodrigues the Karnataka High Court dealt with a case of acid attack where both sides appealed against the punishment imposed by a lower court, the accused seeking to mitigate the sentence and the State seeking to enhance it. In discussing the nature of the offence, the court held that the fact that pouring a large quantity of acid on a person’s head is likely to cause death must have been known to the accused or must be inferred and the offence would fall under the category of attempt to murder. Discussing acid attacks, the court stated,

“Even otherwise, the Court cannot shut its eyes to obnoxious growing tendency of young persons like accused resorting to use corrosive substances like acid for throwing on girls, causing not only severe physical damage but also mental trauma to young girls. In most of the cases the victim dies because of severe burns or even septicemia or even if luckily survives, it will only be a grotesque disfigured person, who even if survive lives with mangled flesh, hideous zombie like appearance and often blind if acid is splashed on face and suffer a fate worse than death.”

520 Section 9, ibid.
521 Section 10, ibid.
522 Sections 11 and 13, ibid.
523 Sections 15 and 16, ibid.
524 Section 18, ibid.
527 MANU/KA/8317/2006
Stating that the reformation theory of punishment would not apply in crimes where the damage is immense, irreparable and cannot be retractable the court observed that, “the imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that the Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.”

While imposing a punishment of life imprisonment and a fine of 200,000 rupees, the court directed that the fine be paid to the victim along with the fine already imposed by the lower court. The High Court also took note of the high cost of treatment and surgeries in such cases and opined that in such cases, the court felt it was the duty of the government to provide special help and rehabilitation programmes and hoped the government would come out with such a programme at the earliest.

For discussion: The discourse of the Court around the impact on the victim

“She was a young girl of hardly 20 years of age with pretty face and by one stroke the accused/appellant has made her face hideous and also blind in both eyes. By mere look at the faces (before and after the incident) it needs no great imagination to feel not only her physical but also mental trauma. She cannot come out of the house and walk in the streets with blind eyes nose lips forehead reduced to mangled flesh and thus has become a prisoner in her own house for a lifetime. One has to consider the plight of the poor parents who named their beautiful daughter Haseena (which literally means beautiful) and now every day they have to look at the mangled face and cry in silence. We can imagine what they may be feeling and wishing that their daughter be rather dead than live with such a ghostly face…The learned Counsel for the appellant/accused and the accused pleaded before us that leniency may be shown on the ground of the accused being a young person and after coming out of jail may try to settle in life. But we asked them what about the victim? A young beautiful girl who has now to carry all along her entire life the hideous face who has lost hopes forever of leading normal life including loss of a chance of marriage the revered dream of every girl viz. motherhood for no fault of her and this is only because of the act of the accused.”

In Reshma v. State of Rajasthan, the High Court of Rajasthan received a letter from the petitioner narrating the story of how she survived an acid attack, that her father was a poor labourer and they were no longer able to take on the medical expenses of her treatment and that she had been awarded only 10,000 rupees from the government whereas in a similar case the government had taken care of all the expenses of another victim of an acid attack. The court took cognisance of the letter and appointed an amicus curiae for the petitioner. The government in response stated that it had been vigilant in this case in prosecuting and convicting the man who perpetrated the crime, had paid compensation and therefore had no further duty to the girl.

The High Court in directing the Government to release 100,000 rupees from the Chief Minister’s Relief Fund stated that India was a welfare state and that the relationship between

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528 MANU/RH/0170/2009
the State and its citizens is one of trust. As the trustee of the people, the State must be dedicated to uplifting and ameliorating the condition of the people.

“Simultaneously it is the duty of the State to protect the people from crime by maintaining law and order. Although the State cannot be held liable to pay compensation for every breach of law and order, but cases of heinous crime, specially where the woman is the victim, the State must show its sense of humanism. In the present case, not only the petitioner is a woman, but most importantly, she belongs to a poor family, which is forced to eke out its living for its sheer survival. Financial crushed, socially ignored, the family deserves to be uplifted from its pitiable condition…”

Holding that the Directive Principles of State Policy that impose a duty on the State to provide public assistance and to improve the standard of living of the people have to be read in the fundamental right to life contained in Article 21, it further held that,

“Right to life, not only imposes a constitutional duty on the State to protect the life of people, but most importantly, imposes a duty on the State to ameliorate the condition of the life of the people. The concept of social justice permeates the Constitution like the golden rays of the sun. In order to eliminate the darkness which has fallen on the family of petitioner, it is imperative that the light of constitutional provision should permeate through their lives. The dreams of the Constitution cannot be confined merely to the preamble of the Constitution but need to be concretized, need to be implemented, and need to be diffused through the lives of our brotherens, who are poor and faceless, voiceless and hapless.”

5.8 Honour crimes

The prevalence of honour crimes is reported in India and Bangladesh. In India, such crimes take place largely in the context of caste. In Bangladesh, fatwas being issued by local bodies have included the stoning, flogging and forced marriages of girls for adultery.

In **India**, the judges of various High Courts and the Supreme Court have been calling for an end to honour crimes. However, a recent case where the Supreme Court commuted the death sentence in an honour killing matter on grounds that a person cannot be fully blamed for social conditioning on caste has generated a lot of debate. The discussion of the Supreme Court in commuting the death sentence is reproduced below for the purposes of discussion:

“Sushma was the younger sister of this accused. It is a common experience that when the younger sister commits something unusual and in this case it was an intercaste, intercommunity marriage out of the secret love affair, then in the society it is the elder brother who justifiably or otherwise is held responsible for not stopping such affair. It is held as the family defeat. At times, he has to suffer taunts and snide remarks even from the persons who really have no business to poke their nose into the affairs of the family. Dilip, therefore, must have been a prey of the so-called insult which his younger sister had imposed upon his family and that must have been in his mind for seven long months. It has come in the

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529 See for instance, Sujit Kumar and Ors. v. State Of U.P. and Ors 2002(3) Civil Court Cases 3 (Allahabad) and Lata Singh v. State Of U.P. and Another, Writ Petition (crl.) 208 of 2004, Supreme Court of India (Date of Decision: 7 July 2006)
evidence that even if the marriage was performed with Prabhu, there were efforts made by the family members of Dilip to bring Sushma back. It has come in evidence that mother of Dilip tried to lure back Sushma and so did her other married sister Kalpana who actually went on to meet Sushma in her college. Those efforts paid no dividends. Instead, Sushma kept on attending the college thereby openly mixing with the society. This must have added insult to the injury felt by the family members and more particularly, accused Dilip.

Why did he wait for seven months? The answer lies in the fact that Sushma became pregnant and thus reached a point of no return. Till such time as she became pregnant, there might have been some hopes in the family to win her back but once she became pregnant, even that distant hope faded away and, in our opinion, that is the reason why this ghastly episode took place. As if all this was not sufficient, Dilip himself must have had the feeling of being cheated. It is not that Dilip did not know Prabhu who was living only three houses away from his house. The secret love affair which went on between Sushma and Prabhu for which Abhayraj acted as a messenger must have raised the feeling of being cheated by Prabhu. This was further aggravated because of the so-called higher status of a Brahmin family on the part of Dilip and so-called non-Brahmin status of Prabhu. It has come on record that Sushma was moved to Andheri at the house of Shashidharan and this ought to have added as a spark which resulted in tornado. Dilip undoubtedly was a young person not even having crossed his 25 years of life and not having any criminal antecedent. If he became the victim of his wrong but genuine caste considerations, it would not justify the death sentence.

The murders were the outcome of social issue like a marriage with a person of so-called lower caste. However, a time has come when we have to consider these social issues as relevant, while considering the death sentence in the circumstances as these. The caste is a concept which grips a person before his birth and does not leave him even after his death. The vicious grip of the caste, community, religion, though totally unjustified, is a stark reality. The psyche of the offender in the background of a social issue like an inter-caste-community marriage, though wholly unjustified would have to be considered in the peculiar circumstances of this case.”

5.9 Sexual exploitation (including trafficking, of minors)

The issue of exploitation is addressed in the Constitutions of some of the research countries. In India, Article 23 embodies a right against exploitation and states, “Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.” According to Article 39(e), “the State shall direct its policy towards securing…that the health and strength of workers, men and women, and the tender age of children are not abused…”

The Bangladeshi and Thai Constitutions prohibit forced labour while the Indonesian Constitution prohibits enslavement. Nepali’s Interim Constitution specifically guarantees

530 Article 34(1) of the Constitution of Bangladesh: All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

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every person “the right against exploitation” and states further that a person shall not be exploited in the “name of custom, tradition and practice, or in any other way” or be subjected to trafficking, slavery or bonded or forced labour. Sri Lanka’s Constitution provides that no person shall be subject to “torture or to cruel, inhuman or degrading treatment or punishment”, which could be interpreted to include exploitation of varying kinds including trafficking. In the context of sexual exploitation, these provisions overlap with the rights to life, to equality and the rights of women and children.

This paper attempts to distinguish sexual exploitation and trafficking laws from those related to sex work as these have typically been conflated in national and international laws and treaties. At times the same law may have provisions related to all these matters. In so far as they deal with sexual exploitation and trafficking they are referred to here. Where the provisions or laws relate to sex work they are examined in Chapter 8 below.

Trafficking laws and provisions: Among the research countries Thailand and Indonesia have enacted new anti-trafficking laws that are broad in their scope whereas the primary focus of anti-trafficking laws of the other countries is on the regulation and control of prostitution – the provisions related to trafficking are highlighted below. The Thai and Indonesian laws trafficking are based on the Protocol To Prevent, Suppress And Punish Trafficking In Persons, Especially Women And Children, Supplementing The United Nations Convention Against Transnational Organized Crime. Anti-trafficking provisions are also located in general criminal laws.

In 2008, Thailand amended its decade old anti-trafficking legislation. The Anti-Trafficking in Persons Act B.E. 2551 (2008) marks a significant departure from the previous Thai law and indeed the trafficking laws of the other research countries. Unlike the previous law which was specifically focused on women and children, the 2008 anti-trafficking law is gender neutral. It defines exploitation as, “seeking benefits from the prostitution, production or distribution of pornographic materials, other forms of sexual exploitation, slavery, causing another person to be a beggar, forced labour or service, coerced removal of organs for the purpose of trade, or any other similar practices resulting in forced extortion, regardless of such person’s consent.”

It further defines forced labour or service as, “compelling the other person to work or provide service by putting such person in fear of injury to life, body, liberty, reputation or property, of such person or another person, by means of intimidation, use of force, or any other means causing such person to be in a state of being unable to resist.”

531 Section 38, Constitution of Thailand states, “Forced labour shall not be imposed except by virtue of law specifically enacted for the purpose of averting imminent public calamity or by virtue of law which provides for its imposition during the time when the country is in a state of war or armed conflict, or when a state of emergency or martial law is declared.”
532 Article 28I of the Constitution of Indonesia states, “The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance.”
533 Article 29, Interim Constitution of Nepal, 2007
534 Article 11, Constitution of Sri Lanka, 1978
535 United Nations, 2000
536 Section 4, Anti-Trafficking in Persons Act B.E. 2551 (2008) (Thailand)
537 Ibid.
Section 6 of the Thai trafficking law states that, “(1) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving any person, by means of the threat or use of force, abduction, fraud, deception, abuse of power, or of the giving money or benefits to achieve the consent of a person having control over another person in allowing the offender to exploit the person under his control; or (2) procuring, buying, selling, vending, bringing from or sending to, detaining or confining, harboring, or receiving a child; is guilty of trafficking in persons.”

The law also holds those supporting the commission of trafficking offences in any manner including by contributing property, procuring a meeting place, accepting property or benefits to help offenders not getting punished or becoming a member of an organised criminal group as punishable.538 It also prescribes punishments for preparation or conspiracy to commit a trafficking offence and extends the law to offences committed outside Thailand as well.539 Increased punishments are prescribed for officers and members of government or statutory or constitutional bodies.540

The law empowers “competent officials” with various investigative and search powers while also prescribing safeguards in the exercise of such powers (e.g. only women to search women, official to show he has nothing on his person before searching, to show identity card, present a report of the search, etc.)541 It also allows the official to take custody of a person suspected of being trafficked for 24 hours; longer custody requires permission from the court. Such person must be placed in an appropriate place not a detention cell or prison.542 The performance of duties in relation to custody are specifically required to take into account “all human rights principles seriously.”543

Similarly the law allows obtaining a document sent by post, computer etc. only on filing an ex-parte application in court and further requires the court to consider the effect on individual rights or any other rights as well as whether there are reasonable ground to believe an offence has been or is going to be committees, that the document will provide access to information about the offence and that there is no other appropriate or more efficient method.544

The law provides for assistance for trafficked persons and directs the government to “provide assistance as appropriate to a trafficked person on food, shelter, medical treatment, physical and mental rehabilitation, education, training, legal aid, the return to the country of origin or domicile, the legal proceedings to claim compensation according to the regulations prescribed by the Minister, providing that human dignity and the difference in sex, age, nationality, race, and culture of the trafficked person shall be taken into account. The right to receive protection, whether it be prior to, during and after the assistance providing, including the timeframe in delivering assistance of each stage, shall be informed the trafficked person. In this connection, the opinion of trafficked person is to be sought.”545

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538 Section 7, ibid.
539 Sections 8 -11, ibid.
540 Sections 12 and 13, ibid.
541 Sections 27 and 28, ibid.
542 Section 29, ibid.
543 Ibid.
544 Section 30, ibid.
545 Section 33, ibid.
The law also includes the right of compensation, safety protection for trafficked persons and their families, witness protection, and for returning to their country of residence or even staying in Thailand for proceedings against the offender, medical treatment, rehabilitation or compensation, where there is documentary or other proof to show the person has temporary or permanent residence or in exceptional cases to stay based on the security and welfare of such person.\textsuperscript{546} It also protects against criminal proceedings against trafficked persons for violation of immigration or prostitution laws unless specific permission is given by the Minister of Justice.\textsuperscript{547} It creates a fund to be used for providing assistance and safety protection to victims, safety, assistance in helping the person return to their country of residence and for the prevention and suppression of trafficking.\textsuperscript{548} The law also establishes a high level committee to make recommendations to the Cabinet concerning the policy on prevention and suppression of trafficking in persons, for the revision of laws and rules, etc.\textsuperscript{549}

Penalties for trafficking in the law are of imprisonment from four to ten years and a fine from 80,000 to 200,000 Baht.\textsuperscript{550} Where the offence is committed against a child whose age exceeds fifteen years but not yet reaching eighteen years, imprisonment is from six years to twelve years and a fine from 120,000 to 240,000 Baht.\textsuperscript{551} If the child is not over fifteen years of age, imprisonment is from eight years to fifteen years and a fine from 160,000 to 300,000 Baht.\textsuperscript{552} If the offence is committed by a juristic person, they are required to pay a fine between 200,000 to 1,000,000 Baht.\textsuperscript{553}

The Preamble to Indonesia’s \textit{Law on the Eradication of the Criminal Act of Trafficking in Persons, 2007},\textsuperscript{554} states that, among other things, the law has been enacted as “…trafficking in persons, especially the trafficking of women and children, constitutes a crime which violates human dignity and respect and human rights, thus should be eliminated.”\textsuperscript{555} Consent of the victim is inconsequential to the prosecution of the crime.\textsuperscript{556} The definitions of trafficking and exploitation are the same as those in the Thai law as both have been adapted from the Palermo Protocol. Interestingly, within these definitions, while the Thai law defines forced labour, the Indonesian law defines “sexual exploitation” i.e. “any form of the use of sexual organs or other organs of the victim for the purpose of obtaining profit, including but not limited to all acts of prostitution and sexually indecent acts.”\textsuperscript{557} Strict punishments are prescribed for trafficking as well as various scenarios within trafficking including sending or bringing a person or a child (including adoption) out of or in to Indonesia with the intention

\textsuperscript{546} Sections 34 – 40, ibid.
\textsuperscript{547} Section 41 states that, “Unless the Minister of Justice grants a permission in writing, the inquiry official is barred from taking criminal proceeding against any trafficked person on the offence of entering, leaving, or residing in the Kingdom without permission under the law on immigration, giving a false information to the official, forging or using a forged travel document under the Penal Code, offence under the law on prevention and suppression of prostitution, particularly on contacting, persuading, introducing and soliciting a person for the purpose of prostitution and assembling together in the place of prostitution for the purpose of prostitution, or offence of being an alien working without permission under the law on working of the alien.”
\textsuperscript{548} Section 42, ibid.
\textsuperscript{549} Section 15, ibid.
\textsuperscript{550} Section 52, ibid.
\textsuperscript{551} Ibid.
\textsuperscript{552} Ibid.
\textsuperscript{553} Section 53, ibid.
\textsuperscript{554} Law Of The Republic Of Indonesia, Number 21 Year 2007, State Gazette Of The Republic Of Indonesia Year 2007, Number 58.
\textsuperscript{555} Article 1(1), Law on the Eradication of the Criminal Act of Trafficking in Persons, 2007 (Indonesia)
\textsuperscript{556} Article 26, ibid.
\textsuperscript{557} Article 1(8) ibid.
of exploitation.\textsuperscript{558} The punishment is enhanced where the trafficking or exploitation results in major injury, major “\textit{mental disturbance}”, contracting a life-threatening contagious disease, pregnancy, damage or loss to her/his reproductive organs, or death or where the victim is a child.\textsuperscript{559} Victims who commit crimes under this law under the coercion by an offender are exempt from criminal liability.\textsuperscript{560}

The law also details procedures for investigation, prosecution and trial of offences including specifying that the testimony of the victim is sufficient for proving the guilt of the offender provided one other evidentiary instrument is provided.\textsuperscript{561} It also details measures for the protection of victims and witnesses during trial and prosecution\textsuperscript{562} as well as for the restitution, medical and social rehabilitation, return assistance etc.\textsuperscript{563} and for emergency assistance where the victim suffers trauma or disease that threatens their life.\textsuperscript{564} Again as in the case of the Thai law, the institutional structure for addressing trafficking is dealt with in the law which provides for local and transnational co-operation and assistance.\textsuperscript{565}

The “elucidation” on the provisions of the law (that accompany all Indonesian laws) specifies that the law “\textit{constitutes a manifestation of Indonesia’s commitment to observe the UN protocol of 2000 on the Prevention, Suppress and Punishment of Trafficking in Persons, especially Women and Children (the Palermo Protocol), to which Indonesia is a signatory.”}\textsuperscript{566}

In \textbf{Nepal}, the \textit{Human Trafficking and Transportation (Control) Act, 2007} governs issues related to trafficking.\textsuperscript{567} Human trafficking is defined as selling or buying a person for any purpose, forcing a person into prostitution, removing organs except as authorized by law and engaging in prostitution.\textsuperscript{568} Therefore trafficking is directly equated with prostitution under this law, consequently criminalizing prostitution in all its dimensions. “\textit{Human transportation}” includes taking a person out of the country for buying or selling the person and inducing or forcing a person out of his or her home or place of residence and keeping that person or handing him or her over to another person for the purposes of prostitution and exploitation.\textsuperscript{569}

This law gives extensive authority to the police. For instance it empowers a sub-inspector or higher personnel to enter premises, seize any property and gather evidence or arrest a person without warrant on the suspicion that an offence of human trafficking or transportation is

\textsuperscript{558} Articles 2-6, ibid. Punishments are also prescribed for various activities surrounding trafficking and exploitation including assisting, planning or commission by a group of persons.
\textsuperscript{559} Articles 7 and 17, ibid.
\textsuperscript{560} Article 18, ibid.
\textsuperscript{561} Articles 28 – 42, ibid.
\textsuperscript{562} Articles 43 – 47, ibid.
\textsuperscript{563} Articles 48 – 52, ibid.
\textsuperscript{564} Article 53, ibid.
\textsuperscript{565} Chapter VI and VII, ibid.
\textsuperscript{566} Elucidation Of The Law Of The Republic Of Indonesia, Number 21 Year 2007 On The Eradication Of The Criminal Act Of Trafficking In Persons, Supplement To The State Gazette Of The Republic Of Indonesia Number 4720
\textsuperscript{567} The English version of this statute available to the authors is an unofficial translation obtained from the website of the Kathmandu School of Law: \url{www.ksl.edu.np/cpanel/pics/trafficking_act_2064.pdf}
\textsuperscript{568} Section 4, Human Trafficking & Transportation (Control) Act, 2007 (Nepal)
\textsuperscript{569} Ibid. “Exploitation” is defined as “an act of keeping human beings as slave and bonded and this word also implies to remove human organ except otherwise determined by existing law.”
being committed. While prosecuting cases under this Act, except in cases where a person is being prosecuted for engaging in prostitution, the court is required to keep the accused in custody during the period of prosecution. The burden of proof to demonstrate innocence is placed on the accused under this statute. Here too, as in legislations related to domestic violence or children’s issues in Nepal, court proceedings are to be conducted in camera.

Punishments for forcing a person into prostitution is from 10-15 years imprisonment and a fine up to Nepali rupees 100,000. For human transportation the punishment extends to 20 years in prison and a fine up to Nepali rupees 200,000. Punishment is enhanced by 25 percent for a person convicted of an offence who also holds public office and by 10 per cent for a person who is convicted and also is in a prohibited degree of relationship with the victim as per the chapter on incest in Nepal’s Country Code. A victim of an offence under this law is granted immunity from punishment for causing death of the offender while trying to escape the circumstances.

Nepal’s Country Code also has a chapter covering human trafficking. This chapter does not refer to sexual exploitation explicitly. However, it does consider buying or selling of a person as an offence. Yet, this translation does not provide clarity. For instance, clause 2 impliedly permits the enticement or separation of a person below 16 years or a person who is “mentally disturbed” with permission of the legal guardian, which could not have been the purpose of this law.

Bangladesh’s Suppression of Immoral Traffic Act, 1933 aims more at the regulation of prostitution than at the prevention of trafficking. These provisions are discussed below. The law is specific to women and girls. Elements of trafficking are covered in the punishment of procurement or bringing a female to any place for prostitution and if the person procuring is male, then punishment can also include whipping. The Act punishes the detention of any female below the age of eighteen in places where prostitution is carried on and that of females over the age of eighteen with the intention that she may have sexual intercourse with a man other than her lawful husband. It also punishes a person (including whipping for a male offender) who has the custody, charge or care of a girl under eighteen who causes, encourage or abets the seduction or prostitution of the girl. The Act also allows police officials above a certain rank to remove minor girls from places where offences under the Act may be taking place; the law then allows courts to place them in custody till they are eighteen or make other arrangements. The court can also direct the parents of a girl who is under custody to contribute for her maintenance and the person in whose custody she is placed has

570 Section 7, ibid.
571 Section 8, ibid.
572 Section 9, ibid.
573 Section 27, ibid.
574 Section 15, ibid.
575 Ibid.
576 Ibid. The authors have been unable to obtain an English translation of the chapter on incest in Nepal’s Country Code.
577 Section 16, ibid.
578 The authors obtained an unofficial translation of this chapter from the Kathmandu School of Law website: http://www.ksl.edu.np/cpanel/pics/6_H_T.pdf.
580 Sections 9(1) and 10(1), Suppression of Immoral Traffic Act, 1933 (Bangladesh)
581 Section 11, ibid.
582 Sections 13 and 14, ibid.
control over her as if such person was a parent and shall be responsible for her maintenance and protection.\textsuperscript{583}

The Suppression of Violence Against Women and Children Act 2000 creates a specific offence of trafficking in women and children. The offence for women takes place, “if any person imports or exports or buys or sells or lets to hire or dispose of or hires or otherwise obtains possession or custody of any woman with intent that such woman shall be employed or used for the purpose of prostitution or illegal or immoral purposes or for torturing her in any other manner.” Where a woman is sold to a person keeping or managing a brothel the presumption will be that she has been sold for prostitution; similarly a brother owner who buys, hires or otherwise obtains possession or custody of a woman is presumed to have done so for prostitution. The punishment in all these cases is death or life imprisonment or a minimum sentence of 10 years extending up to 20 with fine. It also punishes trafficking in children which takes place is any person imports or exports, buys or sells or otherwise obtains possession or custody of any child for illegal or immoral purposes. In such cases the punishment is death or life imprisonment with a fine. Unlike Suppression of Immoral Traffic Act, 1933, this provision applies to persons below the age of 16 regardless of their sex. The kidnapping and illegal confinement of women and children is also punishable.

India’s Immoral Traffic (Prevention) Act 1986 deals with trafficking for the purposes of prostitution. The law was enacted to, “provide in pursuance of the International Convention signed at New York on the 9th day of May, 1950 for the prevention of immoral traffic.” The Act, however, does not define trafficking and predominantly regulates sex work as is discussed in Chapter 8 below. The law is gender neutral. To the extent that it relates to trafficking the law punishes the procurement, inducement taking of a person regardless of their consent for prostitution\textsuperscript{584} with graded punishments where the person against whom the offence is committed is a child (below the age of 16), a minor (between the ages of 16 and 18) or a person above the age of 18.

General criminal provisions related to trafficking can be found in India’s Penal Code, 1860. These include offences related to kidnapping and forced labour.\textsuperscript{585}

\textsuperscript{583} Section 18, ibid.
\textsuperscript{584} Section 5, Immoral Traffic (Prevention) Act 1986 (India)
\textsuperscript{585} Section 366A of the Indian Penal Code, 1860 states, “Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.” Further, Section 372 of the Indian Penal Code, 1860 states, “Selling minor for purposes of prostitution, etc. Whoever sells, lets to hire, or otherwise disposes of any[person under the age of eighteen years with intent that such person shall at any age be employed or used for the purpose of prostitution or illicit intercourse with any person or for any unlawful and immoral purpose, or knowing it to be likely that such person will at any age be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. [Explanation I: - When a female under the age of eighteen years sold, let for hire, or otherwise disposed of to a prostitute or to any person who keeps or manages a brothel, the so disposing of such female shall, until the contrary is proved, be presumed to have disposed of her with the intent that she shall be used for the purpose of prostitution. Explanation II: - For the purposes of this section “illicit intercourse” means sexual intercourse between persons not united by marriage or by any union or tie which, though not amounting to a marriage, is recognised by the personal law or custom of the community to which they belong or, where they belong to different communities, of both such communities, as constituting between them a quasi -marital relation].”
Broader provisions related to child trafficking are also found in the *Goa Children’s Act, 2003*. It defines child trafficking as “the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise.”\(^{586}\)

This law separately prohibits the trafficking of children for employment which attracts imprisonment for three months and fine of 50,000 rupees.\(^{587}\) In its provisions related to child abuse, the law prohibits the sale of children,\(^ {588}\) requires airport authorities, border police, railway police and traffic police to report suspected cases of trafficking in children\(^ {589}\) and prohibits the sale of children in the garb of adoption for among other things, child trafficking, including by agencies, doctors, hospitals, etc.\(^ {590}\) The Chapter in the law on ‘child sexual trafficking’\(^ {591}\) prohibits child prostitution, provides for the removal of child prostitutes and provides for a punishment of imprisonment for one year and fine up to 100,000 rupees for any person who exploits a child for commercial sexual exploitation. It also prohibits the system of ‘devdasi’ or the dedication of a minor girl to a temple/god.\(^ {592}\)

Some of the research countries\(^ {593}\) are parties to the SAARC (South Asian Association for Regional Cooperation) *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002*. As is evident from the name of the convention, its scope is limited, confined as it is to the trafficking of women and children and only in the context of prostitution.\(^ {594}\) It makes punishable the act of trafficking\(^ {595}\) and the provision of any place for the same. The convention recognizes the need for states to enter into multi-lateral mechanisms to implement the convention. However, as a legal framework the convention is ineffective as it lacks a treaty body and enforcement mechanisms through which violations of the convention can be brought to book.

In 2005, **Sri Lanka** enacted the *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, No. 30 of 2005* incorporating key provisions of the SAARC Convention. Following the Convention, Sri Lanka’s criminal law punishes trafficking (see below) while this law focuses on maintaining, financing, renting, etc. a place for the purposes of trafficking in women and girls (below the age of 18) which is punishable law with imprisonment from three to 15 years and a fine.\(^ {596}\) Aiding, abetting and attempting to commit this offence attracts the same punishment.\(^ {597}\) The law also specifies the circumstances where the offence is considered grave (i.e. where it is committed in custody,

\(^{586}\) Section 2(z), Goa Children’s Act, 2003 (India)
\(^{587}\) S. 7(9), ibid.
\(^{588}\) S. 8(13), ibid.
\(^{589}\) S. 8(15), ibid.
\(^{590}\) S. 8(16), ibid.
\(^{591}\) S. 9, ibid.
\(^{592}\) S. 9(7), ibid.
\(^{593}\) Bangladesh, India, Nepal and Sri Lanka
\(^{594}\) Article 1(2) defines ‘prostitution’ as “sexual exploitation or abuse of persons for commercial purposes”.
\(^{595}\) Article 1(3) defines ‘trafficking’ as “the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking”.
\(^{596}\) Section 2, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution Act, No. 30 of 2005 (Sri Lanka)
\(^{597}\) Ibid.
by an organized criminal group, through the use of violence or arms, etc.) Courts are given extra-territorial jurisdiction where the offence is committed outside the country but the perpetrator or victim are in the country or are Sri Lankan. Under this law "persons subjected to trafficking" are “women and children victimized or forced into prostitution by the traffickers by deception, threat, coercion, kidnapping, sale, fraudulent marriage or any other unlawful means” and "trafficking" is “the moving, selling or buying of women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person being subjected to trafficking.”

Trafficking in Sri Lanka is also addressed under provisions of the Penal Code. Section 357 prohibits the kidnap or abduction of a woman so that she may be forced or seduced to ‘illicit intercourse’. Section 358 prohibits the kidnap or abduction of any person in order to subject that person to the ‘unnatural lust’ of another person. Section 360C addresses trafficking. It punishes anyone who buys, sells or barters or instigates another to do so or does anything to promote, facilitate or induce the buying, selling or bartering of any person for money or other consideration, or recruits, transports, harbours or receives any person (including a child i.e. below eighteen years of age) or does any other act by the use of threat, force, fraud, deception or inducement or by exploiting the vulnerability of another for the purpose of, inter alia, prostitution. “Exploiting the vulnerability of another” means compelling a person to submit to any act, taking advantage of such person’s economic, cultural or other circumstances. Lastly, Section 360E prohibits the solicitation of a child (i.e. a person under eighteen years of age) for the purpose of sexual abuse of the child.

Child specific legislation or provisions: Apart from laws related to trafficking or child sexual abuse discussed in the previous section, laws and provisions specific to children may also address sexual exploitation.

Nepal passed a Children’s Act in 1992 with the aim of “protecting the rights and interests of children” particularly in the context of their physical, mental and intellectual wellbeing. It defines a ‘child’ as a person not having completed 16 years of age. The Act prohibits torture or cruel treatment against children but excludes “scolding and minor beating” by a parent, guardian or teacher in the interests of the child. Interestingly this appears to be at odds with Nepal’s domestic violence law, which punishes mental abuse and defines it to include reprimanding a person within a domestic relationship. It is unclear which law will prevail in case of such a conflict, although a normative interpretation would give precedence to the later statute.

The Act prohibits involving children in an “immoral profession” a term which is left undefined. It specifically prohibits taking, distributing or exhibiting the photograph of a child
in order to engage the child in such a profession. Further, publication, exhibition, or distribution of a photograph, description or “personal events” of a child is also prohibited.\textsuperscript{610} One assumes that this section aims to address issues of child prostitution and pornography. Any court proceedings pursuant to violations under this statute are protected by confidentiality measures. Such proceedings are prohibited from publication in any press outlet without the permission of the concerned investigating officer.\textsuperscript{611}

Laws related to the sexual exploitation of children in India include the provisions on child sexual abuse, those of the Information Technology Act, 2000 and of the Goa Children’s Act, 2003 discussed above. India’s Juvenile Justice (Care and Protection of Children) Act, 2000 caters to children “in need of care and protection” who are defined to include children who are “being or …likely to be grossly abused, tortured or exploited for the purpose of sexual abuse or illegal acts”, who are “found vulnerable and …likely to be inducted into …trafficking” or who are “being or …likely to be abused for unconscionable gains.”\textsuperscript{612} A juvenile or a child has the same meaning under this law, which is any person below 18 years of age. The law empowers the state government to set up a Child Welfare Committee at district level to look into concerns of children in need of care and protection.\textsuperscript{613} The committee, has the power, inter alia, to enquire into a case of such a child and order the child’s care to be taken in children’s homes to be established under the law and in cases of immediate care, to refer children to shelter homes designated as such under the law.\textsuperscript{614} The laws adds that “[r]estoration of and protection to a child shall be the prime objective of any children's home or shelter home”, which means returning the child to parents, foster parents or adopted parents.\textsuperscript{615} The provisions in the Goa Children’s Act, 2003 are discussed above.

India’s Commission for Protection of Child Rights Act, 2005 which establishes National and State level Commissions for the protection of child rights as well as child courts, specifically requires the Commissions to examine all factors that inhibit the enjoyment of rights of children affected by “trafficking, maltreatment, torture and exploitation, pornography and prostitution and Recommend appropriate remedial measures.”\textsuperscript{616}

Thailand’s Child Protection Act, 2003 was enacted to amongst other things bring Thai law in line with the United Nations Convention on the Rights of the Child and defines a child as a person below the age of 18 (but does not include those who have attained majority through marriage). It defines torture\textsuperscript{617} as “any commission or omission of acts which cause the deprivation of freedom of, or mental or physical harm to, a child; sexual abuses committed against a child; inducement of a child to act or behave in a manner which is likely to be mentally or physically harmful to the child, unlawful or immoral, regardless of the child's consent.” The law forbids such torture\textsuperscript{618} and provides for safety protection of a tortured child\textsuperscript{619}, creates a duty on a person who witnesses or knows of such torture to inform a competent authority\textsuperscript{620} and for criminal proceedings including against a guardian if that is the

\textsuperscript{610} Section 15, ibid.
\textsuperscript{611} Section 49, ibid.
\textsuperscript{612} Section 2, Juvenile Justice Act, 2000 (India)
\textsuperscript{613} Section 29, ibid.
\textsuperscript{614} Sections 34 & 36, ibid.
\textsuperscript{615} Section 39, ibid.
\textsuperscript{616} Section 13(1), Commission for Protection of Child Rights Act, 2005 (India)
\textsuperscript{617} Article 4, Child Protection Act, 2003 (Thailand)
\textsuperscript{618} Article 26, ibid.
\textsuperscript{619} Article 40, ibid.
\textsuperscript{620} Article 41, ibid.
person torturing the child.\textsuperscript{621} It also forbids, regardless of the child’s consent, forcing, threatening, using, inducing, instigating, encouraging or allowing a child to perform or act in a pornographic manner, regardless of whether the intention is to obtain remuneration or anything else.\textsuperscript{622} The law establishes a National Child Protection Committee to, among other things, advise the government on policies and programmes related to the law.\textsuperscript{623}

Under Sri Lanka’s Penal Code, “sexual exploitation of children” is severely punishable. It includes keeping a child to be sexually abused in any premises, procuring a child for sexual abuse or intercourse, inducing persons to be clients of a child for sexual intercourse through print or other media, threatening a child for sexual intercourse or abuse, or paying the child or its parents for the same.\textsuperscript{624}

The International Covenant on Civil and Political Rights Act, 2007, has been legislated “to give effect to certain Articles in the International Covenant on Civil and Political Rights relating to human rights which have not been given recognition through legislative measures”. It includes a guarantee that every child has the right, inter alia, to “be protected from maltreatment, neglect, abuse or degradation” and be given legal assistance by the State at its expense in criminal proceedings affecting the child, if lack of such representation would result in substantial injustice.”\textsuperscript{625} This law provides an efficacious remedy directly before the High Court in cases where there has been an alleged or imminent infringement of a human right stipulated in the Act, due to executive or administrative action.\textsuperscript{626}

Sri Lanka also has a National Child Protection Authority Act, 1998 aimed at formulating a national policy to prevent child abuse, protect and treat children subject to such abuse and to coordinate and monitor action against child abuse. The Authority has members representing, inter alia, the mental health profession, physicians, police, and civil society representatives from the fields of education, law and child welfare.\textsuperscript{627} The Authority is vested with several functions, including a policy-making role (formulating policy, recommending law reform, creating awareness, monitoring implementation of laws and investigation of cases etc.) However, it is also vested with enforcement functions, which include taking measures to secure protection of children who are involved in criminal investigations, to receive complaints of child abuse and refer them to the appropriate authority, maintain a national data base of child abuse cases\textsuperscript{628} and empowering officers to enter, inspect and seek information from premises where child abuse or illegal adoptions, are suspected to be occurring and seize material or detain any person for this purpose.\textsuperscript{629} Persons who fail to provide or provide false information to officers are liable to imprisonment.\textsuperscript{630}

Bangladesh’s Child Protection Act, 1974, punishes persons in charge or control of a girl under the age of 16 years who “causes or encourages the seduction or prostitution of that girl or causes or encourages any person other than her husband to have sexual intercourse with

\begin{itemize}
  \item Article 43, ibid.
  \item Article 26, ibid.
  \item Chapter 1, ibid.
  \item Section 360B, Penal Code, 1883 (Sri Lanka)
  \item Section 5, International Covenant on Civil and Political Rights Act, 2007 (Sri Lanka)
  \item Section 7, ibid.
  \item Section 3, National Child Protection Authority Act, 1998 (Sri Lanka)
  \item Section 14, ibid.
  \item Sections 34, 35, ibid.
  \item Section 37, ibid.
\end{itemize}
A person is deemed to have caused or encouraged the seduction or prostitution of a girl by knowingly allowing the girl to “consort with” or be employed by a prostitute or “person of known immoral character.” Where a court is notified that a girl below the age of 16 is in danger of seduction or prostitution without knowledge of her parents or guardians, the court may direct the parent or guardian to exercise due care and supervision.

Indonesia’s Child Protection Act 2002 provides for children in need of “special protection” which includes those children who are “being economically or sexually exploited” and “who are the victims of kidnapping, sale and trading” and provides for a punishment of up to five years and a fine up to one hundred million rupiah. The law assigns the government or an authorized state institution with the responsibility and accountability of such children. Where children are victims of criminal acts, the law also specifies special protection in the form of institutional and non-institutional rehabilitation efforts, confidentiality, preventing stigmatization of the child, providing physical, mental and social safety guarantees and ensuring access to information regarding the development of the legal process. The law prohibits the “permitting, undertaking, ordering to be undertaken or participating in the exploitation of children” and for special protection including dissemination of laws concerning the protection of children from economic or sexual exploitation and for the involvement of “various government agencies, companies, labor unions, and non-governmental and community organizations in the effort to eradicate the economic and/or sexual exploitation of children.”

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631 Section 42, Child Protection Act, 1974 (Bangladesh)
632 Section 43, ibid.
633 Article 15(1), Child Protection Act, 2002 (Indonesia)
634 Article 78, ibid.
635 Article 59, ibid.
636 Article 64, ibid.
637 Article 66, ibid.
6. ACCESS TO HEALTH SERVICES IN RELATION TO SEX AND SEXUALITY  
(IN THE CONTEXT OF CESC GC14)

Health services, as well as health systems which organize and ensure the appropriate delivery of health services and goods, are essential for the promotion of sexual health.

The structure and delivery of health care must be seen as contributing the experience of being a full member of one’s society, a valued person. A health and human rights-based approach to health services focuses not only on the technical and clinical quality of services, but also on the design, delivery and use of these services. In addition to evaluating the impact of health services on the rights to health and life of all persons without discrimination, a rights-based analysis examines how the structure and delivery of sexual health services follows other key values of human rights. Moreover, a rights-based framework recognizes that untreated or inadequately treated sexual health conditions are themselves often a source of stigma for affected persons and groups.

In addition to evaluating health services in regard to customary public health criteria, it is necessary to assess the legal and policy framework of health services with attention to values of equality, dignity, freedom and autonomy for all. Such evaluations would address the laws and policies determining the distribution, content, accessibility, delivery, and accountability for inadequate services. While the state is ultimately responsible for insuring the availability, accessibility, acceptability, and quality of health services, the state itself is not the only provider of these services. The state remains responsible, however, to ensure that non-state actors do not discriminate and that non-state actors providing services to marginalized populations are not themselves discriminated against nor face restrictions on their rights to association and expression.

Four key aspects of accessibility for health services have been spelled out in international human rights law and are applicable to services necessary for sexual health: (1) non-discrimination, by which is meant in the sexual health context that health services must be accessible without discrimination, including on the basis of sex, gender, sexual conduct, marital status or sexual orientation; (2) physical accessibility, which requires health services to be within safe physical reach of all persons, including persons in detention, refugees, and women facing restrictions on movement; (3) economic accessibility, by which is meant that health services are affordable to all, including marginalized populations; and (4) information accessibility, meaning the right to seek, receive and impart information and ideas concerning sexual health, including the availability of relevant services, even services challenging dominant sexual mores.

Each of these four aspects must be considered in regard to the wide array of health services important to sexual health. The scope of these services includes the prevention and treatment of STIs and HIV/AIDS (including voluntary testing, and post-exposure prophylaxis, and access to anti-retroviral therapies); contraception, including condoms and emergency contraception; and abortion services. Laws that erect barriers to accessing contraception or safe abortion services have the affect of reducing the sexual wellbeing of girls and women, in

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639 General Comment 14, CESCR; see also General Comment 3, CESCR. For further discussion, see International Human Rights Law section, [add place].
640 General Comment 14, CESCR, see Cusack, Western Asia for more elaboration
that they are denied the fundamental right to determine if and when sexual activity will become reproductive. Other laws fail to provide adequate access to goods and services in the context of sexual assault (such as forensic tests as well as treatment of injuries and STIs).

Discriminatory exclusion of certain categories of persons (married women, men, adolescents, those assaulted in conflict situations, in detention, refugee or displacement settings) and thereby result in preventable ill health, compounding the initial abuse and falling disproportionately on marginalized populations. Other laws regulate access to assisted reproductive technologies and other infertility services on the grounds of individuals’ marital status or perceived or actual sexual orientation. Excluding unmarried women and lesbians from access to infertility services violates non-discrimination standards and the rights to health.

In general, the analysis of health service laws must consider not only the necessary scope of the laws, but the barriers that specific populations and marginalized sub-groups may face: does the law on its face or in practice exclude unmarried women, from accessing contraception, for example? Does the law provide for information and distribution in ways that will reach young married women or men who have sex with men? Is the privacy of persons seeking information and services protected explicitly, or does the law subordinate their rights to police registration of HIV status of people in sex work? Are there other laws penalizing behaviour, such that a person seeking care would be reluctant to disclose his or her actual sexual practices? Do the services reach populations in prison and non-nationals, including both migrants and refugees? Are the insurance or social welfare schemes supporting access to health services non-discriminatory, and adequately held accountable to meeting health and rights protections?

HIV status (actual or imputed) can also function as a major barrier to accessing general health services, or conversely, HIV-positive status can result in coercive services (for example, mandatory testing). Other groups, such as persons in sex work or men having sex with men can, also be singled out for coercive health services (mandatory health checks and tests) which are often rationalized as public health measures but which in fact fail both on effectiveness and ethical grounds.

Persons under 18 years of age face particular barriers in accessing sexual health services, care, and information. The necessity of consent for health services and procedures is fundamental. While in regard to minors, parents or guardians may retain formal powers to consent, respect for the principles of the evolving capacity of the child and his or her best interest can result in under-18s accessing appropriate and necessary services without recourse to parental involvement or consent. The principle of evolving capacity suggests that older adolescents should be able to access services without consent of parents or guardians. In addition, the right to enjoy confidentiality in regard to sexual health services and care should be respected. Persons under 18 years of age have the right to accurate, comprehensive, and age-appropriate sexual health information, regardless of the nature of the provider (state or non-state actor). Sexual health information may not be restricted on discriminatory grounds.

641 Systems which impose mandatory testing on certain groups, on the grounds of their alleged or real higher risk, often drive persons further from care and services. These mandatory tests also violate medical norms in that testing is not provided for the health benefit of those tested, but for the good of others (most clearly shown in laws which mandate tests without providing for treatment of tested individuals). See also the section on Discrimination.
(for example, sex, gender, or sexual orientation). Young persons’ rights to information include information about sexual health services.

State obligation for non-discriminatory access to health services includes the obligation to eliminate both formal and substantive discrimination. Formal discrimination consists of codified differential access and treatment (both exclusion from treatment or services, or mandated and non-consensual treatment). Substantive discrimination includes practices, such as derogatory, humiliating, and inferior treatment in health facilities and programs, which are legally mandated but to which the law does not provide adequate redress. Both formal and informal discrimination excludes or reduces the access of persons from care, treatment, and information necessary for sexual health, increasing mortality and morbidity.

Access to health services in relation to sex and sexuality is premised on the rights to life, health and equality. The Constitutions of the research countries recognize the right to health to varying degrees.

**India’s Constitution** recognizes the right to life while the Directive Principles of State Policy require that the Indian State protect the health and strength of the people. In *Consumer Education and Research Centre v. Union of India* the Supreme Court recognised the right to health and medical care as part of the right to life by reading into this fundamental right the content of the directive principles of state policy.

Similarly, **Bangladesh** recognizes the right to life while its’ Fundamental Principles of State Policy direct the government to improve public health. The High Court Division of the Supreme Court of Bangladesh has interpreted the right to life with the aid of the directive principles of state policy, to include the protection of health.

Sri Lanka’s Constitution does not explicitly recognize the right to life or provide for the right to health. However, in a case related to claiming of medical expenses from the State for torture, it has determined that Sri Lankan citizens have the right to chose between State provided and private sector health services in getting medical care and seeking compensation on that basis. While holding as such the court referred to the enjoyment of the highest attainable standard of physical and mental health in Article 12 of the *International Covenant on Economic, Social and Cultural Rights*.

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642 See Article 39(e) (securing the health and strength of workers, men and women), Article 41 (State within the limits of its economic capacity and development to provide public assistance in cases of sickness and disablement), Article 42 (maternity relief) and Article 47 (improvement of public health among primary duties) of the Constitution of India.

643 AIR 1995 SC 922

644 See also *P.B. Khet Mazdoor Samity v. State of West Bengal* AIR 1996 SC 2426 where the Supreme Court recognized the right of persons to emergency healthcare. Held: Article 21 imposes an obligation on the State to safeguard the right to life of every person. Preservation of human life is of paramount importance. The Government hospitals run by the State and the medical officers employed therein are duty bound to extend medical assistance for preserving human life. Failure of a Government hospital to provide timely medical treatment to a person in need of such treatment results in the violation of his right to life guaranteed under Article 21.”

645 *Farooque v. Government of Bangladesh*, WP 92 of 1996 (1996.07.01)

646 See *Kottabadu Durage Sriyani Silva v Chanaka Iddamaloda and others*, S.C. (FR) Application No. 471/2000 where the Supreme Court recognized it as implicit in some of the fundamental rights.

647 *See Gerald Perera v. Suraweera* 2003 1SLR 317, The Human Rights Commission of Sri Lanka argues that this case read with Sri Lankan laws on provision of health services, criminal laws on the protection of public health all imply that the right to health is justiciable under the Sri Lankan Constitution. See “Right to Health of
Indonesia’s Constitution recognises the right to health as a fundamental right. Article 28H states that, “Every person shall have the right to… to enjoy a good and healthy environment, and shall have the right to obtain medical care.”

The Constitution of Thailand recognizes the ‘Rights to Public Health Services and Welfare’ and provides that, “Every person shall enjoy equal rights to receive appropriate and standard public health service, and the indigent shall have the right to receive free medical treatment from a State infirmary. A person shall have the right to receive comprehensive and efficient public health services from the State. A person shall have the right to enjoy the prompt prevention and eradication of harmful contagious diseases from the State free of charge.”

The only Constitution to specifically recognize reproductive rights is the Interim Constitution of Nepal which states that, “every woman shall have the right to reproductive health and other reproductive matters.”

While the Constitutional foundations for the right to health exist to varying degrees, they have not necessarily been used to promote access to health services in the context of sexual health.

6.1 Abortion

Several of the research countries continue to have highly restrictive legal provisions in relation to abortion.

Sri Lanka’s Penal Code provides that any person who voluntarily induces the miscarriage of a foetus (including the woman concerned), unless it is done in good faith in order to save the woman’s life, is liable to imprisonment. This penalty increases to up to twenty years if such miscarriage is committed without the consent of the woman.

Indonesia’s Penal Code contains several provisions criminalizing abortion and the provision of abortion services. It punishes the woman (if there is deliberate intent; punishment 4 years) as well as any person who causes the abortion (without consent 15 years, with consent 5 years). Higher punishment if it results in the death of the woman. A physician, midwife or pharmacist who is an accomplice enhanced punishment and deprived of profession. Although the Penal Code provides no exceptions, Indonesia’s Law concerning Health No. 36/2009 provides limited circumstances in which abortion can be carried out i.e. “medical emergency

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648 Section 50(1), Constitution of Thailand, 2007. Section 80(2) of the Directive Principles of Fundamental State Policies direct the State to, “Section 80(2): (2) to promote, support and develop a health system with emphasis on health promotion for sustainable health conditions of the public, including the provision and promotion of people’s access to comprehensive and efficient standard public health services and encouraging private sector and the communities in participating in health promotion and providing public health service, and the person having duty to provide such service whose act meets the requirements of professional and ethical standards shall be protected as provided by law;


650 Section 303, Penal Code, 1883 (Sri Lanka)

651 Section 304, ibid.

652 Article 346 of the Penal Code of Indonesia provides that ”Any woman who deliberate intends, causes or lets another cause the drifting off to death of the fruit of her womb, shall be punished by a maximum imprisonment of four years.” See also Articles 347 and 348 for the punishment of person causing the abortion.
detected from the early age of pregnancy, both threatening the life of the mother and/or foetus, suffering from severe genetic diseases and/or congenital defects, or that can not be repaired so as to cause difficulty for the infant to survive out the womb;” or “pregnancy due to rape that may result in psychological trauma for the rape victim.”

Even in such cases there are further limitations and abortions may be performed only:

“a. before pregnancy attains the age of 6 (six) weeks counting from the first day of the last menstruation, except in the case of medical emergencies;
b. by health workers with skill and authority with a certificate stipulated by Minister;
c. with the consent from the pregnant mother concerned;
d. with the permission from the husband, except rape victim; and

e. health service provider satisfying requirements stipulated by Minister.”

Abortions can be performed only with counseling before and after the abortion. The law further requires the government to protect and prevent women from having abortions in the limited circumstances allowed by the law where they are not qualified, safe and accountable and “contradictory with religious norms and provisions of laws and legislations.”

In Bangladesh while the Penal Code criminalises abortion except where it is performed in good faith to save the life of the woman, the Government in the late 1970s started providing “menstrual regulation” services, reportedly as “an interim method to establish non-pregnancy.” Legally, as the pregnancy is not confirmed, the provision of these services does not violate the prohibition on abortion.

653 Article 75, Law concerning Health No. 36/2009 (Indonesia)
654 Article 76, ibid.
655 Article 75, ibid.
656 Article 77, ibid.
657 “Menstrual regulation” services have been available in the Government’s family planning programme. The Government does not feel that this service conflicts with current abortion laws as it provides menstrual regulation as a family planning method, not as an abortifacient… Menstrual regulation, however, can be performed on an out-patient basis and may be performed by a trained paramedic. In practice, many providers of menstrual regulation have received only informal training. Training in menstrual regulation and services is provided by the Government in seven government medical colleges, two district hospitals and a large family planning clinic.”


658 “However, abortion during the first trimester is widely practiced under the name of Menstrual Regulation (MR). MR services were initially justified as preventing botched abortions and consequent maternal mortality; it finds its legal basis in an interpretation that it is "an interim method to establish non-pregnancy". This effectively removes it from the Penal Code. MR services have been widely available since the late 1970s as part of the family planning programme and provided at government health facilities free of cost by government functionaries who receive high quality training.”

659 Ibid.
In Thailand too, abortion is illegal and the Penal Code provides punishment for the woman and the person causing the abortion (with different punishments for abortion with and without her consent and where the act results in bodily harm or death.) However, for medical practitioners Section 305 of the Penal Code carves out an exception, “if it is necessary for the sake of the health of such woman,” or if she is pregnant as a result of sexual assault.

In 2006, the Medical Council of Thailand empowered under the Medical Profession Act B.E. 2525 prescribed the Medical Council’s Regulation on Criteria for Performing Therapeutic Termination of Pregnancy in accordance with Section 305 of the Criminal Code of Thailand B.E. 2548. Under the regulations the termination of pregnancy under Section 305 would be performed only with the consent of the pregnant woman and only by a medical practitioner. The regulation provides that abortions can be carried out in cases of necessity due to the physical or mental health problem of the pregnant woman. In the case of the latter, the mental health problem has to be certified by at least one medical practitioner other than the one performing the procedure. Mental health problems include severe stress caused by finding out that the foetus has or is at risk of having a severe disability or genetic disease. Physical and health problems are required to have clear indications and examination and diagnosis must be recorded. For abortions in case of sexual assault, the regulations require evidence or fact leading to a “reasonable belief” that the pregnancy is caused by sexual assault. Terminations of pregnancy in accordance with the regulations are to be performed in specified medical premises and must be reported to the Medical Council of Thailand. The Regulation specifies that therapeutic terminations of pregnancy performed in accordance with the Regulation would satisfy the provisions of Section 305 of the Criminal Code discussed above.

The legal framework relating to abortion in India is contained in the Indian Penal Code, 1860 read with the Medical Termination of Pregnancy Act, 1971. Under the Penal Code, abortion is criminalized and may be performed only in good faith to save the life of the mother. Abortion under the code is permitted only where it is performed in good faith to save the life of the mother.

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660 Sections 301, 302, 303 and 304, Penal Code (Thailand). Under Section 297, abortion is also punishable as a grievous bodily harm.
661 The authors obtained an unofficial translation of these regulations from the “Annual Review of Population Law,” Harvard School of Public Health, available at http://www.hsph.harvard.edu/population/abortion/Thailand.abo.htm
662 No.1, Medical Council’s Regulation on Criteria for Performing Therapeutic Termination of Pregnancy in accordance with Section 305 of the Criminal Code of Thailand B.E. 2548.
663 Nos. 3 and 4, ibid.
664 No. 5, ibid.
665 Ibid.
666 Ibid.
667 Ibid.
668 No.6, ibid.
669 Nos. 7 and 8, ibid.
670 No. 10, ibid.
671 Sections 312 to 318 of the Indian Penal Code relate to inducing miscarriages, injuring unborn children, exposing infants and concealing of births and make abortion a crime for both the abortionist as well as the mother. While the Indian Penal Code does not define the word ‘miscarriage’ judicial pronouncements have defined it to mean abortion and the expulsion of the embryo or foetus i.e. the immature product of conception. Infanticide and foeticide are therefore also offences under the code. Abortion under the code is permitted only where it is performed in good faith to save the life of the woman.
672 Punishment under the Indian Penal Code for causing a miscarriage differs depending on the situation. Where a person (including the woman herself) voluntarily causes the miscarriage, the punishment is imprisonment for a term extending to three years. If the woman is ‘quick’ with child i.e. the perception of movement of the foetus by the mother, the imprisonment may extend to seven years. Where the miscarriage is caused without the consent of the mother, the imprisonment may extend to ten years. The same punishment is prescribed if a person...
woman. In 1971, the *Medical Termination of Pregnancy Act, 1971* liberalised the law on abortion as a health measure (in case of physical or mental danger to the life or health of the woman), on humanitarian grounds (where the pregnancy has arisen out of a sex crime or in case of a lunatic woman) and on eugenic grounds (where there is a substantial risk that the child would suffer from disease or deformities).

Under this Act, an abortion may be performed where there is a risk of life or grave injury to the physical or mental health of the woman and in case of risk of the child being born with such physical or mental abnormalities as to be seriously handicapped. Pregnancy, alleged by the pregnant woman to be caused by rape or by the failure of a contraceptive device used by a married woman or her husband, is deemed to cause such mental anguish as to constitute a grave injury to the mental health of the woman. Thus, unmarried women cannot rely on the failure of the contraceptive device as justification for the abortion. The law also provides for the abortion of minor or lunatic women with the written consent of a guardian. It also provides for the consent of the pregnant woman for the abortion where she is above the age of 18 and not mentally handicapped. The performance of an abortion in accordance with provisions of the *Medical Termination of Pregnancy Act, 1971* requires the opinions of two registered medical practitioners or is to be performed at a prescribed place or between 12 to 20 weeks of pregnancy (or later in the case of risk to the woman’s life). The heavy reliance on the opinions of medical practitioners places them in a position of predominance with no mechanism for accountability, leaving the law open for abuse.

In 2002, the *Medical Termination of Pregnancy Act, 1971* was amended to replace the term ‘lunatic’ with ‘mentally ill person’ who is defined as, “a person who is in need of treatment by reason of any mental disorder other than mental retardation.” The scope of the right to consent and who is a mentally ill person was determined by the Indian Supreme Court in *Suchita Srivastava and Anr. v. Chandigarh Administration*.

In this case, a woman who was an inmate of a state-run welfare institution was allegedly raped and became pregnant as a result. The government then approached the High Court for approval of the termination of the woman’s pregnancy “keeping in mind that in addition to being mentally retarded she was also an orphan who did not have any parent or guardian to look after her or her prospective child.” The High Court gave the permission despite findings of an expert body set up by the court that the woman had expressed her willingness to have the child.

The Supreme Court, in an appeal from the High Court’s order, ascertained that the woman was suffering from mild to moderate mental retardation and examined two questions before it – (1) whether the termination of pregnancy could take place without her consent and (2) whether the termination of pregnancy was in the best interests of the victim.

intending to cause a miscarriage causes the death of the woman instead. If the act was done without the woman's consent, the punishment may extend to a life sentence as well. The fact that the person was unaware that the act may cause the death of the woman is considered irrelevant. Acts that are intended to prevent the child from being born alive or that cause it to die after birth are punishable with imprisonment that may extend to ten years. The punishment prescribed for these offences may be of either description and may be accompanied with a fine. Only in the cases of miscarriage caused voluntarily before the woman is ‘quick’ with the child and acts done to prevent the child from being born alive or that cause it to die after birth can the imposition of a fine be alternated with imprisonment.

672 See Statement of Objects and Reasons, Medical Termination of Pregnancy Act, 1971 (India)

673 MANU/SC/1580/2009
With regard to the first question, the Supreme Court noted that Indian laws including the Medical Termination of Pregnancy Act, 1971 make a clear distinction between mental illness and mental retardation. Disagreeing with the direction of the High Court to terminate the pregnancy held, “We disagree with this conclusion since the victim had clearly expressed her willingness to bear a child. Her reproductive choice should be respected in spite of other factors such as the lack of understanding of the sexual act as well as apprehensions about her capacity to carry the pregnancy to its full term and the assumption of maternal responsibilities thereafter. We have adopted this position since the applicable statute clearly contemplates that even a woman who is found to be ‘mentally retarded’ should give her consent for the termination of a pregnancy.” [emphasis added]

Discussing the intent of the Medical Termination of Pregnancy Act, 1971, the Court noted further,

“The legislative intent was to provide a qualified 'right to abortion' and the termination of pregnancy has never been recognised as a normal recourse for expecting mothers. There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21 of the Constitution of India. It is important to recognise that reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman's right to privacy, dignity and bodily integrity should be respected. This means that there should be no restriction whatsoever on the exercise of reproductive choices such as a woman's right to refuse participation in sexual activity or alternatively the insistence on use of contraceptive methods. Furthermore, women are also free to choose birth-control methods such as undergoing sterilisation procedures. Taken to their logical conclusion, reproductive rights include a woman's entitlement to carry a pregnancy to its full term, to give birth and to subsequently raise children. However, in the case of pregnant women there is also a 'compelling state interest' in protecting the life of the prospective child. Therefore, the termination of a pregnancy is only permitted when the conditions specified in the applicable statute have been fulfilled. Hence, the provisions of the MTP Act, 1971 can also be viewed as reasonable restrictions that have been placed on the exercise of reproductive choices.” [emphasis added]

With regard to the second question of whether the termination was in the best interest of the woman, the Supreme Court held that the doctrine of 'parens patriae' (invoked by the lower court to make the decision on behalf of the woman) has been evolved in common law and is applied in situations where the State must make decisions in order to protect the interests of those persons who are unable to take care of themselves. This includes for persons found to be mentally incapable of making informed decisions for themselves. In such cases two different standards may apply: the ‘Best interests’ test and the ‘Substituted judgment’ test. The latter only applies in cases where persons are mentally incompetent to take decisions which the Supreme Court held was not the case here. In looking at the best interests test then, the Supreme Court noted that the court's decision should be guided by the interests of the victim alone and not those of other stakeholders such as guardians or society in general and held that, “it is evident that the woman in question will need care and assistance which will in turn entail some costs. However, that cannot be a ground for denying the exercise of reproductive rights.”
In determining the best interests of the woman, the Supreme Court noted that at the time of the lower court’s decision the woman was already 19 weeks pregnant and relying on the US Supreme Court decision in *Roe v. Wade*, the court noted the compelling state interest in the health of the woman and the prospective child after a certain point in the gestation period. The court found that performing an abortion at such a late stage could have endangered the victims' physical health and the same could have also caused further mental anguish to the victim since she had not consented to such a procedure and was therefore not in her best interests.

The Supreme Court held that its conclusions were strengthened by norms developed in the realm of international law including United Nations *Declaration on the Rights of Mentally Retarded Persons, 1971* and the *Convention on the Rights of Persons with Disabilities* which the court noted India had ratified on October 1, 2007 and the contents of the same are binding on the Indian legal system.

The Supreme Court also noted that the case presented an opportunity to confront some social stereotypes and prejudices that operate to the detriment of mentally retarded persons including the fact that such persons can live in normal social conditions and do not need institutionalisation; that in a family setting the woman may also have received training to avoid unwelcome sexual acts which was not the case having lived all her life in an institutional setting; that such persons are capable of being good parents.

The Supreme Court commented in strong terms on the eugenics theory that has been disproved. It stated that, “*the said 'Eugenics theory' has been used in the past to perform forcible sterilisations and abortions on mentally retarded persons...We firmly believe that such measures are anti-democratic and violative of the guarantee of 'equal protection before the law' as laid down in Article 14 of our Constitution.*” [emphasis added]

The court also directed, in relation to concerns about the woman’s capacity to cope with the pregnancy and childbirth that the best medical facilities be made available so as to ensure proper care and supervision during the period of pregnancy as well as for post-natal care.

In *Nepal*, the *Country Code* underwent significant reform through the Eleventh Amendment in 2002, which is of great relevance to sexual health rights of women and children in particular. In relation to abortion, the reformed law grants the right to undergo abortion with the advice of a medical practitioner at any time, in cases where the pregnancy poses danger to the life of the pregnant woman or to her physical or mental health or it leads to the birth of a disabled child.

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674 Since there is an apprehension that the woman in question may find it difficult to cope with maternal responsibilities, the Chairperson of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities (constituted under the similarly named 1999 Act) has stated in an affidavit that the said Trust is prepared to look after the interests of the woman in question which will include assistance with childcare.

675 The authors did not have access to the original text or an English translation of the Country Code (Eleventh Amendment) Act. This overview is based entirely on a note prepared by the Forum for Women, Law & Development and available at its website: [http://www.fwld.org.np/11amend.html](http://www.fwld.org.np/11amend.html) and an unpublished study and analysis on sexuality and rights undertaken by the FWLD, which was made available to the authors. [See also Abortion section English version - http://www.hsph.harvard.edu/population/abortion/NEPAL.abo.htm]
Further, any pregnant woman may voluntarily obtain an abortion up to 12 weeks of pregnancy and abortion is available up to 18 weeks in cases of rape or incest. Prior to the changes, abortion was not allowed even in cases of rape and incest. The amendment also prohibits amniocentesis tests undertaken to perform an abortion on the basis of sex and prescribes imprisonment for persons conducting such tests or performing abortions based on such tests. Prior law criminalized causing the termination of pregnancy.\textsuperscript{676}

In 2004 a case was filed in the Supreme Court of Nepal, which sought to curb the right of women to seek safe abortion on the ground that the law did not require a husband’s consent prior to aborting the foetus. However, the Supreme Court dismissed the case, reasoning that if spousal consent were required for exercising the right to abort it would negate that right.\textsuperscript{677}

6.2 Contraception

Access to contraception in the research countries is predicated mostly on their family planning/welfare programmes and provision of health services. [See for example Bangladesh Population Policy.] In some of the countries issues related to contraceptive access have been dealt with by law and the courts.

In 1992, Indonesia passed the Law Concerning Population Development and the Development of Happy and Prosperous Families.\textsuperscript{678} The Law was enacted for the comprehensive development of the Indonesian people and Indonesian society as a whole and deals with all dimensions of population including size, quality, mobility, harmony with the environment, etc. The Law details the rights of a person as an individual, as a member of society, as a citizen and as part of a collectivity. Article 7 states that, “every person as a member of a family has the right to build a happy and prosperous family by having an ideal number of children, or by adopting children, or by providing education to children on living as a family as well as other rights in order to create a happy and prosperous family.”

This Law deals with contraceptive access only in the context of a married couple. Moreover, the Law defines family as “the smallest unit of society consisting of husband and wife, or husband and wife and their children, or a father and his children, or a mother and her children” and family planning as “the efforts to increase society's concern and participation through delayed marriage, birth control, fostering family resilience, improving family welfare to create small, happy and prosperous families.” The Law clearly articulates the intent of the government to control the size of the population.

Article 16 of the Law details the provisions in relation to family planning and directs the government to issue policies to that are connected to determination of the ideal number of children, the spacing of childbirth, the ideal marriage age, and the ideal age for delivery.


\textsuperscript{677} Achyut Prasad Kharel v Government of Nepal. The authors did not have access to the original text or an English translation of this judgment and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.

\textsuperscript{678} Number 10 of 1992, Law of the Republic of Indonesia. However the Indonesian Penal Code appears to also criminalise the provision of certain contraceptive treatments. Thus under Article 299, a person who with deliberate intent gives treatment to a woman giving her to understand or raising the expectation that thereby the pregnancy may be curbed is punishable. The punishment is higher for professionals (physicians, nurses, etc.) and conviction may result in the person being released from the profession.
Birth control is to be carried out by methods which are efficient and effective and which can be accepted by husband and wife couples in accordance with their choice with regards to health, ethics, and the religion adhered to by the persons concerned. The Law provides that every husband and wife couple may make its choice in planning and regulate the number of children and the spacing of childbirth based on awareness and responsibility to the present generation and to future generations. Article 19 provides that “the husband and wife have equal rights and responsibilities as well as equal status in determining the method of birth control.”

Birth control methods that have a health risk are to be carried out under the guidance of health personnel and display and demonstration of contraceptive devices, drugs and methods are to be performed by competent personnel, in the proper place and in the proper way. The government is required to regulate supply and distribution, ensure equitable distribution of services, conduct research and development and provide information and awareness.

The Law Concerning Health, 2009 in Indonesia defines reproductive health as “a wholly healthy condition whether physically, mentally and socially, not merely free from diseases or disabilities relating to the reproductive system, functions and processes in men and women.”679 The law further specifies that this includes:

1. “prior to pregnancy, during pregnancy, child birth and post-natal;
2. pregnancy management, contraceptive devices and sexual health; and
3. health of the reproductive system.”

The law also recognizes various aspects of the right to reproductive health. Thus, every individual has the right to “a healthy and safe reproductive life and sexual life free from coercion and/or violence”; however this is only with a lawful partner.681 The right to determine his/her reproductive life and to be free from discrimination, coercion and/or violence is subject to respecting noble values and religious norms.682 Religious norms must also not be contradicted while enjoying the right to “personally determine when and how often to reproduce in a medically healthy manner and not contradictory to religious norms.”683 The right also includes obtaining information, education and counselling regarding proper and accountable reproductive health.684

The law underscores again the importance of religious values in the manner in which reproductive health services are to be provided. Thus, reproductive health services that are promotive, curative, rehabilitative including reproduction with assistance are to be provided in a safe and healthy manner with due attention to female reproduction; however such implementation of services shall not be contradictory to religious values.685

Apart from the provisions on abortion discussed above, the Law Concerning Health also details provisions on “family planning” which is “intended to plan pregnancy for couples in

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679 Article 71, Law Concerning Health 2009 (Indonesia)
680 Article 71(2), ibid.
681 Article 72(a), ibid.
682 Article 72(b), ibid.
683 Article 72(c), ibid.
684 Article 72(d), ibid.
685 Article 74, ibid.
childbearing age to establish a healthy and intelligent future generation." The Law obligates the Government to ensure the availability of human resources, infrastructure, equipment and medicines to provide family planning services that are safe, affordable and of good quality.

The Law obliges the Government to ensure the availability of information and that reproductive health services, including family planning are safe, of good quality and affordable. However, the impact of these various provisions in Indonesian law in providing or increasing access for single persons or unmarried couples is unclear.

By contrast, in Thailand, sexual and reproductive health issues are recognized as part of the rights specific to women. Thus, the National Health Act, 2007 is specific to the rights of the woman. The Law states that, “A woman’s health in aspect of her gender and reproductive system which is of specific characteristics, complicate and influential to her total life span, shall be harmoniously and appropriately promoted and protected.” This Act details rights and duties in relation to health and provides for the establishment of a high level National Health Commission which is directed to develop a statute on health and provide inputs on health policies and programmes, among other things.

In India, contraceptive access began with the family planning programme which over time evolved first into the family ‘welfare’ programme and then to its current avatar - the Reproductive and Child Health Programme. Some Indian courts have dealt with the quality of contraceptive services provided through the government.

The Supreme Court in Achutrao Haribhau Khodwa v. State of Maharashtra dealt with a case where a cotton mop left in the abdomen of the patient during a sterilisation operation in a government hospital led to her death. The Supreme Court held that, “running a hospital is a welfare activity undertaken by the government but it is not an exclusive function or activity so as to be classified as one which could be regarded as being in exercise of its sovereign power.” It was further held that the fact that it had not been conclusively established as to which of the doctors or other staff had acted negligently was not sufficient to defeat the claim. The State was held liable to pay damages for the negligent death of the patient. It is pertinent to note that the death that originally led to the institution of this case occurred in 1963, 33 years before the Supreme Court judgment.

In State of Haryana & Ors. v. Smt. Santra, Smt. Santra had approached the Chief Medical Officer of Gurgaon for a sterilisation operation under the ‘Sterilisation Scheme’ launched by the Haryana Government. However, due to the negligence of the doctor, the operation related only to one of her fallopian tubes and was therefore not complete. Though she was assured full, complete and successful sterilisation she later gave birth to a child. The State asserted that the operation had in fact been completed successfully and carefully and there was no negligence on the part of its medical officer. It further contended that the petitioner was estopped form claiming damages for negligence or an unsuccessful operation as she had put her thumb impression on a paper stating that she agreed not to do so. The Supreme Court

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686 Article 78(1), ibid.
687 Article 78(2), ibid.
688 Article 73, ibid.
689 Section 6, National Health Act, 2007 (Thailand)
690 (1996) 2 SCC 634
691 2000 (3) Scale 417
rejected this contention outright. Holding the doctor negligent and the State liable for the
negligence of its agent, the court stated that,

“Family Planning is a National Programme. It is being implemented through the
agency of various Government Hospitals and health Centres and at some places
through the agency of Red Cross. In order that the national programme may be
successfully completed and the purpose sought may bear fruit, everybody involved
in the implementation of the Programme has to perform his duty in all earnestness
and dedication. The Government at the centre as also at the State level is aware
that India is the second most-populous country in the world and in order that it
enters into an era of prosperity, progress and complete self-dependence it is
necessary that the growth of the population is arrested. It is with this end in view
that family planning programme has been launched by the Government which has
not only endeavoured to bring about an awakening about the utility of family
planning among the masses but has also attempted to motivate people to take
recourse to family planning through any of the known devices or sterilisation
operation. The Programme is being implemented through its own agency by
adopting various measures, including the popularisation of contraceptives and
operation for sterilising the male or female. The implementation of the
Programme is thus directly in the hands of the Government officers including
Medical officers involved in the family planning programmes. The medical
Officers entrusted with the implementation of the Family Planning Programme
cannot, by their negligent acts...sabotage the scheme of national importance.”

The court also examined the claim of the petitioner that the State should bear the expenses of
the “unwanted child” and the public policy implications of this claim. The Supreme Court
noted that Indian law was silent on this point and examined the law and legal
pronouncements in several countries for guidance in this regard. Based on this examination
and the particular situation of the petitioner, the court determined that,

“...we are positively of the view that in a country where the population is
increasing by the tick of every second on the clock and the Government had taken
up the family planning as an important programme for the implementation of
which it had created mass awakening for the use of various devices including
sterilisation operation, the doctor as also the State must be held responsible in
damages if the sterilisation operation performed by him is a failure on account of
his negligence, which is directly responsible for another birth in the family,
creating additional economic burden on the person who had chosen to be
operated upon for sterilisation.”

In State of Punjab v. Shiv Ram and Ors
692, the Supreme Court was again faced with a case of
a failed sterilisation through the family planning programme. The Court examined in detail
how such operations are conducted, failure rates and failure reasons. The Court agreed with
the submissions of the Government that pregnancy occurring after sterilization may be
attributable to natural failure. It also agreed with the Government that the plaintiffs having
learnt of the unwanted pregnancy, should have sought medical opinion and opted for medical
termination of pregnancy within 20 weeks which is permissible and legal. Referring to its
decision on medical negligence, the Court held that where there was no negligence, the

692 Appeal (civil) 5128 of 2002, Supreme Court [Date of Decision: 25 August 2005]
Government could not be held liable for the failed sterilization and that where the couple did not opt for an abortion, the child was no longer unwanted. The Court however, also suggested that the Government provide a welfare fund or insurance scheme for couples like the plaintiffs, stating:

“...The fact cannot be lost sight of that while educated persons in the society belonging to the middle-class and the upper class do voluntarily opt for family planning and are careful enough to take precautions or remedial steps to guard against the consequences of failure of sterilization, the illiterate and the ignorant and those belonging to the lower economic strata of society face the real problem. To popularize family planning programmes in such sections of society, the State Government should provide some solace to them if they, on account of their illiteracy, ignorance or carelessness, are unable to avoid the consequences of a failed sterilization operation. Towards this end, the State Governments should think of devising and making provisions for a welfare fund or taking up with the insurance companies, a proposal for devising an appropriate insurance policy or an insurance scheme, which would provide coverage for such claims where a child is born to woman who has undergone a successful sterilization operation, as in the present case.”

The population control and family planning context (which has been endorsed time and again by Indian courts) of access to contraceptives in India has seen coercive elements to the governments programmes and policies at various points in time. Some Indian states have also introduced laws to limit the number of children.

In Javed and others. v. State of Haryana and others,693 the Supreme Court upheld a local government law that disqualified any person having more than two living children from holding certain posts. The judges held that the law did not violate the right to equality or life and personal liberty and sought to further the aims of the National Population policy. Nor did the judges agree that the law would have its greatest impact on women who are not in a position to refuse their husbands if they want to have a third child.

The choice of contraceptives introduced through the government programme has also been challenged in court. In All India Democratic Women Association v. Union of India694 which challenged the use of the drug ‘Quinacrine’ as a method of female sterilisation, the Supreme Court disposed of the petition based on the undertaking by the Central Government that it had already initiated steps for the banning of this drug.

Other issues related to contraceptives including quality, advertising, etc. are addressed under different Indian laws. For instance, rules under India’s Drugs and Cosmetics Act, 1940 provide that the formula for contraceptive creams and foam tablets for local use and of oral contraceptive pills must be approved as safe and efficacious by the Central Government and for quality standards for condoms.695 The Drugs and Magical Remedies (Objectional Advertisements) Act, 1954 prohibits the publication of any advertisement referring to any drugs in terms which suggest or are calculated to lead to the use of that drug for the

693 MANU/SC/0523/2003
694 AIR 1998 SC 1371
695 See Rule 125(2) and Schedule R of the Drugs and Cosmetics Rules, 1945 (India)
procurement of miscarriage in women or prevention of conception in women. These provisions are however, inapplicable to any advertisements published by the Government itself.

6.3 HIV services (including prevention, testing and treatment)

Over the past decade, all the research countries have adopted policies related to the provision of HIV services. Although these policies do not have the force of law in the research countries, they have dramatically changed access to sexual health services in these countries and are accordingly being discussed. These policies have also been put in place in pursuance of commitments adopted by the research countries under the United Nations General Assembly Special Session Declaration of Commitment on HIV/AIDS and the countries file annual reports with the UN of their progress in meeting these commitments.

For example, although Sri Lanka’s government does not have legal requirements, which mandate access to HIV services including those for prevention, testing and treatment, its National HIV/AIDS Policy professes a strong rights-based perspective in this context. Clause 3.4, which deal with HIV testing states that the government “promotes voluntary confidential testing, recognizing that mandatory testing would drive those at high risk of HIV infection beyond reach and prevent their access to public health preventive activities and other health services. Testing will be carried out according to accepted international guidelines.” Complementing this clause 3.5 provides that “[c]ounseling is recognized as an integral part of programs related to HIV/AIDS prevention, care and treatment. It is important that these services are provided by persons who are adequately trained in HIV/AIDS counseling.” Clause 3.6 relates to care & treatment issues and states that the government “accepts the rights of those living with HIV/AIDS to have access to treatment without stigma and discrimination. Persons living with HIV/AIDS requiring antiretroviral treatment and management of opportunistic infections will be provided such services by the State sector in line with national guidelines and prevailing National health policy.” The clause on prevention of mother-to-child transmission is worded thus:

“It is possible for a HIV infected mother to transmit the infection to her new born child. As such the policy is directed at preventing the occurrence of infection

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696 Section 3 of the Magical Remedies Act provides that, “Subject to the provisions of this Act, no person shall take any part in the publication of any advertisement referring to any drugs in terms which suggest or are calculated to lead to the use of that drug for- (a) the procurement of miscarriage in women or prevention of conception in women; or (b) the maintenance or improvement of the capacity of human beings for sexual pleasure; or (c) the correction of menstrual disorder in women; or (d) the diagnosis, cure, mitigation, treatment or prevention of any venereal disease or any other disease or condition which may be specified in the rules made under this Act.


700 Clause 3.7, National HIV/AIDS Policy (Sri Lanka)
among those in the reproductive age and promoting voluntary counseling & testing for HIV in women in this age group. In addition there is a need to prevent unplanned pregnancies among HIV infected women through sexual/reproductive health services and to provide antiretroviral therapy and other standard care practices for HIV infected pregnant women to prevent mother to child transmission.”

Clause 3.11 of the policy refers to “Addressing human right issues”. It states that the government recognizes that “people living with HIV/AIDS are entitled to enjoyment of their fundamental human rights and freedom without any unjustified restrictions. These include the rights of everyone to life, liberty and security of person: freedom from inhuman or degrading treatment or punishment; equality before the law, absence of discrimination; freedom from arbitrary interference with privacy or family life, freedom of movement, the right to work (rights of people living with HIV in the workplace) and to a standard of living adequate for health and well-being including housing, food and clothing; the right to highest attainable standard of physical and mental health; the right to education, the right to information which includes the right to knowledge about HIV/AIDS/STIs related issues and safer sexual practices, the right to participate in the cultural life of the community and to share in scientific advancement and its benefits.”

Access to HIV treatment and intellectual property law: Some countries have also used provisions of their intellectual property laws to increase access to treatment related to HIV. Among the research countries, Indonesia was the first to do this and in 2004, the Government of Indonesia issued a compulsory licence for the import of nevirapine and lamivudine used as part of first line treatment for HIV. The compulsory licence states that it was issued “in line with the urgent need in the effort to control HIV/AIDS epidemic in Indonesia...to provide access to Anti Retroviral Drugs that are still protected under Patent.”

In 2006 and 2007, Thailand’s Ministry of Public Health issued compulsory licences for the anti-retrovirals efavirenz and lopinavir/ritonavir. According to the compulsory licence for efavirenz,

“It is generally accepted that HIV (AIDS) epidemic is one of the most grievous public health problems. Approximately, more than one million Thai people have been afflicted with the HIV. More than five hundred thousand of this number are still alive and eventually need long term uses of HIV antiretroviral drug to maintain their productive lives. The budget allocated for health services of the people who have been infected with HIV as well as AIDS patients under the

national health security system for the fiscal year B.E. 2549 (2006) is limited to
2,796.2 million Baht for the target group of 82,000 patients.

Even now there are many effective HIV antiretroviral drugs which are capable of
extending life span of HIV infected persons and the Royal Thai Government has
launched, since 1st October B.E. 2546 (2003), a policy to promote access to HIV
antiretroviral drugs for all HIV infected persons and has also allocated budget for
this purpose, but an accessibility to some kinds of HIV antiretroviral drugs which
are effective and having low level of side-effect still be difficult in spite of an
inevitable necessity for the HIV infected persons. This due to the fact that all
those HIV antiretroviral drugs are under patent protection in accordance with the
law on patent which enable the patent holders to dominate market without
competition. The prices of those HIV antiretroviral drugs are, as a result, very
high and a hindrance for the State to acquire the drugs for distribution to all HIV
infected persons.

Efavirenz has already been proved so far to be one of highly effective and safe
HIV antiretroviral drugs with very low side-effect. It has also been placed in the
National System for Secured Accessibility to HIV Antiretroviral Drugs. This HIV
antiretroviral drug, however, is subjected to patent protection which deters the
Government Pharmaceutical Organization or other manufacturers from
manufacturing and importing this specific drug for sale in the market. The price of
Efavirenz in Thailand is twice the price of the same drug which is generic drug in
India. Budget allocated by the government is therefore sufficient to provide only
some patients with Efavirenz, while the rest has to use non-patent drugs with
higher level of side-effect than Efavirenz because of their lower prices.”

The need for compulsory licences and other measures to increase access to HIV treatment has
arisen in the context of the compliance of the research countries with the Agreement on Trade
Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organisation
(WTO). The TRIPS Agreement requires WTO member countries to grant 20 year patents or
exclusive rights on, among other things, pharmaceuticals. The Doha Declaration on TRIPS
and Public Health said signed by all WTO members highlighted the impact of the Agreement
on medicines. According to the Doha Declaration:

“We recognize the gravity of the public health problems afflicting many
developing and least developed countries, especially those resulting from
HIV/AIDS, tuberculosis, malaria and other epidemics…We stress the need for the
WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) to be part of the wider national and international action to
address these problems…We recognize that intellectual property protection is
important for the development of new medicines. We also recognize the concerns
about its effects on prices.”

The Doha Declaration accordingly recognized that “the TRIPS Agreement does not and
should not prevent Members from taking measures to protect public health…that the
Agreement can and should be interpreted and implemented in a manner supportive of WTO

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704 Declaration on The TRIPS Agreement and Public Health, World Trade Organisation, Ministerial Conference,
Fourth Session, Doha, 9 - 14 November 2001, WT/MIN(01)/DEC/W/2, 14 November 2001
Members’ right to protect public health and, in particular, to promote access to medicines for all.”

All the research countries are WTO members although Nepal and Bangladesh are classified as Least Developed Countries and do not have to comply with TRIPS in relation to medicines till 2016. While Indonesia and Thailand have issued compulsory licenses for HIV medicines as noted above, courts in Sri Lanka and India, which amended their patent laws later to comply with TRIPS, have also played a role in this area.

In 2003, the Bill on Intellectual Property proposed by the Sri Lankan government to comply with its obligations under the TRIPS Agreement was challenged before the Sri Lankan Supreme Court under Article 12(1) of the Sri Lankan Constitution i.e. “to determine whether the Bill or any provision thereof is inconsistent with the Constitution.” In Special Determination of the Supreme Court on the Bill on Intellectual Property,705 the petitioners contended that the requirement of 20 year product patents would allow foreign patent holders of any product or process, including medicinal drugs and the processes for their manufacture, to control the supply and price of such drugs in the Sri Lankan market and increase the prices of medicines. The Bill presented by the government, it was contended did not adopt any of the mitigating measures in the TRIPS Agreement to prevent such a situation and drew the attention of the court to the Doha Declaration on the adoption of such measures including compulsory licensing with regard to public health crises including those related to HIV/AIDS, tuberculosis, malaria and other epidemics.

The Supreme Court determined that the Bill without the mitigating provisions violated the provisions of Article 12(1) i.e. the guarantee of equality before the law and equal protection of the law. Rejecting the contention of the Government that fundamental rights can be restricted “in the interests of national economy or of meeting the just requirements of the general welfare of a democratic society”, the court held that the rights to equal rights and equal protection cannot be so overridden and that,

“the provisions in Article 12(1) guarantee equal rights as well as equal protection and the provision of the TRIPS Agreement cannot be applicable to developed and developing countries equally without attributing due consideration to such rights with particular reference to the mitigatory provisions in the Agreement. Producers of patented products and processes and their agents in developed nations and consumers of such products in developing countries such as Sri Lanka cannot be taken as parties that are similarly circumstanced. There is ample justification to treat them differently as they cannot be put on equal footing. If they are to be treated equally such decision should be justified by relevant criteria.”

Finding no such justification shown by the Government or any reason why mitigating provisions of the TRIPS Agreement were not included in the Bill, the Supreme Court held that the Bill was inconsistent with Article 12(1) of the Constitution. Based on the finding of the Supreme Court, the government introduced provisions related to compulsory licencing and other mitigating provisions in the law.706

706 See Section 86, Intellectual Property Act, 2003 (Sri Lanka)
India’s deadline to comply with the TRIPS Agreement came in 2005 and in amending its Patents Act, 1970 introduced several public health safeguards. This included stricter patentability standards, allowing oppositions both before and after the grant of a patent, compulsory licencing, etc. In Novartis AG v. Union of India and others\textsuperscript{707} the strict patentability standard of the amended patent law were challenged before the Madras High Court. The provision in question, Section 3(d) does not allow patents on new forms, new uses or combinations of existing substances.\textsuperscript{708} Novartis AG which was denied a patent by the Indian patent office on a new form of a cancer medicine filed the challenge. Upholding the provision in the Indian law, the Madras High Court held:

\begin{quote}
“We have borne in mind the object which the Amending Act wanted to achieve namely, to prevent evergreening; to provide easy access to the citizens of this country to life saving drugs and to discharge their Constitutional obligation of providing good health care to its citizens.”
\end{quote}

These provisions of India’s patent law have been used by patients groups and networks of people living with HIV to challenge patent applications on HIV and other medicines. In Boehringer Ingelheim v. Indian Network for People Living with HIV/AIDS (INP+) and Positive Womens Network (PWN), the Delhi Patent Office rejected the patent application on Nevirpaine Hemihydrate which is used in the treatment of pediatric AIDS.\textsuperscript{709}

\textsuperscript{707} Novartis AG and another v. Union of India and others, W.P. Nos 24759 and 24760 of 2006, High Court of Madras (Date of Judgment: 6 August 2007).

\textsuperscript{708} Section 3(d), Patent Act, 1970 (India) states: The following are not inventions within the meaning of the Act…the mere discovery of a new form of a known substance which does not result in the enhancement of the known efficacy of that substance or the mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant. Explanation.- For the purposes of this clause, salts, esters, ethers, polymorphs, metabolites, pure form, particle size, isomers, mixtures of isomers, complexes, combinations and other derivatives of known substance shall be considered to be the same substance, unless they differ significantly in properties with regard to efficacy.

\textsuperscript{709} In the matter of an application for patent having no. 2485/DEL1998, Delhi Patent Office, 11 June 2008
7. INFORMATION, EDUCATION AND EXPRESSION RELATED TO SEX AND SEXUALITY

Sexuality education and the right to health/sexual health

Rights to education, information and expression are inter-dependent, and the impact of each on sexual health must be addressed with an eye to their interrelation. Nonetheless, because education (both formal and informal) constitutes a specific right\(^{710}\), a distinct field of law, specific state institutions, and a distinct field of practice (characterized by mutual exchange between teachers and students), we address education and sexuality education in a separate section from information and expression.

A rights approach to sexuality education is derived from the rights to health, education, to information and expression, as well as the right to participate in, and benefit fully from, scientific progress, combined with fundamental guarantees to equality, dignity and the right to participate in the cultural and political life of one’s community and nation. Sexuality education, as a component of education, is understood to be essential to the full development of the human personality, in addition to being an essential means to protect oneself from sexual ill-health, whether from sexually transmitted infections, unwanted pregnancies, or sexual violence and abuse.\(^{711}\)

Many different sectors of law are essential to ensure adequate education in general and adequate sexuality education in particular. These sectors include administrative regulations regarding educational curricula, and constitutional provisions on rights to education; equality and non-discrimination law (regarding sex, gender, sexual orientation, race, religion, disability, health status and national status among other grounds). Other important laws engaged to support effective sexuality education include those protecting freedoms of speech and expression, and laws guaranteeing both teachers and students safe and non-discriminatory environments.

Sexuality education is understood to include not only accurate, age appropriate, scientifically supported information on health, sexual health and sexuality as an aspect of human conduct, but also ideas on non-discrimination and equality, tolerance, safety and respect for the rights of others, which are delivered through trained agents using age- and context-appropriate pedagogical methods. In particular, a rights-based approach to sexuality education requires the participation and contributions of young people, particularly adolescents and older teens.\(^{712}\) Sexuality education, coupled with comprehensive access to information, contributes to health through promoting individuals’ ability to have preferences for, and act on decisions that protect their health, as well as determine the number and spacing of children. Sexuality education is also essential to each person’s ability to develop themselves and their sense of self-worth, particularly in regard to any decision regarding their sexual and gender identity, and sexual behaviour as an aspect of their personhood. Sexuality education is aimed at

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\(^{710}\) Are we footnoting references to treaties or cross-referencing? Can include: CRC, CESCR articles 13 and 14 CEDAW article 10, CERD, article XX, and CRPD etc. Note that the persons covered by the CRC include children, adolescents and young people up till age 18. Young people (in WHO terms, see-- http://www.who.int/child_adolescent_health/en/) range in age from 10 to 24 make up an overlapping but separate category for policy makers.

\(^{711}\) See in particular CEDAW, CRC and CESCR ad the discussion in the international section

\(^{712}\) CRC general comments cite et al address participation of adolescents in particular.
prevention\textsuperscript{713}, as well as creating understanding of when and how to seek treatment or other forms of assistance for ill health, abuse, or other sexuality-related concerns.

As a key component of effective prevention of sexual ill health, sexuality education recognizes that a significant amount of health promotion occurs outside of health care services and health systems per se. As such, it is both less expensive than much health care, in importantly highlights self-care through support for the conditions of empowerment. Sex education, like all health education, promotes the values of well-being and autonomy.

Failures to develop and deliver accurate and comprehensive sexuality information, therefore, not only contribute to ill health, unwanted pregnancies, exposure and transmission of STI’s, and increased rates of HIV infection, but also contributes to reduced use of services and treatment for STI’s and HIV as well as reduced access to appropriate contraception and family planning services and services responding to pregnancy and complications of unsafe abortion.

Accessible and good quality sexuality education can contribute to breaking silences over sexual violence, sexual exploitation and abuse, and inspire those who suffer from sexual dysfunction to seek assistance. Furthermore, sexuality education can serve as an important tool for equality and dignity in society -- when presented in a non-discriminatory and non-judgmental manner -- it can challenge gender stereotypes and fearful or negative attitudes towards sexuality in general and towards those who engage in non-conforming, consensual sexual practices in particular.\textsuperscript{714}

Barriers in law or practice of the state to implementing comprehensive sexuality education, therefore, contribute to inequality, violence and exclusion as well as to higher incidence of otherwise preventable STIs, unwanted pregnancies, abortion and unsafe abortion in particular and other complications. Often state law or policy exclude specific topics or persons from sexuality education as part of a larger policy of sex or gender stereotyping, or imposition of particular religious or cultural beliefs about the intrinsic need of sexual activity to be legitimized by reproduction, and the specific obligation of girls or women to submit to husbands in regard to sexual decision–making, or the ‘sinfulness’ of same sex behaviour or sex outside of marriage. These exclusions run counter to evidence-based evaluations of effective sexuality education as well as conflict with basic rights protections for education. Moreover, sexuality education should not replicate gender stereotyped understandings of sexual behaviour in the name of promoting respectful behaviours, such that girls are taught that their duty is to be chaste in the face of the ‘natural’ lust of boys.

Comprehensive sexuality education may include information and ideas regarding the effective use of contraception, protection against HIV, protections against sexual violence, understanding of sexual orientation and information on the diversity of sexual practices in society. This form of education is associated with better health outcomes for girls and women, as well as sexual minority populations.\textsuperscript{715} Comprehensive sexuality education requires strong protections in the law for freedoms of expression, education and the right to

\textsuperscript{713} Education must of course be paired with access to services and resources necessary to act on the knowledge gained, which includes links to other preventive systems, as relevant, such as HPV vaccine and cervical cancer screening

\textsuperscript{714} From Westeson, European region pp. 112 passim

\textsuperscript{715} need cite from WHO study on sexual health here
education as well as non-discrimination, as it relies on the dissemination of information that may challenge religious leaders and dominant but gender stereotyped beliefs in society around the roles of women and men, for example. For example, educational curricula that limit sexual education to a content promoting abstinence before marriage fail to provide the information that sexually active youth need, even if they delay sexual activity: evidence shows that while some delay may occur, when sexual activity follows that delay, condoms are used less often.\textsuperscript{716} Under international human rights standards it is clear that states must refrain from arbitrarily censoring scientifically accurate sexual health information or dispensing misinformation in sexuality education programs.\textsuperscript{717}

Sexuality education can be conveyed by both state and non-state actors, in both formal and non-formal, educational settings. While the state has the primary duty to ensure sexuality education in its system of primary and secondary education, to reach the widest range of people, voluntary organizations must be involved and protected from intimidation and censorship. For example, reaching people in sex work, or men who have sex with men with sexuality education is often done most effectively by voluntary organizations rather than the state, which is associated with police abuse and exclusionary policies. National laws, such as those for expression, association and non-discrimination, as well as laws ensuring the ability to participate in the benefits of scientific progress and to participate in cultural and political life are essential to protecting voluntary groups who provide important sexuality education to marginalized groups.

Sexuality education must be flexible in its formats, so that it reaches both school going and non-school going youth (especially street youth) and must be available to adults throughout their lives. Women in particular often face de facto bars to accessing comprehensive sexuality education; and special steps, supported by law, must often be taken by the state to reach young married adolescents (who often leave school early). Sexuality education must also be understood to be required throughout life, as older people should not be excluded from the benefits of new information and understanding of sexuality in their lives.

It is important to distinguish rights-based, necessary and affirmative measures that must be taken to reach targeted populations and the rights-denying and less effective tactics that assume categories of information are relevant to specific populations and deny comprehensive sexuality education. For example, assuming that only ‘gay-identified’ populations need information about anal sex (in the face of evidence that heterosexual youth are engaging in anal sex to avoid pregnancy) and condom use is to fail to provide effective sexual health education. To assume laws on education for women are all that is needed to ensure population-wide use of contraception and the rights of women (as if men in heterosexual relationships do not need to understand family planning) or to assume that MSM only need education on condom use with men (as if they did not also have sex with women) is to provide insufficient sexuality education, and thus to fail to protect the health and rights of the general populations as well as the rights of women and girls.

Children have specific rights to age-appropriate and comprehensive sexuality education, which is made accessible to them regardless of gender, disability or national status. International rights standards elaborate the importance of sexuality education, especially for adolescents, to support them in determining their lives and identities, and to live free of abuse.

\textsuperscript{716} Santelli, and SAM et al—these are all US studies—does WHO have global?
\textsuperscript{717} CRC, general comments 3 and 4, ADD
and preventable illness and unwanted pregnancy. Sexuality education, understood to be an obligation of the state which is often in constructive tension with the rights of parents and families. While families have the right to raise their children consistent with their religious and cultural beliefs, the rights of the child to objective and scientifically supported information (commensurate with their evolving capacity) is coupled with the duty of the state to present information and education in an objective and pluralistic manner to that child. This set of rights and duties means that parents cannot bar their children from receiving such critical information.  

It is important to note that education’s impact on sexual health is not limited to sexual health education. Education in general is a vehicle for realizing other rights, and to contributing to all persons’ ability to live lives of equality, dignity and freedom. The importance of non-discriminatory access to education for all is critical to supporting the rights and sexual health of persons who might otherwise be stigmatized and excluded from formal and informal opportunities for education, such as unmarried pregnant girls and women, men or women failing to conform to gender norms or persons in sex work, etc. Laws that mandate or permit discrimination against students or teachers on the grounds of sexual orientation, gender expression or marital status, therefore are violations of the right to education but also contribute to the stigmatization of persons excluded on these grounds, and thus ultimately erect barriers to their health.

As noted, the rights to education, information and expression are inter-dependent. This section, however, focuses on information and expression, in order to identify their particular implications for sexual health.

In international human rights, information and expression are understood to have a dynamic relationship with each other. Freedom of expression implies a corresponding right: the freedom to hear the ideas and opinions that are expressed. Information is rendered meaningless if it cannot be expressed to others, whether through scholarly, scientific, popular, medical, political, or artistic channels. Rights to expression imply the right of everyone to hear and know of the opinions of others, and to access the information on which those opinions are based.

716 See ECRC, GC 3 and 4 and ECHR Danish sex ed case (See, Europe region, Westeson). Parents can of course, provide their children with their vision of morality or skepticism in receiving this information.

719 See General Comments 11 and 13 of the ICESCR, G C 13 stresses that “education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence”. According to the Committee, “education in all its forms and at all levels shall exhibit the following interrelated and essential features: a) availability; b) accessibility; c) acceptability; and d) adaptability”.

720 UDHR article 26

The exchange of information through free expression is the basis of democratic and pluralistic societies. Rights to information and expression are essential to equality, participation, freedom of conscience and autonomy. A rights-based approach to expression, however, must consider permissible state-based constraints on rights, found within the core human rights treaties and declarations. Under international law standards, unpopular, offensive, dissident sexual speech, and even speech deemed ‘against public morals’ under national law, may be protected.

A diverse array of laws provide the framework for permissible speech, publication, performance, research, and other forms of expression, on the one hand, and permissible limitations on the rights of information and expression, on the other hand. These laws include criminal codes, intellectual property law, and administrative/regulatory laws, for example. In many nations, legal limitations have been placed on material featuring sexuality as the subject matter. Often (but not always) using criminal law, limitations utilize terms such as ‘obscene’, “indecent’, “offensive”, pornographic” "prurient" or "against public morals" to indicate the material that cannot be published, distributed, purchased, or viewed/read, as the case may be.

Often these terms, and the definitions provided for them, are problematic. First, they fail to give notice about what they cover: it is not possible in advance to infer what type of sexual content is prohibited or limited, without extensive research into prosecutions and convictions in that country and legal system. Second, these terms are highly variable and unstable: terms have undergone changes in meaning, as law evolves in a single nation, and they also vary considerably in meaning from one national legal system to another. Caution is thus advised against unwarranted assumptions that the nature of the prohibited texts or images can be easily known from the legal term employed. Historically, the same term (“obscenity”) has been applied to scientific and medical research; health and self-help instruction aimed at consumers; artistic expression, including novels, paintings, and performances; erotic instructional material; recreational and popular entertainment, including songs and humor; political satire; and expression of unconventional political speech about sexual behavior or arrangements in society. Terms such as ‘obscenity’ or ‘pornography’ have decidedly negative connotations. In some political contexts, the label ‘obscenity’ affixed to sexual health texts or images makes it difficult for advocates to question the designation or defend the material in question, for fear of being labeled deviant or immoral. Indeed, historical struggles over what can be said and shown about sexuality are, at their core, contests over social and political questions. Tellingly, ‘obscenity’ was the legal term used to penalize family planning information in the late 19th and early 20th centuries in a number of countries (check countries).

Information and expression important to sexual health spans genres, fields, of knowledge, and media. It includes medical, social, and scientific research (information about sexual dysfunction, new methods of family planning, or surveys of sexual practices within a population); legal information (about rights to access sexual health services, non-discriminatory treatment, and legal avenues for seeking redress\(^\text{722}\); and ideas and opinions, demonstrating diverse perspectives on sexuality, including those of minority persons.


\(^{722}\) Cite to Irish Well Woman, ECHR
opinions, and practices. Expression and information also include social and political analysis of sexual arrangements and norms in society, and creative and artistic expression that describes human experience, including works that allude to or depict behavior or speech deemed sexual. Expression and information may be conveyed via texts, images, and speech, as well as personal expression through dress, deportment and demeanor. Methods of communication may be verbal or non-verbal, and involve many types of media—print, film and video, electronic, internet, performance, and many domains—newspapers, songs, books, scholarly papers, movies, television, internet sites, and the radio.\(^{723}\)

Limitations on the rights of information and expression regarding sexual health can be life-threatening. Broad censorship of factual information about family planning for women and men, legal access to abortion to save the health or life of the woman, or HIV/AIDS prevention denies individuals the ability to protect their health and lives. In addition, restrictions on information reinforce discrimination, gender stereotypes and inequality in society (for example, when information and expression are denied to unmarried adolescent girls, married women lacking husbands’ permission, or those in same-sex sexual relationships). Restrictions or censorship of research about ‘difficult’ or disfavored topics or groups (for example, non-reproductive or non-marital sexual practices; or groups espousing controversial ideas about sexuality) can interfere with scientific exploration and discovery, resulting in increased levels of sexually transmitted infections, unwanted pregnancies, unsafe abortion and other preventable burdens of disease and ill-health.\(^{724}\) Moreover, denials of other forms of expression, such as restrictions on association, political speech, publication, protests or rallies, can result in indirect but powerful health effects. Such restrictions curtail the ability of persons and groups (women protesting sexual abuse in health clinics, men who have sex with men needing safe sex information, or transgender persons and sex workers seeking redress for police abuse) to present grievances, make rights claims, and influence law and public policy that effectively address their needs regarding sexual health and rights.

The application of human rights principles to material with sexual content has a limited history, because affirmative rights to sexual expression is relatively recent as a topic for human rights standards elaboration.\(^{725}\) Under international human rights law, states are given limited powers to restrict the fundamental right of expression: restrictions are permitted only as determined by law, and as necessary to protect national security, public safety, public morals, public order/ordre public, public health, or the fundamental rights and freedoms of others.\(^{726}\)

The Siracusa Principles (1984) provide a roadmap for evaluating when and whether the permissible grounds for limiting rights (as listed above) have been met. In the short section on ‘public morality’, the Principles note that “[s]ince public morality varies over time and from one culture to another, a state which invokes public morality as a ground for restricting human rights, while enjoying a certain margin of discretion, shall demonstrate that the limitation in question is essential to the maintenance of respect for fundamental values of the

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\(^{723}\) Another rapidly expanding area of legal and rights analysis on information and expression focuses on the rules governing cyberspace and internet communication.

\(^{724}\) Barriers to access to information about medical research, including the development of pharmaceuticals, are a key component of sexual health rights. However, while this report acknowledges that legal regulatory regimes, such as TRIPS, the fundamental health rights component of, this report does not directly address them.

\(^{725}\) UN Special Rapporteur on the Right to Health >>>?WHO Publications

\(^{726}\) UDHR, <<<>, ICCPR <<<>; ICESCR;
community.” In each case, the Siracusa Principles affirm a rights-oriented test of proportionality (including concern for the abusive nature of the criminal law as a mode of regulating speech) and non-discrimination.

The lack of an extensive doctrine on sexual speech and rights to sexual expression in international human rights law presents an important opportunity for developing a coherent, health and rights approach, as stringent national criminal laws often have direct effects on the sexual health and overall rights of individuals, as well as long-term chilling effects on the provision of effective services and information necessary to promote sexual health. Sexual health information and expression is vital to all persons and groups (not just marginalized populations) in attaining the highest standard of health, well-being, and personal development.

Material with sexual content is sometimes prohibited on grounds that it is harmful to the character, dignity or morals of women. Such laws regarding women constitute a form of gender stereotyping, which draws on assumptions that women are keepers of chastity or should remain untouched by sexual information; thus, women are ‘harmed’ simply by viewing such material or being viewed as sexual actors. Other arguments for limiting material with a sexual content assert that it may lead to violence against women [See, e.g., CEDAW general recommendation 19 at International section]. Gender inequality in general and violence against women in particular are complex social problems, influenced by discriminatory norms, beliefs, and practices in law and society. Depictions of women (sexual and non-sexual) may be stereotyped or convey ideas of women’s inferiority. While women’s rights bodies express concern that gender-stereotyped images may contribute to discrimination and thus seek measures to discourage their ubiquity and promote alternative and more diverse images, they do not endorse the criminalization and censorship of these materials.

The regulation of how and when persons under 18 can access material with sexual content, whether in print, internet or other media, is a specific domain of censorship. While some international standards (see American Convention on the Rights of Man, e.g.) permit prior restraint in the service of protecting minors, other rights-based standards recommend that adolescents in particular require access to information and education about sexuality, in order to protect their sexual health as well permit them to share in the benefits of scientific progress and participate in their communities and culture.

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727 The principles also state that “[t]he margin of discretion left to states does not apply to the rule of non-discrimination as defined in the Covenant.” which means that the state is scrutinized closely for regulations that impact the rights of marginalized groups or ideologically dissident views differentially. “Without discrimination, the law must protect the freedom to express minority views, including those potentially offensive to a majority. Protection does not ebb or retract its ambit where expression ceases to utter what is approved, or inoffensive, or indifferent. To be meaningful, it must safeguard and sentinel those views that offend, shock, or disturb the State, or any sector of the population. “ Report of the Special Rapporteur, Mr. Abid Hussain, pursuant to Commission on Human Rights resolution 1993/45,” E/CN.4/1995/32, December 14, 1994 (Referencing jurisprudence of the European Court of Human Rights). THIS IS SO IMPORTANT. MAYBE SHORT BIT CAN BE IN TEXT.


729 Insert ref re article.
health is also important to the development and expression of adolescents’ full personality [without discrimination [see CRC, general comments 3 and 4]. Reasonable time, manner and place restrictions may be allowed to inhibit accidental viewing of age-inappropriate material with sexual content by minors, but assumptions of hypothetical harm of incitement to sexual activity are disallowed. (See, Westeson, EUROPE regional report)

Many legal regimes criminalize the production and distribution materials deemed to be “obscene”, but do not prohibit the mere possession of such material, regimes which in addition criminalize possession are recognized as invading private life to a disproportionate extent, unjustifiable under basic protections of privacy.

It should be noted that the category of material called ‘child pornography’ is handled differently under many legal regimes. Photographs, videos, or other depictions of sexual behavior or sexualized poses of, actual minors are not permitted, and many states have adopted criminal statutes toward this end. The freedom from sexual abuse or exploitation of persons less than 18 years of age is of paramount importance and obligation of the state. A rights-based approach to child pornography focuses on coercion of, and harm to, actual children, regardless of the sex and gender of the minor. Many current criminal law regimes, aiming at discouraging any market for child pornography and in light of the alleged relationship between such a market and incentives for actual abuse of a minor, criminalize possession of such images, as well as their production and distribution. Criminalization of possession is an emerging topic in international criminal law, although the rights standards are also evolving, and many international agreements may not pass national constitutional or international rights review. As an element of contemporary rights evolution, however, some regions have exempted from penalization material with a sexual content made by adolescents by and for their own private use.

The Constitutions of the research countries recognize the right to information and/or freedom of speech and expression to varying degrees. Typically these rights are not absolute and are restricted by considerations of morality, public order, etc. Thus, Article 19(1)(a) of the Indian Constitution guarantees the freedom of speech and expression. This is limited by Article 19(2), which allows the state to impose reasonable restrictions through legislation in order to protect, inter alia, “public order, decency or morality….” Similarly, Sri Lanka’s Constitution guarantees every citizen “the freedom of speech and expression including publication.” Interestingly, it restricts this freedom “in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence” but not for reasons such as public order and morality etc. as mentioned in the Indian counterpart.

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730 See, Europe regional section, as well as USCAN, e.g.
731 CRC, OP on the Convention on the Sale of Children, which is contributing to the development of specific attention in the law on ‘child pornography’, albeit one with great variability. See: Innocenti Center guidelines on applying the OP also.
733 CRC OP above, Preamble and article 3 of the OP
734 Cite to Westesson, Europe region (and ECHR amicus brief?)
735 Article 19, Constitution of India, 1950
736 Article 14, Constitution of Sri Lanka, 1978
737 Article 15, ibid.
Nepal’s *Interim Constitution* limits the freedom of “opinion and expression” through restrictions, which are a combination of those found in the Indian and Sri Lankan text. Importantly, Nepal’s apex law gives every citizen the right to “demand or obtain information on any matter of concern to himself or herself or to the public” subject to confidentiality laws.

In Thailand, the *Constitution* recognizes various facets of the right to information including the right to enjoy the liberty of communication, the liberty to express opinions, speech, writing, printing, publication and expressions of newspapers and mass media. Any restrictions must be made by virtue of a law typically on grounds of security of the state, maintaining public order or good morals. The liberty to express opinions can further be restricted to protect the rights, liberties, dignity, reputation, family or privacy rights of another person or for preventing or halting the deterioration of the mind or health of the public. The right of every person to receive comprehensive and quality education from the State, free of charge is also recognized.

The freedom of thought and conscience is guaranteed by the *Bangladeshi Constitution* though the right of every citizen to freedom of speech and expression and freedom of press is subject to reasonable restrictions imposed by law in the interests of security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence. Providing education is a fundamental principle of state policy.

Under the *Indonesian Constitution*, while the right of every person to communicate and obtain information for his/her development or the development of the social environment and, “shall have the right to seek, obtain, possess, store, process and convey information by employing all available types of channels,” the freedom of thought expressed verbally or in writing and similar rights are to be determined by law. Every citizen also has the right to education; the obligation on the government is to implement a national education that aims at enhancing religious and pious feeling as well as moral excellence.

### 7.1 (De)criminalization of obscenity/indecency

The laws of all the research countries continue to criminalise obscenity.

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739 Article 27, ibid.  
740 Section 36, Constitution of Thailand, 2007  
741 Section 45, ibid.  
742 Section 45, ibid.  
743 Section 46, ibid.  
744 Section 49, ibid.  
745 Article 39, Constitution of Bangladesh, 1972  
746 Article 17, ibid.  
747 Article 28F, Constitution of Indonesia, 1945  
748 Article 28, ibid.  
749 Article 31, ibid. See also Law on National Education System and Law on Child Protection both of which recognise the right to education of children and young persons. However these laws do not provide any specific and their specific provisions on education being related to religious and pious lives and morals likely hamper the provision of sexuality education or other information related to sex and sexuality being imparted to children and young persons through the government education system.
Obscenity legislation in **Sri Lanka** is found in its *Penal Code*, the *Obscene Publications Ordinance, 1927* and the *Children & Young Persons (Harmful Publications) Act, 1956*. The *Penal Code* punishes the sale and other activity related to obscene books and other printed material.\(^{750}\) Possession of such material for the purpose of sale and other related activities is also punishable\(^{751}\) as is the public utterance of an obscene song or words.\(^{752}\) More specifically, the law punishes child pornography with significantly heavier jail terms than other forms of obscenity.\(^{753}\) For the purposes of this clause a child is defined to be any person under the age of 18 years of age. The punishment for obscene publications related to children is considerably higher than that in the general provisions (2 to 10 years). Obscenity is not defined in the Sri Lankan *Penal Code*. Neither is it defined in the *Obscene Publications Ordinance, 1927*. The ordinance prohibits the very same things as the general provisions of the *Penal Code*. However, the punishments prescribed are greater (maximum 6 months in jail as against 3 months).

The *Children & Young Persons (Harmful Publications) Act, 1956* applies to every book, magazine or other publication which is likely to fall into the hands of any child or young person and which consists of pictorial stories, with or without written matter, that portrays the commission of a crime, or any act of violence or cruelty, or an incident of a "repulsive or horrible nature", which could corrupt a child or young person. Any person who prints, publishes, sells or lets on hire any such publication possesses any such publication for selling it or letting it on hire, shall be guilty of an offence and be liable to a fine and/or imprisonment up to six months. The importation of any such publication is also prohibited. Under this law a "child" is defined to be under 14 years of age and a "young person" is one who is between 14 and 16 years of age.

The laws that regulate obscenity in **Nepal** are based on broad grounds for limiting publication and access to information, impinging on information related to sexuality and sexual health. These broad grounds include public morality and decency and the understanding of obscenity is itself left open to interpretation, For instance, the *Electronic Transaction Act, 2006* prohibits the publication or exhibition in the electronic media of any material that is against public morals or decency\(^{754}\); the *National Broadcasting Act, 1992* stipulates that advertisements cannot contain obscene materials\(^{755}\) and the *Press and Publication Act, 1991*\(^{756}\) prohibits publication of any material that offends the good behavior, morality and social dignity of general people.

**India** has a gamut of laws that relate in one way or another to obscenity. As noted above, restrictions on freedom of speech and expression on grounds of morality are provided for in the *Indian Constitution*. The general criminal law is contained in the *Indian Penal Code*.

\(^{750}\) Section 285, *Penal Code, 1883* (Sri Lanka)
\(^{751}\) Section 286, ibid.
\(^{752}\) Section 287, ibid.
\(^{753}\) Section 286A, ibid.
\(^{754}\) Section 47, *Electronic Transaction Act, 2006*. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
\(^{755}\) Section 15, *National Broadcasting Act, 1992*. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
\(^{756}\) Section 14, *Press & Publication Act, 1991*. The authors did not have access to the original text or an English translation of this law and relied on an unpublished study and analysis on sexuality and rights undertaken by the Forum for Women, Law & Development, which was made available to the authors.
Sections 292, 292A, 293 and 294 of the *Indian Penal Code* penalize obscenity. Section 292 prohibits, inter alia, the sale, hire, distribution, exhibition, possession, advertisement, import or export of obscene books, pictorial representations or figures. Such items are deemed to be obscene if they are “lascivious or appeal to the prurient interest”. Exceptions to this are items which are demonstrated to be for the public good since they are “in the interests of science, literature, art or learning…”, or used “bona fide for religious purposes” or any representation on or in any ancient monument or temple, or on any vehicle used for the conveyance of idols or used for any religious purpose. Section 292A contains a similar prohibition for materials that are “grossly indecent or scurrilous”. The term “scurrilous” is explained to mean anything which “is likely to be injurious to morality.” Section 293 has a similar prohibition of materials made available to anyone below 20 years of age and enhances imprisonment from two to three years (and from five to seven years for repeated offences). Section 294 prohibits doing an obscene act or uttering an obscene song or words in a public place, to the annoyance of others.

There have been several judgments of Indian courts in relation to obscenity but only a few which are presently relevant. In an earlier case, *BK Adarsh v. Union of India* the Andhra Pradesh High Court considered a film titled “Sex Education”, which the petitioners claimed fell foul of obscenity provisions in the *Indian Penal Code* and the *Cinematograph Act*. While drawing its conclusion the court elucidated on the content of what would amount to obscene material. It stated:

> “Ideas having redeeming social importance are allowed to be conveyed; yet obscene, lewd or lascivious are no essential part of any expression of ideas and have little social value as a step to truth or progress or order in society. The words obscene, lewd and lasciviousness signify that form of immorality which has a relation to sexual impurity and has a tendency to excite lustful thoughts. Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest. The portrayal of sex either in the art, literature of scientific works or through motion pictures is not itself sufficient reason to deny material the protection of freedom of expression assured under Article 19(1)(a).”

It went on to add that:

> “...the test of inculcating depravity and corrupt thoughts of those whose minds are open to such immoral influences and into whose hands the publication may fall needs to be modified in considering the freedom of expression guaranteed under Article 19(1)(a). Therefore, each case has to be considered and the test to be laid down must obviously be of a general character but it must admit of just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinguishing between that which is obscene and that which is not. None has so far attempted a definition of ‘obscenity’ because the meaning can be laid bare without attempting a definition by describing what must be

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757 Section 292, Indian Penal Code, 1860
758 Section 292A, ibid.
759 Section 293, ibid.
760 Section 294, ibid.
761 AIR 1990 AP 100
762 Ibid.
looked for. It may however be said at once that sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more.”

In the present case the film depicted trafficking of girls, venereal disease, HIV/AIDS, cancer of reproductive and sexual organs and pregnancy all of which the court held were valid and could not be considered obscene. However, in relation to different sexual postures the court found that deletion of these scenes was valid as they could create “lasciviousness or lustful thoughts” particularly in adolescents.

In a more recent case, Ajay Goswami v. Union of India the Supreme Court of India considered a case where the petitioner invoked the Indecent Representation of Women (Prohibition) Act and the Indian Penal Code and sought the imposition of fetters on newspapers in India which printed material that was unsuitable for the reading by minors. The court found that if such material was felt to be obscene the aggrieved person already had several remedies to pursue under the gamut of laws addressing obscenity. Further fetters in the forms of guidelines were unnecessary.

In relation to the argument of the petitioner that minors would have access to inappropriate material, the court held,

“We are able to see that respondent Nos. 3 & 4 [Ed - the newspapers] are conscious of their responsibility towards children but at the same time it would be inappropriate to deprive the adult population of the entertainment which is well within the acceptable levels of decency on the ground that it may not be appropriate for the children. An imposition of a blanket ban on the publication of certain photographs and news items etc. will lead to a situation where the newspaper will be publishing material which caters only to children and adolescents and the adults will be deprived of reading their share of their entertainment which can be permissible under the normal norms of decency in any society.”

Dismissing the petition, the court reiterated certain principles that have been followed by Indian courts in a series of judgments to deem a material as obscene: that an ordinary person (and not a hypersensitive one) applying contemporary community standards finds the material taken as a whole to be of prurient interest, that the work depicts sexual conduct specifically in a patently offensive manner and whether the material taken as a whole lacks serious literary, artistic, political or scientific value.

In Maqbool Fida Hussein v. Raj Kumar Pandey the Delhi High Court deliberated on whether a painting which depicted India as a nude woman fell within the obscenity prohibition in Indian law. For present purposes it is pertinent to note certain observations of the bench, which reflect a more progressive, balanced view between the freedom of speech and expression and obscenity standards. The court observed that:

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763 Ibid.
764 Ibid.
765 2007 (1) SCC 143
766 2008 CriLJ 4107
“...any interpretation of 'obscenity' in the context of criminal offences must be in consonance with the constitutional guarantee of freedom of expression which freedom is not confined to the expression of ideas that are conventional or shared by the majority. Rather, it is most often ideas which question or challenge prevailing standards observed by the majority that face the greatest threat and require the greatest protection ...”

“Obscenity” as a legal term, has clearly been deliberately left undefined by lawmakers in order that it be left open to interpretation in relation to the contexts and the times in which it requires to be understood. From the judgments discussed above, it is evident that courts have done so in evolving principles that limit the application of obscenity laws and continuously evolve the understanding of the notion of obscenity. But for the aforementioned case of BK Adarsh (which was notably decided 20 years ago) the authors have not come across cases where information related to sexual health per se has been contested as obscene before the courts. In the era of HIV and AIDS, it would seem fair to expect that sexual health information would pass the scrutiny of obscenity standards in law. However, in India for instance, this would be difficult to predict given the repeated outcries of certain sections of the public against the government introducing sex education in the schooling system there.

In Bangladesh, the Penal Code contains provisions similar to those in the Indian Penal Code.

In Thailand, the Criminal Code has a broad provision on obscenity that covers documents, drawings, prints, paintings, printed matter, pictures, posters, symbols, photographs, cinematograph films, noise tapes, picture tapes or any thing which is obscene. The law punishes the gamut of persons associated with such obscene materials including those who make, produce possess, bring into the country, trade in, distribute, exhibit, help circulate it, etc.768

Indonesia’s Penal Code contains offences against decency.769 Specific provisions prescribe punishments for persons who knowingly disseminate, openly demonstrate or put up a writing, a portrait or an object “offensive to decency”; this includes producing importing conveying in transit, exporting, storing, openly or by dissemination in writing makes an unsolicited offer or indicates that such matter is procurable.770 Punishment is also prescribed where the person does not know but has “serious reasons for suspecting” that the matter is offensive to decency.771 Offences related to decency are also detailed where the matter offensive to decency is shown or given to a minor as is showing matter that relates to a means to prevent or curb pregnancy.772

7.2 Regulation/censorship of sexual content (incl. internet)

Censorship laws in the research countries mostly appear in the form of laws related to media and information technology.

767 Ibid.
768 Section 287, Criminal Code (Thailand) (Unofficial Translation)
769 Chapter XIV, Crimes Against Decency, Penal Code, 1982 (Indonesia)
770 Article 282(1), Penal Code, 1982, (Indonesia)
771 Article 282(2), ibid.
772 Article 283, ibid.
In India, the *Indecent Representation of Women (Prohibition) Act, 1986* aims to curb such representation, which means “the depiction in any manner of the figure of a woman; her form or body or any part thereof in such way as to have the effect of being indecent, or derogatory to, or denigrating women, or is likely to deprave, corrupt or injure the public morality or morals.” It prohibits publication and sale or distribution of such representation except, inter alia, material which is justified as serving public good as it is in the interest of science, literature, art, or learning, or which is used bona fide for a religious purpose, or is sculpted, painted etc. on an ancient monument, temple, or vehicle used for the conveyance of idols, or is permitted on film under the *Cinematograph Act, 1952*.

The *Information Technology Act, 2000* similarly prohibits the publication of obscene material (that which is “…lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons…” in electronic form. More specifically, this Act also punishes any person who publishes or transmits material which “contains sexually explicit act or conduct” in electronic form. In 2008, the Act was amended to include, among other things, offences related to child pornography and child sexual abuse. The law punishes any person who cultivates, entices or induces children into an online relationship for purposes of indulging in a sexually explicit act or facilitates the abuse of children online. In relation to child pornography, the law punishes not only the transmission of material depicting children in sexually explicit conduct but also whoever “collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes,” such material. An exception is carved out for publication which is proved to be justified for public good as it is in the interest of science, literature, art or learning or for bona fide heritage or religious purposes. A child is defined to be any person below the age of 18 years.

In Bangladesh, the *Certification of Films Act, 1963* provides for “the censorship of cinematograph films and for the decertification of certified films on certain grounds.” The Act establishes the Bangladesh Films Censor Board to examine and certify films for public exhibition in Bangladesh. It also includes penalties for the violation of the Act. The Act was amended in 2006 to provide enhanced penalties for its violation, which the government in news reports claimed was primarily aimed at tightening controls on obscene films. In 1985, the Bangladesh government issued instructions for film certification which provided that films that have immorality or obscenity would be unsuitable for public display. The restrictions on films are reproduced in the box below.

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773 Section 2, Indecent Representation of Women (Prohibition) Act, 1986 (India)
774 Sections 3 & 4, ibid.
775 Section 67, Information Technology Act, 2000 (India)
776 Section 67A, ibid.
777 Section 67B, ibid.
778 Section 3, The Censorship of Films Act, 1963 (Bangladesh)
779 Section 8, ibid.
I (a) Condones or extenuates acts of immorality.
(b) Over emphasizes, glamorizes or glorifies immoral life.
(c) Enlists sympathy or admiration for vicious or immoral character.
(d) Justifies achievement of a noble end through vile means.
(e) Tends to lower the sanctity of institution of marriage.
(f) Depicts actual act of sex, rape or passionate love scenes of immoral nature.
(g) Contains dialogue, songs or speeches of indecent interpretation.
(h) Exhibits the human form, actually or in shadow graphs-
(i) in a state of nudity;
(ii) indecorously or suggestively clothed;
(iii) indecorous or sensuous posture.
(j) Indecently portrays national institutions, traditions, custom or culture.

(This covers kissing, hugging and embracing which should not be allowed in films of sub-continental origin. This violates accepted canons of culture of these countries. Kissing may, however, be allowed in case of foreign films only. Hugging and embracing may be allowed in sub-continental films subject to the requirements of the story, provided that the same do not appear to be suggestive or of suggestive nature.)

N.B.- (1) Deception of attempts or indication to rape may be permissible on when it is intended to condemn it.

(2) Bikini or bathing costume scene may be permissible in case of foreign films
(3) Modern dress and suitable bathing costume in local production may be allowed in export quality films, provided these are of modest presentation
(4) In case a picture creates such an impression on the audience as to encourage vice or immorality, even it shows that the vicious to the immoral has been punished for his/her wrong.

In Indonesia, the Law regarding Film\textsuperscript{782} which defined censorship as, “...a research and evaluation of a film and film billboard to decide whether or not the film can be shown and/or exhibited to the public as a whole or after removing certain parts of scenes and sounds”, was challenged before the Indonesian Constitutional Court as violating the following Constitutional rights:

Article 28C(1) “Every person shall have the right to develop him/herself through the fulfillment of their basic needs, shall have the right to obtain education and to enjoy the benefits of science and technology, arts and culture, for the enhancement of the quality of their life and for the welfare of humankinds”

Article 28F “Every person shall have the right to communicate and to obtain information to develop him/herself and his/her social environment, and shall have the right to seek, obtain, possess, store, process and convey information by using all available kinds of channel”

In Decision Number 29/PUU-V/2007, the Constitutional Court examined various international treaties and documents including the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and concluded that although human rights are fundamental and universal, their exercise is not absolute and some are subject to restrictions by the State. The

\textsuperscript{782} Law Number 8, Year 1992
court distinguished between derogable and non-derogable rights; the former being subject to restriction such as the freedom of expression, the right to work and rights to education and culture. The court held that, “according to the mandate of the Constitution, the state may restrict the exercise of someone’s right and freedom with laws, with due observance of morality, religious values, security, public order, in a democratic society, including the freedom of information and expression.”

The court then examined the different systems of censorship i.e. Authoritarian and Libertarian and the compromise between the two – the system of liberal-social responsibility. The court rejected the argument that censorship should be replaced by film classification, stating that this cannot guarantee the protection of children.

The court did agree that the Film Law, “including the provisions on censorship and film censorship institution, is already irrelevant to the spirit of the age, so that it is urgent to establish a new film law with the provisions regarding the new film assessment system which is more in line with the spirit of democratization and respect for Human Rights.” However to prevent a legal vacuum till such time, the court held that the Law was “conditionally Constitutional” in that the Law could be maintained “insofar as its implementation is attached with a new spirit to respect democracy and Human Rights or in other words the existing a quo Film Law along with all provisions regarding the censorship included therein shall be conditionally constitutional.”

7.3 Erotic expression

As noted above, the research countries have a plethora of laws that regulate or criminalise what the courts or law enforcement agencies consider to be obscene, indecent or immoral. These laws also extend to the area of erotic expression. In some cases countries have specific laws related to films (see above) and even performances.

In India, the Dramatic Performances Act, 1876 provides the State Government power to prohibit the performance of any form of theatre in a public place if it feels that, inter alia, such a performance is “of a scandalous nature” or “likely to deprave and corrupt” persons watching it.

In Indonesia, the government has recently enacted the Anti-Pornography Law. The law defines pornography as, “drawings, sketches, illustrations, photographs, articles, voices, sound, moving pictures, animations, cartoons, conversations, body movements, or other forms of messages through various kinds of media forms of communication; and/or performances in public, which enclosed obscenity or sexual exploitation breaking morality norm of the society.” Article 10 prohibits any one from displaying themselves or other people in a performance or in front of the public that suggests nakedness, sexual exploitation, sexual intercourse or other content of pornography (which includes sexual violence, masturbation, or onanism).  However, other than these provisions, a verifiable English translation of this law was not available for the purposes of this review.

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783 Authoritarian System i.e. for a country applying this system, the existence of a film as a part of means of communication is to support the state and the government.

784 Section 3, Dramatic Performances Act, 1876 (India)

785 Although an English translation of the law is unavailable, the translation of the definition is taken from a presentation made by the Womens Commission at the VII Conference - International Association for the Study of Sexuality, Culture and Society Hanoi, Vietnam April 15-18,2009
In Thailand, places of entertainment that include performances related to erotic expression are regulated under the Act on Entertainment Places, B.E. 2509 (1966). The Act does not allow prostitution but allows “service partners” and “bath service providers.” It also distinguishes between those types of employees, who are required to wear red circular disks with their numbers, and non-sexual service staff, who are required to wear blue circular disks with their numbers. Employees of establishments regulated by the Entertainment Act are required to be at least 18 years old, and customers are required to be at least 20 years old.

In India, attempts in one of the States to shut down dance bars have resulted in an ongoing legal battle that is currently in the Supreme Court. The Government of the State of Maharashtra in 2005 amended the Bombay Police Act to criminalise dance and other performances in eating houses, permit rooms or beer bars. The constitutionality of these amendments was challenged in the Bombay High Court by a variety of petitioners including women’s groups and the bar dancers’ union. In Indian Hotel and Restaurants Association and another v. State of Maharashtra and others, these petitioners challenged the constitutional validity of the amendments to the Bombay Police Act on various grounds. The law prohibited holding of a performance of dance, of any kind or type, in any eating house, permit room or beer bar, which was challenged as ultra vires the fundamental rights to freedom of speech and expression and to carry on an occupation or profession; it also stipulated that this restriction would not apply to holding of a dance performance in a theatre, cinema hall or club, where entry is restricted to its members only, or to a three-starred or above hotel, which was challenged as ultra vires the constitutional guarantee of equality. The preamble to the amending Act stated that the law was being introduced because the government found that places which were given permits to allow dance performance for “public amusement” were “permitting performance of dances in an indecent, obscene or vulgar manner”. Further the law was justified because the government found “that such performance of dances in eating houses, permit rooms or beer bars are derogatory to the dignity of women and are likely to deprave, corrupt or injure the public morality or morals.”

On the ground of freedom and speech and expression the court dismissed the petitioner’s case saying that the purpose of the dance was not to manifest and expression but to carry on an occupation – if anything, therefore, it would be the violation of the right to carry on an occupation that should be tested. It stated,

“…dance performed by the dancer is not to express views held by the dancer or express their thoughts through the medium of dancing. What the dancer does by dancing is as an occupation or profession. In other words dance performed by the bar dancer would not fall within the expression speech and expression as the dancers activities are mainly to earn their livelihood by engaging in a trade or occupation. We are, therefore, of the opinion that the prohibition and/or restriction imposed does not directly interfere with the freedom of speech and expression and consequently there is no direct abridgement of the right of speech, but it incidentally interferes with such right and consequently there is no interference with [it].”

However, it was on the issue of discrimination that the court found the legislation to have failed the constitutional test. It asked whether if the object sought to be achieved was to

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786 Writ Petition No. 2450 of 2005, [Bombay High Court]
prevent obscenity or the exploitation of women would this be met by banning all kinds of dancing for there existed dancing that was not exploitative, vulgar or obscene. It also held:

“We are, therefore, unable to understand as to why non-vulgar and non-obscene dances cannot also be permitted in the prohibited establishments as they are still entitled to obtain a performance licence. If women can work other than as dancers and that does not amount to exploitation, then how is it that it becomes exploitation, when women dance to earn their livelihood. There is no material to justify the basis for a conclusion, that there is exploitation. If the test is now applied as to whether the classification has a nexus with the object, we are clearly of the opinion that there is no nexus whatsoever with the object. Treating establishments entitled to a performance licence differently, even though they constitute two distinct classes, would be discriminatory as also arbitrary, considering the object of the Act."

The High Court accordingly struck down the legislation; this has been appealed in the Supreme Court where the matter is under consideration.
8. SEX WORK

This section examines how laws governing the exchange of sexual services for money or goods (often called “sex work” or “prostitution”) influence the sexual health of persons in sex work, as well as facilitate or prevent discrimination, abuse and violence against them. Analysis of the law’s influence on the health and rights of people in sex work requires careful attention to legal words and language: terms and their meanings have changed historically, and in addition do not have uniform meaning across nations and legal systems.

The authors of this WHO report mirror the original terminology when referring to the text or discussing the text of national and regional laws which regulate prostitution (often formally called prostitution laws, as well as debauchery or morals offense codes). Confusingly, some national laws prohibiting prostitution are called anti-trafficking laws (i.e., using the same expression as the contemporary international law term “trafficking”, which today has a different meaning entirely [see below]). When such confusion of terms in the law is present, we highlight the problem. When not directly referencing specific national or regional laws, the authors use the terms ‘sex work’ and ‘sex workers’ to describe the practices of, and the people engaged in, exchanging sexual services for money or goods, either regularly or occasionally.

States vary in how they approach prostitution or sex work in the law. Some use criminal law to prohibit various aspects of prostitution. Other states permit buying and selling of sexual services, subject to administrative regulations that govern work and labor practices generally. Others have developed regulatory schemes directed specifically at the people, conditions, and venues involved in the exchange of sexual services for money or goods, with strong penalties for violating these rules. [See discussion below and fn 7 for further elaboration on these frameworks.] Prostitution laws may be gender-specific, punishing only women for selling sex. Nevertheless, men who sell sex in legal systems with sex-specific criminal prostitution codes may face penalties under other criminal laws prohibiting indecent conduct, same-sex sexual behavior or vagrancy, for example.

Criminalization in particular marginalizes people in sex work: to avoid arrest, detention, or conviction, as well as general harassment and surveillance, people may distance themselves or hide from authorities in law, health and education, as well as from family; migrate to other towns or countries; or otherwise organize their lives outside formal social structures. Criminal convictions for prostitution have lasting social consequences, in addition to their direct effects through fines or detention. Criminal records may bar individuals from gainful employment, public housing, or other social benefits. Even in states that do not criminalize prostitution (and more so in states that do), people in sex work face significant social stigma. This stigma is variously linked to disapproval of sex for non-reproductive purposes or sex outside or before marriage, particularly for women, as well as the short-term exchange of sexual services for money outside domestic or ‘private’ locations. This stigma constrains sex workers from seeking support and operates through the condemnation of authorities in key

787 See, e.g., the Indian law criminalizing prostitution, which is called the Immoral Trafficking (Prevention) Act of 1986 (ITPA).
788 This definition of sex work is drawn from the UNAIDS Guidance Note on HIV and Sex Work (2009), citing UNAIDS Technical Update Sex Work and HIV/AIDS (2002). However, we acknowledge that sex workers might not be the best term to convey the multitude of people doing sex work or exchanging sexual services for money, as many people may not necessarily call themselves by this term, or have this ‘identity’.
institutions, enabling abuse with impunity at the hands of both state and non-state actors and generally erecting barriers to sex workers taking steps individually or through organizing to claiming their rights, including rights to health.

Research on ‘sex work’ finds that it takes protean forms. Most exchanges of sex for money, food, or resources occur in informal labor sectors, often in combination with other work, as a livelihood strategy. Sex work is found at all socio-economic levels, with corresponding differences in income, danger, and vulnerability. The selling and buying of sexual services takes place in a range of physical environments, including brothels, bars, clubs, homes, hotels, cars, streets, and outdoor settings. The context of sex work ranges from highly organized, with multiple participants, social differentiation, and inequality of power to individual workers operating independently in the informal sector. Sex work may be arranged through direct personal contact (involving the sex worker or a go-between) or via telephone, Internet, or other modes of solicitation or advertisement. The persons involved in sex work can be male, female or transgender and may range in age.

This extensive variation in the people, places and practices which constitute ‘sex work’ has tremendous implications for health and rights-based policy interventions. Unequal and vastly different vulnerabilities and capacities of people in sex work defy any single characterization. Moreover, a health and rights-based evaluation also reveals that the participation of people in sex work is essential to devising the interventions needed to respond to their needs. As the WHO review of laws engaging with prostitution reveals, however, the dominance of criminalization as the legal response to sex work impedes cooperative and participatory measures.

Under conditions of criminalization, many people in sex work face steep barriers to realizing their fundamental rights, such as rights to health, equality, privacy, association, family life, housing and education, and participation in the cultural life of the community. Under regimes in which some forms of prostitution are legal, sex workers may continue to face social and practical exclusions because of the continued weight of stigma, or because the laws differentiating what is legal and what is criminal in regard to selling sex maintain surveillance over sex workers which render even legal sex workers vulnerable to both state and non-state abuse. Persons in systems that permit some forms of sex work, however, may have better opportunities to organize, share information, and to seek public redress for abuse and discrimination.

In many cases, the state and its agents are the primary abusers of persons in sex work. Arbitrary detention, irregular deportation, forced evictions and removal of children without due process are often committed under the claimed authority of law, but without formal warrant, arrest or other due process protection. Transgender sex workers, migrant sex workers and sex workers of minority racial or ethnic groups can be particularly vulnerable to abuse by law enforcement operating under the cover of the law. They face compounded barriers in seeking redress for these abuses. They also face additional hurdles in accessing health services and information.

789 Trafficking into prostitution or sex work is discussed in Section XXX. Conditions discussed here include a range of abuses, denial of rights, and other injustices, which do not, however, meet the definition of trafficking. See discussion of trafficking, below.

790 While persons under 18 years of age may be involved in sex work, under international standards their involvement is deemed abuse or exploitation [see UN Palermo Protocol]. Thus, persons less than 18 years involved in sex work should --under no circumstances-- be treated as criminal offenders.
The use of raids, and exemptions from the need for independent review of warrants for entering premises or arrest, are common in legal regimes regarding prostitution, demonstrating high levels of state disregard for people in sex work. Extralegal abuses by state agents, including rape, assault, murder, theft, and extortion, are committed with impunity. Revolving door arrests and mass arrests coupled with a high degree of state–generated sensational publicity reveal the extent to which the spectacle of ‘punishing the prostitute’ continues to serve an interest of the state in controlling sexual behaviour through the production of the ‘prostitute’ as moral scapegoat. Often, these public arrests are tied to claims of state action on behalf of public health or national morality.

Health services, provided by both state and non-state actors, have historically not been a site of rights promotion for people in sex work. State health controls, through measures purportedly serving a public health purpose, are a frequent source of violations of sex workers’ rights: mandatory testing for STIs and HIV; routine infringements of confidentiality regarding HIV test results and other medical information (see Chapter <<>> on discrimination); and mandatory health identity cards, which must be displayed to authorities on demand, thus violating the right to privacy. Moreover, the orthodox understanding of sex workers as a discrete and ‘findable’ sub-population of women (as opposed to an often diffuse and diverse population of women, men and transgendered persons as described earlier) has led to interventions tailored in ways that miss many people in sex work. Finally, the tendency of health programs designed for people in sex work to focus exclusively or disproportionately on STI and HIV prevention is a constraint on the right to health, and violates rights to equal treatment, as people in sex work need comprehensive health services for everything from contraception, pre-and postnatal care, to dental care and overall care for physical and mental health.

The state tolerates abuses by non-state actors, such as violence by clients, abuse from neighbors and family members, or abuse as well as substandard care or humiliating treatment by health professionals. Discrimination gains justification by the imputation of ‘prostitution status’, real or imagined, reducing the ability of persons in sex work to function as full members of society. The inability of sex workers to access bank accounts, decent housing, social security schemes, or education for their children, because of discrimination and prejudice, contributes to their precarious livelihood and increases social exclusion.

The health status of many people in sex work can be quite variable: it is often relatively low, in part related to insecurity of income, food and housing for the most vulnerable persons in sex work, and because of the difficulty of accessing appropriate and respectful health services for prevention or treatment. The barriers to care and accurate information are proportionate to socially discriminatory attitudes and legal barriers. That said, people in sex work with higher socio-economic status may enjoy relatively good health status, especially if they also have access to adequate services (although they remain in jeopardy through police abuse and risk of incarceration.)

Having multiple sex partners under conditions of unsafe sex increases the risk of sexually transmitted infections, yet prevention efforts directed at sex workers for STIs and HIV are often demeaning, discriminatory, substandard, and ineffective. Effective prevention programs

791 Interventions also often presume that condom use with casual clients is always the greatest concern in sexual health, whereas some studies show that condom use is less frequent with intimate partners, posing a greater risk for STI and HIV transmission.
are often stymied by police practices under criminalization regimes: for example, while condom promotion is essential to HIV prevention efforts, in many settings possession of condoms is used as evidence of criminal activity (engaging in prostitution). In many states, ARV treatment is denied to sex workers entirely de facto, or persons deemed more ‘innocent’ are prioritized for treatment as a matter of policy.

Many people in sex work have little recourse to law to vindicate their rights, whether to custody of their children, rights to their wages, or prosecutions of perpetrators of violence. Often, police and other authorities will not register their complaints, and many sex workers come to believe that they do not enjoy the same status as other members of their community. Few legal defenses are mounted to challenge the arbitrary detentions or deportations of (alleged) sex workers or to investigate crimes committed against sex workers by law enforcement.

Much of what is termed ‘prostitution law’ (law directly prohibiting prostitution) is criminal law. However, many other laws (loitering, vagrancy, ‘riotous behaviour’ laws, zoning and housing laws, health codes, bar or cabaret licensing laws, public indecency laws, etc.) also have a direct effect on the practice of sex work. The criminal laws on prostitution vary widely: in order to analyze the specific effects of law, it is critical to identify with great specificity what particular acts are prohibited. Inquiry into law must ask: is the actual exchange of sex for money or goods a crime? Are other activities (by the sex workers themselves or others) criminalized, for example, solicitation (the public attempt to seek

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792 [Analysis of the specific problems of some specific “100% condom programs arising in the regions may fit here]

793 The literature (English language) of the last two decades about prostitution law often characterizes legal approaches to prostitution with a set of terms claiming to delineate essential categories: abolitionist; prohibitionist; regulationist, as well as using the terms to decriminalize, to legalize, and to regulate. Despite their ubiquity, these categories do not enable careful analysis. First, the categories suggest that there are clear boundaries between ‘types’ of legal approaches, such that one can assign any national or local law to one category. These assignments are in fact very problematic; for example, does one consider systems that decriminalize the seller and criminalize the buyer “prohibitionist” or partial decriminalization? Further analysis grounded in empirical research reveals that it is mistaken to call this decriminalization, even of the seller, because in practice the person selling sex is not free of criminal surveillance. For example, sex workers may be taken into custody in order to be questioned or to ensure their evidence in any prosecution of the buyer.

Furthermore, this taxonomy attends exclusively to laws governing the exchange of sexual services, ignoring the many overlapping laws (found in other parts of the criminal code, such as statutes punishing vagrancy or indecent conduct, as well as health codes, zoning and other administrative laws) that effectively penalize sex work over and above the offences listed in the criminal code. Finally, even more confusion has been engendered over the meaning and distinctions between ‘legalized’ and ‘regulated’ prostitution, as some use the term ‘regulation’ to refer to prostitution-specific registration and surveillance schemes, while others use the term to refer to any system in which the government plays a role in setting the conditions of work (which may be comparable to state regulation of safety and health in restaurants or other service sectors.) As noted in the discussion in the text, different legalization schemes can be vary greatly in their promotion of equality, autonomy and health, as well as in their impact on sexual health.

794 Many legal systems that are understood to “criminalize prostitution” do not, in fact, criminalize the specific acts of exchange—in part because the proof is so difficult to obtain, absent police surveillance in the private space where the sexual behavior occurs, or direct police participation in the sexual acts themselves. A key reason given for law reform decriminalizing prostitution is corruption by law enforcement agents and abusive or rights—violating methods of surveillance [CITE: OSI] Confusion arises about terminology, when sexual exchange per se is not criminalized, but the penumbral conduct is: some observers describe this as a legal environment in which ‘sex work is not a crime;’ while others deem the penalization of acts supporting the exchange of sex for money as ‘criminalization’.
clients or make an offer for a sex/money exchange), pandering (to act as a go-between in facilitating the sexual exchange), living off the earnings of a prostitute, managing or renting premises for the purposes of prostitution, etc. Many systems do not criminalize the exchange of money for sexual services, but rather the penumbra of conduct surrounding it.

Systems which permit sex work under regulatory codes vary widely in their impact on sexual health and rights. Some systems are rights and health violating, such as those which mandate health cards (as described above, for example), or which restrict the abilities of people registered as sex workers to choose their own housing or live with their families, or which condition limited health care services on registration. These systems transgress norms of equal protection of the law, as well as constraining the underlying rights of privacy, family life, and rights to housing and health. Many legal regimes also severely constrict freedom of movement (through regimes of zoning and registration, or provisions barring working from living together or assigning sex work to isolated areas, rendering persons in sex work more vulnerable to violence and other forms of abuse.

Other legal regimes are more rights and health promoting, particularly as they move toward greater integration with general labor regimes, so that the system ensures access to insurance and other social benefits, and ensures health and safety conditions akin to those found in other service sectors. Other key aspects of health and rights-promoting legal regimes for sex work are: ensuring access to health services for a full range of mental and physical health concerns (and not solely for sexually transmitted diseases), and guaranteeing rights to organize and access to the courts to vindicate a full range of rights.

Even legal systems which administer the conditions of sex work (i.e., permit it as labor) have not succeeded in disentangling sex work from criminal law. Some legal systems define only some forms of sex work as legal (brothel-based, or escort services, for example); street-based or independent sellers of sex may still face criminal sanctions. Some systems permit only nationals of their country (or from a limited number of other countries) to work in the sex sector: persons who fall outside the legally permissible status commit criminal offenses in selling sex. These complicated inter-relationships between legal and criminalized forms of sex work suggest that even systems often characterized as ‘legalized’ can put sex workers at risk of law enforcement monitoring (and concomitant harassment) to a very high degree, suggesting the need for close review of all regulatory and administrative systems regarding sex work from a health and rights perspective.

The historical usage of the word ‘trafficking’ to mean all prostitution has produced a great deal of confusion in the analysis of the relationship between law, human rights, health and sex work. The 1949 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others equated all movement into prostitution with the international crime of trafficking. As noted, however, this Convention has been supplanted in practice by the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons which focuses on trafficking as a crime defined by its use of force, fraud and coercion into a range of labor sectors, including but not limited to prostitution. (For persons under 18, however, movement into prostitution is deemed ‘trafficking’ even absent any force, fraud or

796 This is distinct from many labor regimes, where the irregular immigrant commits an administrative violation in working out of status, but not a criminal offense.
797 See International Law § 8 for more analysis of the international law of trafficking
coercion.  

Traffic[ing as defined in the Protocol is a serious human rights violation, and it has serious effects on health (see the Section on Violence for a discussion of the health and rights responses to trafficking). When the circumstances of persons in sex work fit the crime described in the Protocol, it is critical that authorities respond as they would to any other trafficked person: with full regard for their rights and with concern for the abuses they have suffered, including health consequences. Trafficked persons, including persons trafficked into prostitution, may face extreme abuse in their working conditions, lack of pay, inability to leave, and threats to selves and family members. Trafficked persons in sex work, therefore, are rarely able to organize, employ health promotion and disease prevention measures, and make decisions about clients, which lie at the core of successful sex worker-led health and rights based efforts. For the purposes of this paper (and to the extent possible) laws related to sex work and trafficking are discussed in distinct portions of the report. Trafficking in so far as it is related to sexual health is discussed under the sub-topic sexual exploitation under Violence while provisions related to sex work are discussed in this chapter. Even where both sex work and trafficking are addressed within the same laws, these provisions have been separated and discussed.

From a health and rights perspective, both under-prosecution and over-prosecution in regard to persons in sex work constitute failures to respect rights, especially in creating the conditions for redress and restitution. On the one hand, many national laws and policies often fail to respond to abuses against sex workers, applying gender-stereotyped presumptions about sex workers’ credibility and dismissing their accounts of abuse. On the other hand, campaigns against trafficking into forced prostitution often mistakenly assume all people in sex work, particularly women, are victims of trafficking, and have no capacity to consent to exchange sexual services for money. During criminal investigations, people in sex work may be detained against their will or treated as accomplices in the trafficking of others. The equation of all prostitution with trafficking elides two very different conditions and circumstances. This confusion produces ineffective legal and health interventions such as ‘raid and rescue’ of un-trafficked sex workers, whose livelihoods, associations, and safety nets are torn apart by the raids.

As noted, there is agreement that persons under 18 should not engage in sex work. More difficult to formulate, however, are the legal and policy responses that constructively engage with teenagers engaged in survival sex or other forms of regular or irregular sex work, not infrequently occasioned by ejection from their natal homes or attempts to escape abuse. At minimum, they need access to services to help them protect their health, as well as education, housing, and support that allows for rapid exit from sex work. Many health programs which target young persons aged 14-24 fail to offer services to address the needs and contexts of the diversity of young people in sex work. Transgender or homosexual youth, who are escaping violence in their homes or communities, find both resources and abuse when they leave home and move to larger urban areas, where many engage in survival sex. Services should be designed for them that meet their particular needs and barriers to exiting sex work, and integrating into safer community settings.

Moreover, young persons in sex work should not be prosecuted as criminal offenders. Few legal regimes have incorporated this approach, especially in light of their reliance on punitive

799 CITe: OSI brief?
800 See, CRC, and First OP, ILO worst forms of child labor etc.
and non-rehabilitative juvenile justice systems. Rescues and raids on behalf of minor sex workers often place them in abusive conditions of detention in ‘rescue or remand homes’. Girls face particular problems when rescued from sex work, as they may be returned to communities in which they are culturally stereotyped as no longer ‘good’ women, assumed to be HIV positive unable to re-integrate. Moreover, the raid and rescue strategy has not proved sustainable in many sites, as debt structures that facilitated the minors’ entry into sex work motivates indebted families to send still-younger children in their place. Alternative livelihood strategies and education must be created.

The laws of the research countries reflect the broad criminalization approach to sex work. As discussed below, while Nepal and Sri Lanka criminalise sex work, India, Bangladesh and Thailand do not criminalise sex work per se but the actions surrounding sex work including public solicitation while Indonesia has a complex legal regime operating in different provinces which determines whether sex work, the running of brothels and other actions are criminalized or not. The Indonesian legal regime with regard to sex work is, however, not discussed here due to a lack of access to verified English translations of the various provincial laws. However, even in the case of India and Bangladesh, although there is a narrow de-criminalization of sex work per se, the criminalization of nearly every other aspect surrounding sex work effectively creates a milieu of criminalization in the absence of legalization or regulation. The research countries also follow the trend of dealing with sex work within a trafficking framework. Only Thailand and Indonesia have separate laws dealing with trafficking and separate laws dealing with sex work.

Within this general criminalized context that sex workers find themselves in, this section examines certain positive developments as they connect with sexual health and human rights. This chapter, therefore, should be read in the context of the larger environment of criminalization and violence that sex workers find themselves in the research countries.

8.1 (De)criminalization

Of the research countries, Bangladesh is the only one where there is a Constitutional mandate to prevent prostitution.\(^{801}\) The law relating to sex work in Bangladesh is found in the *Suppression of Immoral Traffic Act, 1933* which was enacted to make it “expedient to make better provision for the suppression of brothels and of traffic in women and girls for immoral purposes.” The provisions in this law dealing with trafficking and minor girls are discussed in the section on sexual exploitation.

This law is specific to women and “prostitution” is defined as “promiscuous sexual intercourse for hire, whether in money or kind”\(^{802}\) and a prostitute “means any female available for the purpose of prostitution.”\(^{803}\)

As noted above, while sex work itself is not punishable, the law does punish public solicitation with imprisonment up to a month and/or a fine up to 100 taka.\(^{804}\) The law includes places of public amusement and of public entertainment as public places. It also outlines certain circumstances where a police officer can arrest a woman for solicitation without a

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\(^{801}\) In this paper the authors have used the term ‘prostitution’ while referring to a statutory provision, which uses the same. While generally referring to the issue they use the term ‘sex work’.

\(^{802}\) Section 3(4), *Suppression of Immoral Traffic Act, 1933* (Bangladesh)

\(^{803}\) Section 3(5), ibid.

\(^{804}\) Section 7, ibid.
warrant.\textsuperscript{805} Further, the law punishes the keeping of a brothel or knowingly allowing the keeping of a brothel by landlords, tenants, etc.\textsuperscript{806} It also punishes persons above the age of eighteen who knowingly live, wholly or in part on the earnings of prostitution; the mother or child of a prostitute are exempted from this provision unless the court is satisfied that they are aiding, abetting or compelling her prostitution.\textsuperscript{807}

In 2000, in the case of \textit{Bangladesh Society for the Enforcement of Human Rights (BSEHR) and Ors v. Government of Bangladesh and Ors}\textsuperscript{808} the High Court division of the Bangladesh Supreme Court examined the issue of the legal status of sex work in Bangladesh. The case arose in the context of forcible evictions of sex workers from a particular locality. After examining the scheme of the \textit{Suppression of Immoral Traffic Act, 1933} and the provisions of the \textit{Penal Code} the High Court held that the profession of sex work, “\textit{apparently is not an illegal one under the law of the land.}”\textsuperscript{809} It did, however note that even if it was not illegal, it would not be encouraged and that, “\textit{State machineries are all out to prevent it by adopting various measures including rehabilitation schemes in consonance with our Constitutional mandate in its directive state policy that the State shall adopt effective measures to prevent prostitution.”}

Having noted this position in law, the court then turned to the matter of the evictions and noted that under the Constitution of Bangladesh every citizen has an inalienable right to be treated in accordance with law and only in accordance with law. Holding that sex workers, as citizens of the country also enjoy this right, the court stated that,

“\textit{[I]he said fundamental protective rights enshrined that no action detrimental to the life, liberty, body, reputation or property or personal liberty of any citizen can be taken except in accordance with law, for a citizen enjoys the equal protection of law and is entitled to equal protection of law. Article 11 of the Constitution declares that the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed. The evicted prostitutes of Nimtali and Tanbazar are citizens of Bangladesh, are enrolled as the voters and do exercise the right of franchise.”}

The court further recognised the right to livelihood of sex workers and noted that, “\textit{in spite of the provisions of Suppression of Immoral Traffic Act, 1933 whereby they are maintaining their earning/ livelihood which the State in the absence of any prohibitory legislation has a duty to protect and a citizen has the right to enforce that right enshrined in Articles 31 and 32 of the Constitution.” Comparing Article 32 of the Bangladeshi Constitution to Article 21 of the \textit{Indian Constitution}, the High Court referred to the Indian Supreme Court judgment in \textit{Olga Tellis v. Bombay Municipal Corporation}\textsuperscript{810} which recognised the right to livelihood as part of the right to life.

\textsuperscript{805} Section 22, ibid.
\textsuperscript{806} Section 4, ibid.
\textsuperscript{807} Section 8, ibid.
\textsuperscript{808} 53 DLR (2001) 1
\textsuperscript{809} “The preamble of our Constitution pledges high ideals of trust and faith in the Almighty Allah and that the State religion is Islam but we are not subjected to Shariat Law making sexual intercourse even with consent between men and women, other than husband and wife, a heinous offence of Jina/ fornication punishable even with stoning to death but the same is not the law of the land to be enforced in the Courts of Law…” Ibid.
\textsuperscript{810} AIR 1986 SC 180
“In view of the aforesaid proposition of law, the inmates of Tanbazar and Nimtali have a protected rights to life and livelihood i.e. important facet of the right to life is the right to livelihood and the easiest way of depriving a person of this right to life would be deprive him of means of livelihood to the point of abrogation. Thus, the said inmates upon their wholesale eviction from Tenbazar and Nimtali have as well been deprived of their livelihood, which amounts to deprivation of the right to life making the action unconstitutional and illegal.”

The Court also noted that rehabilitation schemes for sex workers must conform to the Constitutional mandate. It thus held that,

“the rehabilitation scheme must not be incompatible with their dignity and worthy of human person but designed to uplift personal morals, and family life and provision for jobs giving them option to be rehabilitated or to be with their relations and providing facilities for better education, family connection and economic opportunities in order to do much to minimize the conditions that gave rise to prostitution. But not in the way as has been done in respect of the sex workers of Nimtali and Tanbazar.”

Based on the facts of the case, the High Court found that the conditions of the eviction and detention of the sex workers were not in exercise of any reasonable restrictions on life and liberty and ordered their release. The court also noted the failure of the government to follow court directives in a previous judgment to frame a Code of Conduct in line with the UN Code of Conduct for Law Enforcement Resolution of 1979, in relation to the actions of law enforcement agencies in not preventing the illegal evictions. In response to statements from the police that it was house owners and hoodlums that indulged in the evictions, the court held:

“The police has a duty as instrument of demonstrative welfare of the country but as we have observed earlier, the police at least have failed to resist the owners of the houses at Tanbazar and Nimtali and their hoodlums in preventing the eviction of the sex-workers from their dwelling houses and the action of house owners do not have any sanction of law, not being in due process of law...and that “...the District Administration should not be allowed to shirk the responsibility in effectively maintaining the law and order and thus preventing the house owners and their hoodlums in evicting the sex workers of Tanbazar and Nimtali to take law into their own hands. Thus, we also express our dissatisfaction over the passive role or inaction of the Local District Administration.”

As in the case of Bangladesh, in India too, the legal framework governing sex work is contained largely in its anti-trafficking legislation, the Immoral Traffic (Prevention) Act, 1986, which deals with trafficking for the purposes of “prostitution”. The law was enacted to, “provide in pursuance of the International Convention signed at New York on the 9th day of
May, 1950 for the prevention of immoral traffic.” While the law does not criminalise sex work or sex workers, it prohibits various activities surrounding sex work. The law confers broad powers to the police and the judiciary which are predominantly used to target sex workers rather than traffickers or trafficking networks. The provisions in this Act dealing with trafficking and minor girls are discussed in Chapter 5 on Violence (sexual exploitation).

The fact that a law supposedly aimed at preventing trafficking has been largely used against sex workers has been noted by courts and the government alike. In Vishal Jeet v. Union of India where the Supreme Court issued guidelines for the prevention of child prostitution, the court while speaking of what it termed the evil effects of prostitution, also noted that, “this malignity cannot be eradicated either by banishing, branding, scourging or inflicting severe punishment on these helpless and hapless victims most of whom are unwilling participants and involuntary victims of compelled circumstances,” and requires “law enforcing authorities in that regard take very severe and speedy legal action against all the erring persons such as pimps, brokers and brothel keepers.”

Attempts to challenge Immoral Traffic (Prevention) Act, 1986, its enforcement and the forcible testing of sex workers for HIV in the courts have not been successful. In 2003, a case brought against the Gujarat government for extensive raids carried out in an area predominantly inhabited by sex workers and the resultant destruction of property, arrests and harassments of sex workers was dismissed by the High Court of Gujarat. In a case similar to the one in Bangladesh of the eviction of sex workers from an area called Baina in Goa, the Goa Bench of the High Court of Bombay was not only unwilling to stop the evictions, it called on the government to destroy tenements that housed sex workers, noting that many of the sex workers came from outside Goa and so should be rehabilitated by their respective state governments.

In 2006, the Indian government proposed amendments to Immoral Traffic (Prevention) Act, 1986 which met with mixed reactions. While a proposal to de-criminalise solicitation was welcomed, attendant amendments to punish clients of sex workers led to widespread protests and as of now, the amendments are on the back-burner.

Unlike India and Bangladesh, where anti-trafficking laws are also the laws on sex work, Thailand has separate legislations dealing with these issues, although the two laws do have some overlapping areas of regulation. The primary law in Thailand governing sex work is the Prevention and Suppression of Prostitution Act, B.E. 2539 (1996). Section 4 defines prostitution to mean, “sexual intercourse, or any other act, or the commission of any other act in order to gratify the sexual desire of another person in a promiscuous manner in return for earning or any other benefit, irrespective of whether the person who accepts the act and the

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812 Thus Section 3 punishes any person maintaining a brothel, Section 4 punishes any person living off earnings of prostitution and Section 5 punishes the procurement, inducement or detention for the sake of prostitution.
813 W.P. No. 421 of 1989
814 See Chapter 5 on Violence - sexual exploitation
815 Public at large v. State of Maharashtra, Writ petition No.112 of 1996 Bombay High Court and Andhra Pradesh High Court judgment.
816 Sahyog Mahila Mandal & another v. State of Gujarat & Ors [Special Civil Application No 15195 of 2003 with Special Civil Application No 4594 of 2003]
818 The Immoral Traffic Prevention (Amendment) Bill, 2006 (India)
person who commits the act are of the same sex or not.” The Thai law on sex work is gender neutral.

The law penalises solicitation, association with a prostitution establishment and the advertising of prostitution. While solicitation is punishable only with a fine, the other two offences may involve imprisonment as well. Owners, supervisors, managers of prostitution establishments are also punishable. The Thai law has strict punishments for detention or confinement, provisions for the revocation of parental rights and also provides for situations where the offender in the case is below the age of eighteen. Places of entertainment are also regulated by the law in that officers are empowered to inspect such places day or night for commission of offences under this Act. The law has detailed provisions relating to sex workers below the age of eighteen and some provisions related to trafficking that are discussed in Chapter 5 on Violence (sexual exploitation).

The laws of Nepal and Sri Lanka criminalise sex work.

In Nepal the Human Trafficking and Transportation (Control) Act, 2007 defines human trafficking to include engaging in prostitution. Therefore trafficking is directly equated with prostitution under this law, consequently criminalizing prostitution in all its dimensions. The punishment for engaging in prostitution is 1-3 months in prison and a fine up to Nepali Rupees 5000 for a person convicted of engaging in prostitution. The provisions in this law dealing with trafficking and minor girls are discussed in Chapter 5 on Violence (sexual exploitation).

This law gives extensive authority to the police. For instance it empowers a sub-inspector or higher personnel to enter premises, seize any property and gather evidence or arrest a person without warrant on the suspicion that an offence of human trafficking or transportation is being committed. In order to prevent persons who are alleged to have forced a person into sex work the law provides that while prosecuting cases under the Act, except in cases where a person is being prosecuted for engaging in prostitution, the court is required to keep the accused in custody during the period of prosecution. The burden of proof to demonstrate innocence is placed on the accused under this statute. Court proceedings are required to be conducted in camera.

Sex work in Sri Lanka is governed by a complex, overlapping group of statutes: the Vagrants Ordinance of 1842, the Brothels Ordinance of 1889 and Sri Lanka’s Penal Code.
As is evident in some of its provisions the Vagrants Ordinance gives immense latitude to law enforcers in hauling up persons for any public conduct, which could be considered disagreeable by them. It imposes a five rupees punishment on a first-time offender behaving in a ‘disorderly manner’ in a public street or highway and specifies that ‘a common prostitute wandering in a public street or highway, or in any place of public resort, and behaving in a riotous or indecent manner’ would be deemed to be such a person. It further goes on to punish acts of solicitation for the purposes of ‘illicit sexual intercourse’. It also punishes any person indulging in ‘gross indecency’ or found uninvited in a private enclosure where it is reasonable to infer that the person is there for ‘immoral purposes’. For female offenders under this law the court is given discretion to imprison them in a house under the Houses of Detention Ordinance instead of a regular prison. The law also defines and punishes an ‘incorrigible rogue’ and deems those who knowingly live ‘wholly or in part on the earnings of prostitution’ or ‘systematically procure persons for the purpose of illicit or unnatural intercourse’ as such. Male ‘rogues’ may be whipped if deemed necessary by the court. Under Section 11 any person having the custody or care of a girl is punishable if s/he causes or encourages the seduction or prostitution or unlawful carnal knowledge of the girl (i.e. ‘if he has knowingly allowed the girl to associate with, or to enter or continue in the employment of, any prostitute or person of known immoral character’). However, the section also states that a person shall not be liable to conviction under this section who as parent or guardian has given consent to a girl living with any man as his wife. The law does, however impose burdens on parents or guardians who are aware that a girl is exposed to or living as a prostitute. Further, the law provides that a magistrate may require the parents or guardian of a girl who is, with the knowledge of her parent or guardian exposed to the risk of seduction, prostitution or of being unlawfully carnally known, or is living a life of prostitution, to execute a bond and provide surety for the exercise of due care and supervision in respect of the girl. Again, no person is liable to execute a bond under this provision who

831 Section 2, The Vagrants Ordinance, 1842 (Sri Lanka)
832 Section 3, ibid.
833 Section 7, ibid.
834 Ibid.
835 Section 8, ibid.
836 Section 9, ibid. As per this provision a male person is deemed to be knowingly living on the earnings of prostitution if he is proved to live with, or to be habitually in the company of, a prostitute. A person, whether male or female, who is proved to have exercised control, direction, or influence over the movements of a prostitute in such a manner as to show that s/he is aiding, abetting, or compelling the prostitution of such person, shall, unless shown otherwise, is also deemed as such.
837 For some of these offences, Section 10 provides that if the offender is a male between 12 and 21 years of age, the Magistrate is given the discretion to require him to give a bond or surety of good conduct and release the person. In case of males below 16 years of age discretion is given to commit such a person to an approved school under the Children and Young Persons Ordinance.
838 Section 9, The Vagrants Ordinance, 1842 (Sri Lanka).
839 A “girl” is defined as a girl under the age of 16 years under Section 25 of the The Vagrants Ordinance, 1842 (Sri Lanka).
840 Section 11, The Vagrants Ordinance, 1842 (Sri Lanka).
841 Section 12 provides that a magistrate may require the parents or guardian of a girl who is, with the knowledge of her parent or guardian exposed to the risk of seduction, prostitution or of being unlawfully carnally known, or is living a life of prostitution, to execute a bond and provide surety for the exercise of due care and supervision in respect of the girl. Like Section 11, no person is liable to execute a bond under this provision who as parent or guardian has given his consent to a girl living with any man as his wife.
842 Section 12, The Vagrants Ordinance, 1842 (Sri Lanka)
as parent or guardian has given his consent to a girl living with any man as his wife.\textsuperscript{843} Sections 13 to 15 of the Ordinance provide for detention of a girl to safe custody.\textsuperscript{844}

The Sri Lankan\textit{ Penal Code} also addresses the issue of sex work and does so primarily through three clauses. Section 357 prohibits the kidnap or abduction of a woman so that she may be forced or seduced to ‘illicit intercourse’.\textsuperscript{845} Section 358 prohibits the kidnap or abduction of any person in order to subject that person to the ‘unnatural lust’ of another person.\textsuperscript{846} Section 360C addresses trafficking and insofar as it relates to sex work it punishes anyone who buys, sells or barters or instigates another to do so or does anything to promote, facilitate or induce the buying, selling or bartering of any person for money or other consideration, or recruits, transports, harbours or receives any person (including a child i.e. below eighteen years of age) or does any other act by the use of threat, force, fraud, deception or inducement or by exploiting the vulnerability of another for the purpose of, inter alia, prostitution. “Exploiting the vulnerability of another” means compelling a person to submit to any act, taking advantage of such person’s economic, cultural or other circumstances.\textsuperscript{847}

The\textit{ Brothels Ordinance} is aimed at suppressing brothels and therefore confines its scope as such. It punishes any person who keeps, manages, assists in the management of a brothel or as a tenant, lessee, occupier or owner of a premises, knowingly permits such premises to be used as a brothel, or for the purpose of habitual prostitution or as a lessor, landlord or agent of such lessor or landlord, lets the premises to be used as a brothel, or wilfully is party to the continued use of such premises as a brothel.\textsuperscript{848} The ordinance provides that any person who appears, acts, or behaves as master or mistress, or as the person having the care, government, or management of any brothel, shall be deemed to be its keeper or manager.\textsuperscript{849}

Few judgments of the higher courts in Sri Lanka have dealt with the issue of sex work. All of them have revolved around application of the Brothels Ordinance, which criminalises ‘keeping a brothel’.

Some judgments indicate that courts are not easily swayed while declaring a place a brothel.\textsuperscript{850} For instance in\textit{ Pieris v. Magrida Fernando et al}\textsuperscript{851} the Privy Council examined the

\begin{footnotesize}
\textsuperscript{843} Ibid.
\textsuperscript{844} Sections 13, 14, 15, ibid.
\textsuperscript{845} Section 357, Sri Lankan Penal Code, 1883
\textsuperscript{846} Section 358, ibid.
\textsuperscript{847} Section 360C, ibid.
\textsuperscript{848} Section 2, The Brothels Ordinance, 1889 (Sri Lanka)
\textsuperscript{849} Section 3, ibid.
\textsuperscript{850} On the other hand in\textit{ Mrs. Dorothy Silva v Inspector of Police, City Vice Squad, Pettah} (1977; citation not available, however, authors have access to full text of judgment) the court expanded the meaning of the term ‘brothel’ in order to effectively curb “the mischief sought to be suppressed by the Brothels Ordinance.” It held that to deem a place a brothel there was no need for the acts of sexual intercourse to take place on the very premises where women were offered in prostitution as long as arrangements were made to make women available for men, to be taken elsewhere for purposes of prostitution. The premises where such arrangements were made had all the attributes of a brothel for the purposes of the ordinance. The court went on to explain that the “live” element need not be present to make a place a brothel – even where photographs of prostitutes were displayed in a premises where men selected from the photographs in order to have sexual intercourse elsewhere, such a premises would also be covered by the ordinance as a brothel. It said: “If a narrow construction is given to the word ‘brothel’ .... it would virtually give a licence to running houses of ill-fame by using the subtler
\end{footnotesize}
facets that required to be satisfied to consider a place to be a brothel. The court held that the term ‘brothel’ was understood under law to be a place to which persons of both sexes have recourse for the purpose of prostitution. It held that where a number of women occupied a place and men visited it by day and night, consumed spirits there and indulged in fights, as long as there was no evidence of any act of indecency or fornication taking place on the premises it could not be considered a brothel. In Eliyatamby v. Wijeylath Menika the Privy Council held that a single act of prostitution was insufficient to render place a brothel. In this case it was alleged that a woman was found having sexual intercourse with a man at the time the police raided the premises and that the man had paid the woman Rupee 1, which she was holding in her hand. There was an unsubstantiated allegation that two other women were seen running away from the premises. The court held that before a conviction can be made under the ordinance it must be determined that the premises were being used as a brothel i.e. men visited the place for the purposes of prostitution with women or even with one woman. In this case, based on the evidence before it the court was not convinced that this was the situation and acquitted the accused.

In relation to police raids too the Sri Lankan Supreme Court has treaded with caution to balance arbitrary state conduct and privacy rights against the authority to enter premises. In 1999, the Supreme Court of Sri Lanka considered the case of Wijenayahe v. Amerasena wherein the petitioners alleged a violation of their fundamental rights to freedom from torture and freedom from arbitrary arrest and detention by the police when they raided and searched the petitioners’ guesthouse (first without a warrant and on the second occasion with a warrant) method of keeping a number of women in the premises and allowing them to be taken out for prostitution elsewhere.” To support its view and to effectively curb the ‘mischief’, “namely the suppression of prostitution” the court also considered the way in which “in the street” was broadly interpreted by English courts to include women soliciting from balconies or behind windows in their house.

Interestingly, in this case the court also observed that the evidence given by the man who was allegedly caught having sex with the alleged prostitute should be accepted with great caution ‘because he admitted that his own mother had been convicted of running a brothel’.

Here too, exceptions exist. In Ratnayake v Mediwaka (2004; citation not available, however, authors have access to full text of judgment) the case related to the raid of the petitioner’s hotel on the basis of a search warrant that alleged that the hotel was being used as a brothel frequented by armed personnel and as a place from which heroin was being sold. The search warrant was issued by the magistrate on the basis of a complaint made by a local inhabitant, a subsequent stake-out by the police and the fact that the petitioner had been convicted in the past of a “related offence”. The petitioner claimed a violation of his fundamental rights under Articles 11, 12 and 14(1)(g) (freedom to engage in a lawful occupation, business etc.) of the Sri Lankan Constitution. The court held that there was credible information in this instance for the magistrate to issue a search warrant based on a reasonable suspicion that had arisen about the goings-on in the petitioner’s hotel. The court held that even though the search warrant should have been issued under the Brothels Ordinance (in this case it was issued under the Criminal Procedure Code), this did not vitiate the actions performed by the police thereunder. Additionally, the police had acted on reasonable suspicion. If they had acted on a mere suspicion not founded on any rational basis then it could have been argued by the petitioner that the action was arbitrary and violated his right to equality. It went on to observe that although the integrity, freedom and privacy of a person should be jealously guarded from unnecessary interferences, it should be kept in mind that the larger interests of society require steps to be taken to find out wrongdoers and suppress crime. In this case, it held that the police actions were required for compelling reasons and did not violate the petitioner’s fundamental rights.
with one) on the charge that it was being used as a brothel and brutally assaulted the petitioners. Based on the evidence the court upheld the petitioners’ case and passed firm strictures against the police highhandedness. It held that the conduct of the police in inflicting serious injuries on the petitioners and meting out harsh treatment to them in the presence of onlookers amounted to cruel, inhuman and degrading treatment, which was prohibited by Article 11 of the Sri Lankan Constitution. The court ordered the respondent police officers and the state to pay a total of Rupees 175,000 to the petitioners as compensation and costs.

In Danny v. Sirinimal Silva, the Supreme Court considered a case where police raided a guest house where the petitioner and a woman were spending the night and arrested them (and five other women and four other women) after forcing their room to be opened. The respondent police officers claimed that they conducted the raid acting on a tip-off that there were several LTTE suspects in the guesthouse and on forcing the rooms open the occupants were unable to establish their identities whereupon they were arrested as a need arose to establish the same. However, when produced before the magistrate the petitioner and others were charged under the Brothels Ordinance. The petitioner alleged that his arrest and detention violated his fundamental rights under Articles 12 (the right to equality) and 13 (freedom from arbitrary arrest and detention) of the Sri Lankan Constitution. The court found that there was not a shred of evidence to show that the petitioner managed or assisted in the management of a brothel for him to have been charged under the ordinance and that having sexual intercourse was not an offence under the ordinance; so if the petitioner was indulging in the same in the guesthouse it was not a crime. The court directed the respondent police and the state to pay the petitioner Rupees 55,000 as compensation and costs. In relation to the actions of the lower court in permitting remand of the petitioner and others the court disapprovingly observed that “unfortunately, the Magistrate has almost mechanically made an order of remand because the police wanted them to be remanded.” It further held that magistrates should not do the same in order to “satisfy the sardonic pleasure of an opinionated investigator or prosecutor” but apply their full mind before depriving as person of his personal liberty.

Apart from defining a brothel, Sri Lankan courts have also examined issues related to sentencing under the Brothels Ordinance and have demonstrated a tendency to opt for more lenient penalties in cases where persons were accused of prostitution. For instance, in Podinona v. Haniffa, the court observed that where the law provided for a fine or simple/rigorous imprisonment or both, and the magistrate chose to impose a sentence of imprisonment, s/he must gives reasons for so doing or demonstrate that s/he has exercised discretion properly while sentencing. In that case the court held that there was nothing to demonstrate why a fine would not have been sufficient and altered the sentence accordingly. Similarly, in WH Agnes Nona v. Palipana where the accused was convicted under the Brothels Ordinance and sentenced to six months rigorous imprisonment, the court held that even for repeat offenders the legislative intent was clear - the court is given the discretion to sentence in terms of a fine or imprisonment and must exercise this discretion carefully. As this was not done sufficiently in the present case, the court reduced the sentence to a fine of Rupees 500.

859 2000. Citation not available, however, authors have access to full text of judgment.
860 1953. Citation not available, however, authors have access to full text of judgment.
861 1969. Citation not available, however, authors have access to full text of judgment.
862 It is interesting to note the moral observations of the court in this case regarding the veracity of evidence obtained from accomplices to the crime who were “common prostitutes”. It observed that in such a case “the
As is evident in the research countries, despite certain positive developments in relation to sex work, be they regarding liberal judicial attitudes toward sentencing or injunctions against law enforcement from abusing their powers to raid and arrest, the overarching legal framework is one of criminalisation, often through a multiplicity of laws, whether they criminalise sex work per se or all that surrounds its practice.

The research countries span a variety of legal approaches to sex work with Nepal and Sri Lanka criminalising sex work and India, Bangladesh and Thailand not criminalising sex work per se but the actions surrounding sex work including public solicitation. As noted above, the authors were unable to obtain English translations of relevant Indonesian laws which reportedly has a complex legal regime operating in different provinces which determines whether sex work, the running of brothels and other actions are criminalized or not. Even in the case of India and Bangladesh, although there is a narrow de-criminalisation of sex work per se, the criminalization of nearly every other aspect surrounding sex work effectively creates a milieu of criminalisation in the absence of legalization or regulation.

The laws in the research countries also demonstrate an approach, which conflates sex work and trafficking. The specific trafficking laws of Indonesia and Thailand in this regard, discussed in an earlier chapter may be noted as a positive development.

Amongst the progressive developments from courts in the region, the decision of the Bangladesh High Court in recognising the rights of sex workers including their right to livelihood as well as its strictures on law enforcement excesses stands out for its contribution to the expansion of the rights of equality and life and liberty being applicable by all persons regardless of notions of morality. That said, it stands out also for being the only judgment of this kind from the region with courts in the other research countries limiting their engagement with the rights of sex workers to sympathetic statements or pleas for their rescue.

8.2 Access to health services (regional flexibility)

Specific health services for sex workers in the research countries have mostly arisen in the context of government run HIV programmes.

In Bangladesh, the National Policy on HIV/AIDS and STD Related Issues, 1995, while outlining the need for counseling, risk reduction and testing of “people with risk behaviours” such as sex workers, also highlights the fear and stigma that the association with HIV has had on sex workers. The policy notes that, “An emphatic approach including decriminalisation of prostitution is more likely to succeed with regard to STD reduction than attempts to abolish prostitution and compel sex workers to undergo screening by punitive and harsh legislation that in practice is unenforceable and has proved to be counterproductive.” The policy also recognizes the need to ensure that HIV prevention programmes do not further stigmatise sex workers by blaming them for HIV transmission, promoting condoms only to certain sections of women, mandatory HIV testing of sex workers, etc. It notes the necessity of providing information and education on sexually transmitted diseases, prevention tools and treatment version given by them has to be assessed with great care and caution”, and “that the witnesses are not of sound moral character.”

863 Directorate General Of Health Services, Ministry Of Health And Family Welfare, Government Of The People’s Republic Of Bangladesh
for sex workers while emphasizing their involvement in such programmes for them to be successful.

India’s *National AIDS Prevention and Control Policy, 2000* states that the, “Government recognises that without the protection of human rights of people, who are vulnerable and afflicted with HIV/AIDS, the response to HIV/AIDS epidemic will remain incomplete.” Now in its third phase of implementation, the National AIDS Control Programme (2006-2011) while outlining specific programmes for prevention, care and treatment including those covering sex workers notes that, “criminal statutes such as…Immoral Trafficking Prevention Act…continue to hamper implementation of targeted interventions with…sex workers…” and that the programme, “will strive to ensure that…vulnerable and high risk populations have access to rights and requisite services are made available to them in a non-discriminatory manner based on ethical codes and guidelines.” The Programme provides for the comprehensive prevention, treatment and care services to be provided to sex workers.

The policies and programmes of several of the research countries recognize the importance of for government HIV programmes to provide health services for sex workers. This has been primarily over concerns of preventing the spread of HIV but over the course of time, the language and the policies of some of the governments have reflected problems with criminalisation regimes and even highlighted the rights of sex workers. Although these are merely policies that cannot be enforced in courts of law, they represent an interesting dichotomy in the approach of the government to sex workers and therefore, have been discussed here briefly. It would be fair to assume that HIV policies are a step ahead of the law and HIV programming in relation to vulnerable populations such as sex workers is often at odds with criminal law in the concerned jurisdiction, thereby reflecting a confused approach by the government, which has a health ministry promoting interventions in contravention of criminal laws and a home/interior ministry which is enforcing the very same law against such interventions.
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15. Konttabadu Durage Sriyani Silva v Chanaka Iddamalgoda and others

LEGISLATION, POLICIES, REGULATIONS, COMMENTARIES
This section contains a country-wise list of domestic legislation referenced in this report. Hard copies of legislation not available electronically are on file with the author.

Bangladesh
| 1. | Acid Control Act, 2002 |
| 2. | Acid-Offences Prevention Act, 2002 |
| 3. | Certification of Films Act, 1963 |
| 5. | Dissolution of Muslim Marriages Act, 1939 |
| 6. | Divorce Act, 1869 |
| 7. | Dowry Prohibition Act, 1980 |
| 8. | Labour Act, 2006 |
| 9. | Muslim Family Laws Ordinance, 1961 |
| 11. | Parsi Marriage and Divorce Act, 1936 |
| 12. | Penal Code, Sections 375, 376, 377 |
| 13. | Special Marriages Act |
| 14. | Suppression of Immoral Traffic Act, 1933 |
| 15. | Suppression of Violence Against Women and Children Act, 2000 |

**India**

| 1. | Bombay Police Act, 1951 |
| 2. | Commission for Protection of Child Rights Act, 2005 |
| 3. | Constitution of India, 1950 |
| 4. | Dowry Prohibition Act, 1961 |
| 5. | Dramatic Performances Act, 1876 |
| 7. | Guardians and Wards Act, 1890 |
| 8. | Hindu Adoptions & Maintenance Act, 1956 |
| 9. | Hindu Marriage Act, 1955 |
| 10. | Hindu Minority & Guardianship Act, 1956 |
| 11. | Immoral Traffic Prevention Act, 1956 |
| 12. | Indecent Representation of Women (Prohibition) Act, 1986 |
| 13. | Indian Christian Marriage Act, 1872 |
| 16. | Information Technology Act, 2000 |
| 17. | Justice Malimath Committee on Reform of the Criminal Justice System (Volume 1, March 2003) |
| 22. | Parsi Marriage and Divorce Act, 1936 |
| 23. | Patents Act, 1970 |
| 24. | Pre-Conception & Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act, 1994 |
| 27. | Protection of Women from Domestic Violence Act, 2005 |
| 29. | West Bengal Correctional Services Act, 1992 |
Indonesia

1. Act Concerning Manpower, Act of the Republic of Indonesia, Number 13, 2003
2. Anti-Pornography Law
3. Constitution of Indonesia, 1945
4. Indonesia’s Compliance with the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment: Issues for Discussion with the Committee Against Torture, 2008, Submitted by National Commission on Violence Against Women (KOMNAS PEREMPUAN)
5. Law Number 8 year 1992 regarding Film
6. Law of the Republic of Indonesia regarding Elimination of Violence in Household, 2004
7. Marriage Law, 1974
8. Regulation of the President of the Republic of Indonesia on the National Commission on Violence Against Women, Number 65 Of 2005
9. The Decree of the Minister of Manpower and Transmigration of the Republic Indonesia on HIV/AIDS Prevention and Control in the Workplace, 2004
10. Indonesia Law concerning Health No. 36/2009

Nepal

2. Children’s Act, 1992
4. Electronic Transaction Act, 2006
5. Human Trafficking and Transportation (Control) Act, 2007
6. Interim Constitution of Nepal, 2007 - Articles 12, 13, 20, 22, 23, 27, 28, 29, 33, 34,
11. The Treaty Act, 1990
12. Unpublished study and analysis on Sexuality and Rights undertaken by the Forum for Women, Law & Development, Nepal

Sri Lanka

1. Adoption of Children Ordinance, 1941
2. Brothels Ordinance, 1889
3. Children & Young Persons (Harmful Publications) Act, 1956
4. Constitution of Sri Lanka, 1978 - Articles 11, 12, 13, 14, 15
6. Kandyan Marriage & Divorce Act, 1952
7. Marriage Registration Amendment Act, 1995
8. Marriage Registration Ordinance, 1907
9. Muslim Marriage & Divorce Act, 1951
12. National HIV/AIDS Policy
14. **Obscene Publications Ordinance, 1927**
15. **Penal Code, 1883**
16. **Prevention of Domestic Violence Act, 2005**
17. **The ICCPR Act, 2007**
18. **Vagrants Ordinance, 1842**

**Thailand**
2. **Act on Protection of Domestic Violence Victims, 2007**
3. **Anti-Trafficking in Persons Act B.E. 2551 (2008)**
4. **Child Protection Act, 2003**
5. **Constitution of Thailand, 2007 - Sections 5, 30, 38, 40, 44, 52**
6. **Civil and Commercial Code**
7. **Criminal Code, 1956**
9. **Guidelines for Persons Manifesting Confusion Concerning Their Sexual Identity or Desiring Treatment By Undergoing a Sex Change Operation, 2009 (Medical Council)**
10. **Labour Code, 2006**
11. **Labour Protection Act (No.2) B.E. 2551 (2008)**
12. **Medical Profession Act B.E. 2525**
16. **Thailand Medical Profession Act B.E. 2525**