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General situation of LGBTI persons in Afghanistan

LGBTI persons in Afghanistan have a very narrow space to live their lives freely. Common law and sharia law criminalise same-sex sexual relations, and the acceptance of non-conforming sexual orientation and gender identity is low. The situation of gender division and the oppression of women are obstacles for all genders, but especially lesbian women, to find spaces to live freely. Homosexuality is often associated with sexual abuse, paedophilia and prostitution. The inability to differentiate between consensual sex between adults and sexual abuse is common and trickles down into the nation's legal system. Conservative values and a high rate of violence by family members towards LGBTI persons who break gender-roles are obstacles for those who have non-conforming sexuality or gender expressions, as well as women and men who oppose arranged marriages or domestic violence.

Although little is known about the extent of MSM behaviour or the size of the MSM population in the country, UNAIDS refer to a "tradition", of sexual relationships, including sexual exploitation, by powerful adult men of younger men or boys. The practice is called "Bacha bazi", dancing boys. Despite the negative social attitudes and legal prohibitions, this is an institutionalised form of bisexuality within Afghan culture. This occurs typically in the militia, police and armed forces when powerful adult men buy sexual favours from young boys with money or gifts or even keep them in slave like conditions. These activities are tolerated within Afghan culture because they are not perceived as being an expression of an LGBT-identity, but rather an expression of male power and dominance. Also, there is general impunity for gender based violence and there is not yet child protection legislation in Afghanistan. Together with high stigma and discrimination these practices lead to lack of effective HIV and STI prevention as well as lack of addressing the human rights of these groups.

Legal and human rights instruments

Constitutional provisions and legal framework

The Constitution stipulates that Afghanistan is an Islamic republic, so it is possible for LGBT people in Afghanistan to be charged with violating Sharia law. This could happen in lieu of, or in addition to charges being brought under the penal code. Sharia law based punishment is more likely to occur in isolated, rural communities. In the cities, persons convicted of homosexuality are generally sentenced to prison.

At the same time, the Afghanistan Constitution prohibits any kind of discrimination against Afghan citizens (though not explicitly mentioning LGBTI), which does not correspond to the legislation which criminalises same-sex sexual acts between consenting adults. The Afghanistan Constitution also states that "every Afghan has the right to treatment". However, in practice the LGBT community does not access health services or HIV prevention measures.

Same-sex sexual activity is prohibited for both male and female, according to the Penal Code of 1976 which was reinstated after the American invasion, and it has several provisions that could apply LGBT people.

- Article 398 – Offers lesser punishment for vigilante honour killings, which may involve a family member discovering their spouse or kin engaging in adultery, fornication (consensual sex between unmarried persons) or homosexuality
- Article 427 – Prescribes long prison terms for adultery and "pederasty". The latter may be interpreted as sexual intercourse between men and anal intercourse, in light of the fact that there are still legal punishments proscribed even if the people involved are legal adults. The maximum punishment increases if victim is under eighteen years of age, if the defendant is in a position of authority over the victim, if the defendant has repeatedly committed the crime or if

the crime results in the spread of a disease. The law also increases the available punishment if a "violation of honour" takes place.

- Article 512 states that a person who is engaging in public "watching" in a repugnant manner shall be imprisoned or fined.

Regional or international human rights instruments

Afghanistan is a member of UN and was part of the Universal Periodic Review 18th session in 2014. During the UPR-process, Norway urged Afghanistan to ensure non-discrimination on the basis of sexual orientation and gender identity and repeal the provisions of the penal code, which Afghanistan did not accept. Several countries also expressed concern over legislation and lack of measurements to combat violence against women. Some of these recommendations were accepted by Afghanistan, e.g. to "complete the exercises in strengthening national legal and administrative frameworks in order for them to be in line with human rights principles" and "continue with actions aimed at eliminating all forms of violence against women and girls". Efforts in these areas could open up for work with rights for LGBTI persons as an integral part.

Afghanistan is a member of The United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). In 2010 and 2011, Afghanistan agreed to declarations to achieve universal access to HIV prevention, including working with key populations affected by HIV/AIDS. This is another area where LGBTI issues could be raised.

According to UNDP, in the Afghanistan NCPI Report by the Ministry of Public Health, the government said there are no obstacles to effective HIV prevention, while the civil society disagreed noting that "Sharia law and the Afghan constitution contained either laws, regulations or policies that present obstacles for MSM, people who inject drugs, sex workers and transgender people".

Sexual and Reproductive Health and Rights and HIV/AIDS

The UNGASS country report from 2014 refers to a study, the 2012 Integrated Biological Behavioural Survey (IBBS), that showed that HIV prevalence among MSM was low, around 0.4%. Other sources however suggest that male-to-male sexual contact may play a larger role in HIV transmission than previously assumed. The UNGASS 2014 country report revealed that there was a lack of use of condoms by MSM. A previous mapping in 2007 revealed a close interaction of MSM with female partners (spouses) and young males, and indicated that many MSM engage in sex for money and goods, largely unprotected. A study by Naz Foundation International in 2009 found similar results.

According to UNAIDS, Afghanistan has policies and strategies regulations that specify protection for people living with HIV as a vulnerable group, including Men who have Sex with Men (MSM) and sex workers. The Afghan strategic framework (NSF-II) included writings of the provision of preventive services for key affected population (people who inject drugs and their partners, FSW, MSM, and prisoners).

The Multi Country South Asia Global Fund HIV Programme, a regional HIV programme operating in eight countries (Afghanistan, Bangladesh, Bhutan, India, the Maldives, Nepal, Pakistan and Sri Lanka), was initiated in 2011. Through Community Systems Strengthening, the goal is to reduce the impact of HIV in MSM, intersex, and transgender people. In Afghanistan, the programme will work through the Youth Health and Development organisation.

Despite the statements on access to treatment for all in the Afghan Constitution, service provision to people living with HIV/AIDS is limited to few provinces. Civil society organisations are still the main provider of services to this group.

Civil society organisations and institutions active in LGBTI field

There are not many organisations within Afghanistan working with LGBTI rights in any form. Pakistani organisation, *Naz Male Health Alliance* works in regional cooperation with health clinics in Afghanistan and organisations that support MSM. Other organisations might include LGBTI persons in their work, but due to the security risks there are few that are open with their work.

The Afghanistan Independent Human Rights Commission has an 'A-status' accredited at the Office of the United Nations High Commissioner for Human Rights, OHCHR secured through a peer review process of the International Coordinating Committee of NHRIs (ICC). The OHCHR is committed to working with States, national human rights institutions and civil society to achieve progress towards the worldwide decriminalisation of homosexuality and further measures to protect people from violence and discrimination on grounds of their sexual orientation or gender identity and could be an entry point to discuss LGBTI rights in Afghanistan.

What Sweden can do – questions to discuss

Within the broader context of support to democracy, increased respect human rights and gender equality in Afghanistan, Sweden has an opportunity to include issues related to the rights of LGBTI persons and their access to justice. When addressing LGBTI in non-supportive government contexts, it is generally important to consult LGBTI organisations in how to address issues to make sure not to overrule their agenda. In a country in Afghanistan where LGBTI organisations don't exist in the traditional sense, there is a need to consult other LGBTI organisations or human rights organisations working with LGBTI in the region for example ILGA Asia, organisations in neighbouring countries or LGBTI friendly human

rights' organisation to be advised on the matter.

Questions to discuss:

- Could Sweden do more to keep updated on the legal and security situation of LGBTI persons and when needed contribute to protection of organisations and activists at risk?
- Could Sweden do more to seek strategic alliances (with likeminded donors, UN and EU agencies) and bringing up LGBTI rights in the dialogue with the government, e.g. with reference to the HIV/AIDS national plan or the SRHR and gender based violence programmes?
- Could Sweden do more to encourage and support mainstream Human Rights organisations, HR institutions (e.g. the Afghanistan Independent Human Rights Commission) and HR reporting processes to include LGBTI rights?
- Could Sweden do more to promote inclusion of the LGBTI population in Swedish supported gender equality and gender based violence initiatives, in SRHR initiatives and in HIV/AIDS initiatives? To facilitate networking with regional efforts in these areas?
- Could Sweden do more to support the judiciary to consider LGBTI rights in law reform and in legal aid to LGBTI persons and activists, with reference to the non-discriminatory clauses in the constitution?
- Could Sweden do more to encourage and support emerging LGBTI organisations and facilitating their networking with mainstream human rights organisations in Afghanistan and with LGBTI organisations in the region.

For further advice on dialogue regarding LGBT issues, download the [Sida 'Human Rights of Lesbian, Gay, Bisexual and Transgender persons - Conducting a Dialogue](#) and the Ministry of Foreign Affairs [Dialogue brief](#)

References

General references

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The human rights of LGBTI persons have been a Swedish government priority since 2009. As a service to staff, guidance notes have been prepared to provide basic information about the situation of this (often forgotten) group and inspire discussions on what Sweden could do to better include LGBTI rights in diplomacy and programming.