



*Empowered lives.
Resilient nations.*

**Unequal power and voice:
Discrimination against people who challenge normative
Sexualities in Asia-Pacific**

**Asia-Pacific Human Development
Report Background Papers Series
2010/13**



*Empowered lives.
Resilient nations.*

Asia-Pacific Human Development Report Background Papers Series 2010/13

Unequal power and voice: Discrimination against people who challenge normative sexualities in Asia-Pacific

Sunila Abeysekera

Sunila Abeysekera is a Sri Lankan feminist activist and human rights defender. In 1998 she received the UN Human Rights Prize for her work in the Asia-Pacific region. She is currently the co-chair of the UNDP Global Civil Society Advisory Committee and works for the promotion and protection of human rights in Sri Lanka and globally.

Comments and clarifications on this paper can be addressed by email to the author. Email: sunilasj2011@gmail.com

We are grateful to Li Zhou, Technical Officer (Human Rights and Sexual Diversity) with UNDP's Asia-Pacific HIV, Health and Development Team for his support in finalizing this paper for publication.

Abstract

In recent years, we observe the expansion of the concept of gender to include the range of identities that do not conform to the traditional notions of masculinity and femininity. The original formulation of masculinity and femininity as being socially constructed had taken into consideration the fact that there need not be a direct co-relation between the biological body of any human being and her or his expressions of sex/gender identity. Although the articulation and manifestation of these identities vary greatly according to cultures and contexts, there is a common thread that runs through history that provides examples and evidence of discrimination and violence against groups of people, including women, who are perceived to express their sexual and gender identities in ways which are seen as transgressing dominant social and cultural norms. These norms, which constitute heteronormativity, are in turn rooted in traditions and customs that are based on ideas and ideologies of male superiority and male control of political and economic power, and are often discriminatory of women and other marginalized communities. It is this dominant discourse that is being challenged today by those who espouse an inclusive vision of rights and development that treat all human beings as equals.

Key words: gender equality, gender identity, sexual orientation, human development

The views expressed in this publication are those of the author(s) and do not necessarily represent those of the United Nations, including UNDP, or the UN Member States.

*This paper was commissioned by the Human Development Report Unit as a technical background paper to inform the Asia-Pacific Human Development Report, “**Power, Voice and Rights**”. The data may differ from that finally presented in Asia-Pacific Human Development Report. Readers may contact the author directly for any clarifications, queries on data, inferences, and conclusions or to engage in discussion. This paper has not been copyedited.*

Unequal power and voice: Discrimination against people who challenge normative sexualities in Asia-Pacific

1. Human Development, Equality and Non-Discrimination

Issues of equality and non-discrimination, which are key human rights principles, have been crucial to the articulation of human development since social inequalities contribute to the lack of equal opportunities and denial of access to services that are essential if the full potential of every human being is to be realized. Thus, equal and equitable access to health and education, and to employment and ownership or control over productive resources, are critical factors in determining human development.

Understanding the role played by unequal relations of power in creating and perpetuating structures of discrimination and inequality has also led to a focus on 'empowerment' at all levels of the design and implementation of programmes aimed at achieving human development in the past decades. Shifting the balance of power and enabling sectors of the world's population who are subject to discrimination and unequal treatment, including women, indigenous peoples, migrants and refugees and people living with HIV/AIDS to make choices regarding their lives and their future has been identified as a key benefit of development.

The impact of discrimination on human development has been the topic of global debate for decades. In the 1960s, global resistance to the apartheid regime in South Africa and to race-based segregation and discrimination in the United States led to the creation of the first international human rights treaty in modern times, the International Convention on the Elimination of Racial Discrimination. In 1979, global focus on the role of women in development led to the adoption of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The issue of discrimination on the basis of identity has also been the subject of several World Conferences convened by the United Nations (UN) including the World Conferences on Women,¹ and on Racism.² The significance of international acceptance of the lived experience of inequality and discrimination in ensuring human development is borne out by the fact that all international human rights instruments and procedures have the elimination of discrimination as a their primary objective. The Human Development Report of 2000, which focused on human rights and development, identified seven freedoms of which the first was freedom from discrimination on the basis of gender, race, ethnicity, national origin or religion.

The concept of gender first entered human development discourse in response to empirical evidence regarding the persistent nature of discrimination and inequality based on sex. It enabled analysis of human relationships of inequality and subordination, in a way that was applicable to male/female relations but that also encompassed unequal relations of power

¹ Most recently in Nairobi (1985) and Beijing (1995)

² Most recently in Durban (2001) and Geneva (2009)

between other sectors and communities based, for example, on class and/or race differences. Gender revealed the foundations of the unequal relations of power between men and women. It also unpacked the social construction of masculinity and femininity in a way that enabled a deeper understanding of the role of stereotypes in the subordination of women and men.

The concept of gender was critical in enabling a shift in terms of policies and laws that would address inequalities between women and men, expanding our responses to include consideration of issues of power relations between masculine and feminine human beings. This conceptual shift had a major impact on the inclusivity of the concept of human development. The role of gender in human development was the theme of the Human Development Report of 1995, which defined moving towards gender equality not as a technocratic goal but as a political process. Equality of opportunity, the sustainability of such opportunities and the empowerment of people so that they could participate in, and benefit from, development processes were the key issues identified at the time.³

In recent years, we observe the expansion of the concept of gender to include the range of identities that do not conform to the traditional notions of masculinity and femininity. The original formulation of masculinity and femininity as being socially constructed had taken into consideration the fact that there need not be a direct co-relation between the biological body of any human being and her or his expressions of sex/gender identity. Thus, in the 1980s, concepts of ‘masculine women’ and ‘feminine men’ found their way into the corridors of debate and dialogue on human development and human rights. The growing visibility of transgender communities and their claims for equality and non-discrimination in the 1990s challenged the idea of fixed and static sex or gender identities. It also introduced the idea that gender identities are fluid and in the process of transition and transformation. However, most references to ‘gender’ in official and non-governmental documents, including documents of the UN system, continue to assume that gender is synonymous with women or at the very most is about relationships between men and women.

Any inquiry into issues of gender identity today reveals the richness and diversity that exists in human society and also uncovers the complexities of understanding the phenomenon. Although the articulation and manifestation of these identities vary greatly according to cultures and contexts, there is a common thread that runs through history. This thread provides examples and evidence of discrimination and violence against groups of people, including women, who are perceived to express their sexual and gender identities in ways which are seen as transgressing dominant social and cultural norms. These norms are in turn rooted in traditions and customs that are based on ideas and ideologies of male superiority and male control of political and economic power, and are often discriminatory of women and other marginalized communities. In particular, the role of women in procreation is emphasized and non-procreative sex – sex for pleasure – is often defined as immoral. It is this dominant discourse that is being challenged today by those who espouse an inclusive vision of rights and development that treat all human beings as equals. In promoting such an inclusive vision of rights, the evolution of the concept of inter-sectionality of oppression and

³ UNDP Human Development Report 2005

of discrimination has been crucial since it allows for the consideration that all human beings experience, or could experience, multiple forms of discrimination and therefore calls for an understanding of equality that is complex and sensitive to diversity and difference among human beings.

2. Issues of Definition: Challenging the ‘Norm’

In 2008, the UN celebrated the 60th anniversary of the Universal Declaration on Human Rights with the slogan ‘dignity and justice for all of us’.⁴ This recognition of the diversity and universality of human rights has formed the basis for claims of inclusion of all marginalized groups and communities within all processes of human development. Among these groups who are claiming their space within the community of nations that respect all human rights for all are indigenous communities, *dalits* in South Asia and others who face discrimination on the basis of the descent and occupation, as well as their sexual orientation and gender identity (SOGI).

Sexual orientation is commonly understood to mean the attraction that any one person may feel for another, irrespective of sex or gender. It encompasses attraction between people of the same sex (homosexuality) and attraction between people of the opposite sexes (heterosexuality). **Gender identity** is understood as referring to a person’s sense of identification or ‘belonging’ to any one of many manifestations of gender expression. This allows for understanding that a person’s gender identity may or may not conform to their biological identity.⁵ A wide range of men and women, including men who love men (commonly referred to as gays), women who love women (commonly referred to as lesbians), people who regularly or occasionally adopt the dress and mannerisms of other gender identities, people who are in the process of undergoing surgical and other procedures that may transform their physical sex/gender identity as well as those who live out, or would rather live out, their lives as a member of a gender identity group that is not in conformity with their gender identity at birth (transgender) and those whose biology defies categorization on the basis of male and female (intersex). All of these people are members of our societies who are seeking to be full and equal partners in human development. In some parts of South Asia (Nepal) and Southeast Asia (Malaysia/Indonesia) there is a growing group of transgender and intersex persons who reject the attempts to locate them within a binary

⁴ <http://www.un.org/events/humanrights/udhr60/>

⁵ In the 2006 Yogyakarta Principles on the Application of international Human Rights Law in relation to Sexual Orientation and Gender Identity, Sexual Orientation is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. Gender Identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms. Source: http://www.yogyakartaprinciples.org/principles_en.htm

discourse of male/female or feminine/masculine and who instead declare themselves to be the 'third' gender.⁶

The social practice of *homophobia* (the fear of homosexuals and of homosexuality), is often combined with the embedding of *hetero-sexism* (the ideology that privileges heterosexual relationships and propagates the belief that the only legitimate and legal expression of sexual desire is between members of the opposite sexes within a legal marriage) in legal and policy frameworks as well as in social and cultural structures. This creates an environment in which discrimination and violence against individuals and communities on the basis of their sexual orientation and gender identity is socially and legally sanctioned in many societies and countries of the world. It is also important to remember that *patriarchy*, or the system of embedding male/masculine dominance in society, interplays with hetero-sexism to strengthen gender-based divisions in social and economic life that have an often detrimental impact on the capacity of those of non-normative sexualities to lead lives with dignity and equality.

In many countries, it has been the practice to use the term '*sexual minorities*' to describe those communities that engage in non-heteronormative sexual behaviours and practices. However, there is an emerging consensus that categorizing any community as a 'minority' leads to a positioning of this community as 'lesser than' the 'majority' community against which it is being measured, not only in numerical terms but also in terms of social and political power. Thus, the language of the non-normative and the non-heteronormative is increasingly recognized as being appropriate and respectful.

An overarching concern in all discussions on sexual orientation and gender identity is the inability of existing language to encompass the full range of diversity if one attempts to describe the sexual behavior and practices of diverse communities. If one observes the constantly expanding list, from lesbian and gay in the 1990s to lesbian, gay, bisexual, trans, intersex and queer (LGBTIQ) in the new millennium, the levels of contestation and the inadequacy of the process of naming become clear.⁷

It is in this context that the concept of *hetero-normativity* has evolved, emerging out of the need to locate the discrimination, stigma and marginalization faced by persons and communities because of their sexual orientation and gender identity within a conceptual framework that is not limited or restricted by mere description of sexual practices and behaviours. The positioning of these communities within the 'non-normative' also allows for more critical investigation into the customs and traditions that perpetuate discrimination against people on the basis of their sexual orientation and gender identity since it is acknowledged that social and cultural 'norms' are located within history and are subject to constant change and transformation. The category of non-normative has a strategic and political value as well, since it creates spaces for better synergy and solidarity between social groups and movements that challenge hetero-normativity through various means.

⁶ For more detailed discussions see the work of Anne Fausto Sterling: *The Five Sexes: Why Male and Female are not enough*: <http://about.homosexuality.com/five-sexes.pdf>

⁷ The 'impossibility' of naming is discussed in greater detail by Tom Boellstoff in '*Queer Studies in the House of Anthropology*': 2007. *Annual Review of Anthropology*. University of California at Davis.

For the purpose of this paper, the focus will therefore be on persons of non-normative sexual behaviors and practices, so as to be as inclusive as possible.

3. Hetero-normativity, Sexuality and Rights related to sexuality

Hetero-normativity privileges heterosexual sexual relationships, preferably within the boundaries of legal and monogamous marriage, and therefore creates an environment in which all non-procreative sexualities occurring outside the bonds of marriage are suspect. Within the heteronormative order, certain sexual practices and behaviours are labeled deviant/dangerous, and subject to intense scrutiny. Through creating categories of what is permissible and what is not, in the interests of public order, the framework enables policing and control of all non-heteronormative individuals and groups on the basis that this is required in order to avoid moral disintegration and social disorder. Discrimination against persons on the basis of their sexual orientation and gender identity is often due to prejudice and ignorance. In addition, there is a strong fear of the 'disintegration' of existing social norms and practices in the face of the challenge presented to these norms by those who espouse a 'different' life and lifestyle. Throughout history, those who first challenged discrimination on the basis of race, sex, ethnicity, and cultural and social origin were labeled as 'deviants' and radicals, until their efforts led to broad social acceptance of the alternative 'norms' that they were promoting. There are many examples of this to be found in the Asia-Pacific region. One such example is the resistance to the campaign against the practice of 'sati'⁸ in parts of Northern India, led by Indian reformer Ram Mohan Roy.⁹ The arguments of those who came to the defense of the practice, including some officials of the British colonial regime, were based on the rationale that this was a part of Indian tradition and culture.¹⁰

In a context of prejudice and discrimination, non-heteronormative persons live in an environment of powerlessness, prejudice and fear because of social stigma and because of laws and policies that institutionalize discrimination against them on the basis of their sexual orientation and gender identity. For example, lesbian women in the labour force will often face heterosexist discrimination, which may restrict women workers to certain categories of work considered to be 'appropriate' for women. This discrimination is often rationalized on the basis of being 'women', within the patriarchal framework of a sex and gender-based division of labour. Lesbians will also confront additional problems because of their identity. These problems may include harassment, intimidation and abuse in the workplace from co-workers and from employers, which would have a negative impact on their professional advancement. Even though there is a growing critique of laws that discriminate against non-heteronormative persons, laws, policies and practices which contribute to stigma and prejudice against non-hetero normative persons continue to exist and represent a major impediment to their enjoyment of human rights and freedoms. The existence of anti-sodomy laws could, for example, prevent men who are having sex with men from accessing specialized health care services which they need. Prejudice against lesbians, including the assumption that they do not have active sexual lives, may prevent them from having access to

⁸ The practice of widow burning

⁹ Dāsa, Harihara & Mahāpātra, Sasmitā 1996, *The Indian renaissance and Raja Rammohan Roy*,

¹⁰ Sharma, Arvind, 1998, *Sati: historical and phenomenological essays*

reproductive and sexual health services. Laws and practices such as these mean individuals from these groups face various forms of discrimination and violence at all levels, within the family and the community as well as in the public arena including within state and non-state institutions. The fact that they are marginalized on the basis of their sexual orientation and gender identity restricts their access to education, health and employment, and has a significant impact on their capacity to enjoy the rights and freedoms that are guaranteed to all by national and international laws. In addition, these limitations heighten their vulnerability to poverty and deprivation, and lead to sexual behaviour and practices that expose them to a range of risks including vulnerability to HIV/AIDS, sexually transmitted infections and other illnesses.

The combination of social prejudice and legalized discrimination may also result in the exclusion of persons of non-normative sexualities from employment. Research demonstrates the resistance of employers to recruit persons who behave or dress ‘differently’¹¹ as well as a great deal of anecdotal evidence from persons of non-normative sexualities who have experienced harassment and violence in the workplace.¹²

Focus on these issues has emerged in the international arena in the past years mainly due to the high levels of violence, discrimination and abuse experienced by persons because of their own sexual orientation and gender identity or because of the work they are doing as human rights defenders that calls for the protection of the rights of such persons. Cases of lesbian suicide have been highlighted by groups working on these issues in Sri Lanka and India in the past,¹³ while a high level of harassment of non-normative groups has been reported from countries such as Malaysia, where in October 2008 the National Fatwa Council issued an edict denouncing ‘pengkid’ (loosely translated as tomboys) as un-Islamic.¹⁴ In Thailand, on February 21, 2009, members of MPlus, a group promoting AIDS awareness and the Thai Queer Network were attacked while participating in Queer Pride, a peaceful demonstration calling for equal rights for Thailand’s LGBT community.¹⁵

While existing legal and moral sanctions against individuals and communities on the basis of their sexual orientation and gender identity play a role in enabling such homophobic attacks and violence to continue, social attitudes shaped by heterosexism contribute to further silence and marginalization. The fact that those who defend the rights of non-normative communities are under attack as much as members of non-normative groups themselves is a further impediment to activities that can advance the rights of these groups. A graphic demonstration of the silencing that exists in the region is the low level of information regarding violence and abuse against persons because of their sexual orientation and gender identity that filters out of the region. Even a cursory examination of websites of global organizations that work on these

¹¹ Kristen Schilt and Matthew Wiswall (2008) “Before and After: Gender Transitions, Human Capital, and Workplace Experiences,” *The B.E. Journal of Economic Analysis & Policy*: Vol. 8: Iss. 1 (Contributions), Article 39. Available at: <http://www.bepress.com/bejeap/vol8/iss1/art39>

¹² www.ilga.org, www.iglhrc.org

¹³ See website of Sri Lankan lesbian rights group, Women’s Support Group: www.wsg.org

¹⁴ <http://www.telegraph.co.uk/news/worldnews/asia/malaysia/3250905/Malaysia-bans-women-from-wearing-mens-clothes-and-lesbian-sexual-relations.html>

¹⁵ Bangkok Post. March 26, 2009

issues, such as the International Gay and Lesbian Human Rights Commission, or Human Rights Watch, makes it obvious that there is extremely low representation of cases from the Asia-Pacific region.¹⁶

It is in this context that the inclusive frameworks of human rights and human development become critical in granting protection to these communities, as well as in providing them with the space to engage in all processes of economic and social development as equals.

3.1. Rights related to sexuality: Frameworks and Definitions

In the arena of rights related to sexuality, the most commonly cited definition at present comes from the website of the World Health Organization (WHO), which reads:

*Sexual rights embrace human rights that are already recognized in national laws, international human rights documents and other consensus statements. They include the right of all persons, free of coercion, discrimination and violence, to: (1) the highest attainable standard of sexual health, including access to sexual and reproductive health care services; (2) seek, receive and impart information related to sexuality; (3) sexuality education; (4) respect for bodily integrity; (5) choose their partner; (6) decide to be sexually active or not; (7) consensual sexual relations; (8) consensual marriage; (9) decide whether or not, and when, to have children; and (10) pursue a satisfying, safe and pleasurable sexual life. The responsible exercise of human rights requires that all persons respect the rights of others.*¹⁷

This articulation is an expression of emerging concerns regarding the rights of persons who do not conform to existing norms and standards with regard to sexual expression and behavior. These could include: married women who exercise their right about when and how to have sex with their husbands; married women who choose not to have children; unmarried women who choose to have children; couples – heterosexual and homosexual – who have sex outside of marriage or their primary relationship and so on. Alice Miller, in her work on sexuality and rights, has detailed the shift from existing standards of legitimacy, that were based on norms relating to reproduction and marriage, to standards that are being created in the present, and that foreground individual expression according to principles of autonomy, consent and non-discrimination.¹⁸

Over the years, various human rights mechanisms and procedures of the UN human rights system, as well as regional human rights bodies, have considered complaints and appeals regarding discrimination on the basis of sexual orientation and gender identity. Historically, there have been some rulings which have been seen as path-breaking in addressing legal discrimination. In 1981, the European Court of Human Rights ruling on a case filed by Jeffrey Dudgeon, an activist with the Northern Ireland Gay Rights Association, found that the law criminalizing homosexuality between consenting adults violated Dudgeon's right to

¹⁶ <http://www.iglhrc.org/cgi-bin/iowa/home/index.html>

¹⁷ WHO <http://www.who.int/reproductive-health/gender/sexualhealth.html#4>.

¹⁸ Miller, Alice. 2008. unpublished paper: 'Unresolved Issues – Human Rights and Sexuality' for the International Council on Human Rights Policy

respect for his private life.¹⁹ In 1994, the Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights, heard a case in which gay rights activist Nicholas Toonen challenged the criminalization of homosexuality in Tasmania. He sought repeal of the law on the basis that it violated right to privacy under Article 17 of the Covenant that bars "arbitrary or unlawful interference" with privacy, and the right to equality under two counts drawing on Article 26 that prohibits discrimination 'on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. The arguments on discrimination were on the basis of "sexual orientation" which, it was argued, would come within the phrase "other status", as well discrimination on the basis of "sex" by applying the law only to male homosexual activity. By ignoring lesbians, the argument went, the law followed a criminal law tradition that denied women's sexuality. In its conclusions, the Committee followed the rulings of the European Court of Human Rights in the Dudgeon case in finding that the Tasmanian law violated Toonen's right to privacy. Regarding the equality issue, the Committee held that "sex" included "sexual orientation". The idea that discrimination on the basis of sexual orientation is a form of discrimination on the basis of sex had not been widely accepted before the Toonen decision.²⁰

In 2000 the Committee monitoring the International Covenant on Economic, Social and Cultural Rights issued General Comment 14 on the right to health, interpreting the non-discrimination clause in Article 2 (2) of the Covenant as including prohibition on discrimination on the basis of "sexual orientation".²¹ Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary and Arbitrary Executions, was the first of the Special Procedures within the UN human rights system to include individual cases of severe persecution of members of sexual minorities in her reports to the Human Rights Commission.²² In June 2001, the Special Rapporteur on the Freedom of Opinion and Expression, Abid Hussain, held a historic meeting with transgender activists while on official mission to Argentina.²³ In November, 2001, the Special Representative on Human Rights Defenders, Hina Jilani, met with Colombian LGBT organizations working with members of sexual minorities, people living with HIV/AIDS and sex workers during her visit to Colombia.²⁴ That same month, the UN Special Rapporteur on torture, Nigel Rodley, raised the issue of torture and discrimination against sexual minorities before the UN General Assembly in New York.²⁵ In 2004, Paul Hunt, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health affirmed that sexual rights should

¹⁹ Sanders, Douglas. 2007. *Human rights and Sexual Orientation in International Law*.

²⁰ *Ibid.*

²¹ The material on the *International Covenant on Economic, Social and Cultural Rights*, at www.unhcr.ch, includes "sexual orientation" both in the "Introduction" (dealing with the interpretation of article 2, paragraph 2), and in General Comment 14 on health (paragraph 18).

²² Page 26, Section E, , the Right to Life and Sexual Orientation: Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir. 1999. Doc No. E/CN.4/1999/39

²³ P 22, paras 122-124 of the Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Abid Hussain. Mission to Argentina. 2002. E/Cn.4/2002/75/Add.1

²⁴ P 37, paras 172-174 of the Report of the Special Representative of the Secretary General, Hina Jilani. Mission to Colombia. 2002. E/CN.4/2002/106/Add.2

²⁵ Page 11, Report of the Special Rapporteur on Torture, Sir Nigel Rodley. 2002. E/CN.4/2002/76

include the right of all persons to express their sexual orientation, with due regard for the well-being and rights of others, without fear of persecution, denial of liberty or social interference.²⁶

These decisions by international human rights experts have had a critical impact on law-making at the national level. In Fiji, for example, the judgment of the High Court of Fiji that decriminalized homosexuality relied on Article 17 of the ICCPR, and also took into consideration some judgments of the Human Rights Committee on the basis that “the right to privacy [is] so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity. Criminalising private consensual adult sex acts against the course of nature and sexual intimacy between consenting adult males is not a proportionate or necessary limitation”.²⁷

In India in July 2009, the Supreme Court handed down a judgment supporting the petition filed by the Naz Foundation, India, an NGO working to raise awareness on HIV/AIDS and the Lawyers’ Collective asking for Section 377 of the Indian Penal Code to be read down. The judgment stated: ‘Section 377 IPC insofar as it criminalizes consensual sexual acts of adults in private violates Article 21, 14 and 15 of the Constitution.’²⁸ This has represented a victory that could be replicated in other countries, including in South Asia, where similar criminalization prevails under the Penal Code imposed on this region during the British colonial period.

In 2006, a distinguished group of international human rights experts met in Yogyakarta, Indonesia and outlined what we now know as the Yogyakarta Principles: a universal guide to the applicability of twenty-nine principles already well established in international human rights law to the rights of persons of non-normative sexualities.²⁹ This initiative was prompted by what the Principles describe as ‘violence, harassment, discrimination, exclusion, stigmatization and prejudice...that undermine the integrity and dignity of those subjected to these abuses and that may weaken their sense of self-worth and belonging to their community, and lead many to conceal or suppress their identity and to live lives of fear and invisibility’. In December 2006, a significant achievement for affirming the rights of persons of non-normative sexual practices and behavior was reached at the UN with the granting of consultative status to organizations representing the concerns of these communities. ILGA-Europe, which had consultative status with the European Union (EU), and two other LGBT NGOs, gained consultative status in an ECOSOC vote. In 2007, two additional organizations were accredited, one from Canada and another from Sweden.³⁰

²⁶ Pages 32, 38, 54 of the Report of the Special Rapporteur on the Right of Everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. 2004. E/CN.4/2004/49

²⁷ Baudh, Sumit. 2008. *Human Rights and the Criminalization of consensual same sexual acts in the Commonwealth, South and Southeast Asia*: Working Paper. New Delhi. South and Southeast Resource Centre on Sexuality

²⁸ Naz Foundation website: <http://www.nazindia.org/>

²⁹ www.yogyakartaprinciples.org

³⁰ <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/449.html>

On December 18, 2008, 66 member states of the UN General Assembly signed a statement that declared “the principle of non-discrimination requires that human rights apply equally to every human being regardless of sexual orientation or gender identity”. They stated their deep concerns regarding “violations of human rights and fundamental freedoms based on sexual orientation or gender identity”, and stated that “violence, harassment, discrimination, exclusion, stigmatization and prejudice are directed against persons in all countries in the world because of sexual orientation or gender identity”. The statement condemned killings, torture, arbitrary arrest, and “deprivation of economic, social and cultural rights, including the right to health” and urged all nations to “promote and protect human rights of all persons, regardless of sexual orientation and gender identity”, and to end all criminal penalties against people because of their sexual orientation or gender identity.³¹ Of the countries in the Asia-Pacific region, Australia, Japan, Nepal, New Zealand and Timor-Leste signed on to this statement.³² While the statement has no legal status, it serves as an affirmation of the growing consensus around the world that the protection of rights of people who experience discrimination and violence on the basis of their sexual orientation and/or gender identity is an integral part of global human rights discourse.

In 2011, United Nations Human Rights Council passed a resolution supporting the equal rights of individuals regardless of their sexual orientation and/or gender identity and expressed concern at the violence and discrimination on the basis of sexual orientation and gender identity.³³ The resolution requested the Office of the High Commissioner for Human Rights to conduct a study on discriminatory laws and policies and violence against individuals on the basis of their sexual orientation and gender identity.

International human rights law says that discrimination on the basis of sex and race cannot be justified on grounds of tradition, custom or religion. The same principle logically applies to sexual orientation and gender identity. However, there are many societies in the world that justify discrimination, criminalization and penalization of non-normative communities. Many of the countries in the Asia-Pacific region fall into this category. Finding culturally sensitive and appropriate ways in which to advance the agenda of ‘ALL human rights for ALL’ remains therefore a critical challenge to realizing human development in the future.

4. Social and cultural realities

A key factor that emerges in any investigation of sexual orientation and gender identity is that there is a rich diversity of sexual practices and behaviour in every society. This is borne out by historical records which show that many diverse forms of sexual behaviour and practice existed among indigenous cultures and communities. For example, the diversity of gender identities is borne out through the ways in which the role of the ‘hijra’ in the life of the community throughout the South Asian sub-continent is defined in historical record and by traditional practice, as is the role of the ‘tom boy’ in Southeast Asia. In her Preface to the book *Same Sex Love in India* authored by her and Saleem Kidwai, Ruth Vanita

³¹ <http://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>

³² *Ibid.*

³³ Human Rights Council, A/HRC/17/L.9/Rev.1, (2011).

points to the fact that the *Kamasutra* catalogues ‘sexual interactions between men and between women in the same sections, thus treating them as having much in common’ and adds ‘In a whole genre of late-Medieval Urdu poetry written by men, we encounter depiction of sexual relationships between women’.³⁴ The work of Evelyn Blackwood, Saskia Wieringa and others have explored issues of sexuality, gender identity and culture in a range of Asia-Pacific societies including Indonesia, Malaysia and India, and seeks to expand theories of sexuality beyond the cultural problematics of the West. It also engages in ethnographic explorations of diverse practices and expressions of same-sex love and desire in the Asia-Pacific region.³⁵

These practices were constantly subject to change and transformation due to internal processes of social evolution as well as by processes of colonization. In general, processes of modernization led to the validation of certain forms of social and sexual behavior, creating the norm of the modern family as being heterosexual and nuclear in form. Along with this came legal frameworks that penalized non-normative behavior and legitimised marriage and monogamy.

A report released in 2008 by Human Rights Watch points out that all British colonies inherited laws that criminalized sodomy building on Section 377 of the Indian Penal Code of 1860.³⁶ In Asia and the Pacific, these countries are Bangladesh, Bhutan, Brunei, India, Kiribati, Malaysia, Maldives, Marshall Islands, Myanmar, Nauru, Pakistan, Papua New Guinea, Singapore, Solomon Islands, Sri Lanka, Tonga, Tuvalu, and Samoa.³⁷ Australia, Fiji, Hong Kong, China (SAR), and New Zealand also inherited the same British law, but have abolished it since.³⁸ In the Asia-Pacific region, the dynamic relationship between modernity and tradition has led to a situation in which recognition of diverse practices that are sanctioned by religion, culture and tradition have led to the creation of diverse legal frameworks that co-exist and that, for example, legitimize customary marriages and polygamy in certain communities. It is in this context that the rich and varied experiences of the region in terms of sexuality and gender identity need to be discussed and understood. Often, however, the promotion of static understandings of culture and tradition lead to discrimination against women and other socially marginalized communities and reaffirm hierarchies of power based on economic and political strength that is most often controlled by men. This resistance to change comprises a major challenge to those who seek to transform social and political relationships into more equitable ones, and also obstruct attempts to reform laws and policies that seek to instill equilibrium into social relations.

Sex workers, or people who engage in commercial or transactional sex, are a category of persons who fall within the broader ambit of sexual rights, and who confront discrimination

³⁴ Vanita, Ruth and Kidwai, Saleem: *Same-Sex Love in India*: St Martins Press, Basingstoke, UK; 2000

³⁵ See for example, Blackwood and Wieringa eds. *Female Desires: Same-Sex relations and Transgender practices across Cultures*: Columbia University Press, New York; 1999

³⁶ *This Alien Legacy: The Origins of Sodomy Laws in British Colonialism*: Human Rights Watch, NY; December 2008

³⁷ Godwin, John. 2010. *Enabling Environments for Effective HIV Responses: A leadership challenge for the Commonwealth*, Commonwealth HIV/AIDS Action Group & the HIV/AIDS Alliance.

³⁸ *Ibid.*

and violence because of their challenge to the normative in terms of sexual practice. While there are different attitudes towards sex work in different countries in the Asia-Pacific region, the criminalization of ‘prostitution’ was also a part of the colonial legal tradition that ended up in the statute books of many colonies. The strength of patriarchal domination was borne out by the fact that most of these laws criminalized the person who sold sex, as well as the person who profited from the sale, while the one who bought it was not sanctioned. Struggles for the de-criminalization of sex work and for ending the victimization of sex workers have accompanied the struggles for the ending of discrimination and violence against people on the basis of their sexual orientation and gender identity in many countries. Sex work and laws that govern it have also come under intense scrutiny in this era of HIV/AIDS. In 2008, the independent Commission on AIDS in Asia called for the decriminalization of sex work in countries where the laws still criminalizes this behavior, arguing that this would increase their access to prevention and care services.³⁹ However, the UN is yet to take a firm stand on decriminalization of sex work. The recently developed UNAIDS guidance note on HIV and Sex Work does not discuss possible legal policy positions on sex work and leaves this matter to individual member states, some of which have decriminalized sex work as one policy option.⁴⁰

In the case of Viet Nam, for example, studies show that female sex workers receive special attention not only for the sake of HIV/AIDS prevention, but also as a group that could threaten social stability.⁴¹ Various policy documents have been produced for the purposes of prevention and control of commercial sex, including the national strategy for prevention and control of prostitution (2001–2005) and the 2003 Ordinance on preventing and combating prostitution. Although the Ordinance sanctioned gives penalties for the (overwhelmingly) male customers, including fines and notifying their employers, implementation has fallen short. One of the reasons for hesitancy in enforcing the law on male customers — including growing numbers of government cadres — has been the concern that the news could damage their families. On the other hand severe penalties, ranging from administrative detention to forced re-education, have been enforced against female sex workers.⁴² Current debates on criminalization, including from within the sex worker community, pose the dilemma that criminalization of sex work, whether of client or provider or both, tends to drive sex work underground and thereby renders sex workers, their clients and other sexual partners more vulnerable to violence, abuse and ill health.

In many countries in the Asia-Pacific region today, there are communities of people who espouse non-normative sexualities who occupy a particular niche in society. In many indigenous languages there are terms that describe the transitory and transient nature of sexuality and gender identity in more expressive ways than ‘trans’ gender. The concept of the

³⁹ Report of the Commission on AIDS in Asia: Redefining AIDS In Asia: crafting an effective response, 2008; page 9.

⁴⁰ UNAIDS Guidance note on HIV and Sex Work, 2009

⁴¹ From Family Planning to HIV/AIDS in Vietnam: Shifting Priorities, Remaining Gaps: Le Minh Giang and Nguyen Thi Mai Huong in *SexPolitics: reports from the Front Lines*: eds. Richard Parker, Rosalind Petchesky and Robert Sember; p 301

⁴² *Ibid.*

'ardhnari' (half woman-half man) in classical Indian culture, the traditional role of the 'hijra' as someone who bestows blessings and/or curses at times of marriage and childbirth in all South Asian communities and the diverse terms for trans persons in the many languages of the region are but a few examples.⁴³ In Indonesia, the term 'waria' is traditionally used to describe the trans community,⁴⁴ while in the Maori communities of New Zealand, the term 'whakawahine' incorporated the idea of the feminine man.⁴⁵ In the Pacific region, female social roles defined by the term 'faafafine' in Samoa and by the term 'fakaleiti' in Tonga were traditionally used to identify certain types of men.⁴⁶

Nivedita Menon, in her pioneering work on sexuality and rights in the South Asian region, has pointed out that expressions of non-normative sexuality and desire, far from being 'western' imports, have much older histories, referring to this phenomenon as the 'historical erasure of homo-eroticism and naturalization of heterosexuality'.⁴⁷ As described earlier, this erasure is a part of the silencing that enables denial of the existence of non-normative sexualities in our societies.

5. Normative legal frameworks

The decades from 1990 to 2010 will undoubtedly go down in history as being the period in which normative frameworks around the globe began to pay serious attention to issues of discrimination and violence against people on the basis of their sexual orientation and gender identity. The South African Constitution became the first in the world to explicitly declare that sexual orientation would not be the basis of discrimination, with Ecuador becoming the second state to do so in 2008.⁴⁸ Current debates on the new Constitution of Nepal point to that nation becoming the first in the Asia-Pacific region to insert this inclusive clause in its text.⁴⁹

However, there are many obstacles yet to be overcome. At present, 86 Member States of the United Nations criminalize sex between consenting adults of the same gender, while seven states have death penalties for homosexual relations between consenting adults.⁵⁰ Many laws define non-heteronormative practices as being 'abnormal', 'against nature' and 'indecent' and many policies and social practices continue to exclude and marginalize persons on the basis of their sexual orientation and gender identity.

In the 21st century, out of the 44 countries in the Asia-Pacific region that are member states of the UN, all have a discriminatory policy or law that criminalizes sexual behaviour that is not

⁴³ Reddy, Gayatri. *With Respect to Sex: negotiating Hijra Identity in South India*, (2005).

⁴⁴ Kortschak, Irfan. Defining Waria in www.insideindonesia.org

⁴⁵ Website of New Zealand Human Rights Commission. www.hrc.co.nz

⁴⁶ Some of the other terms used for the transgender communities in South and Southeast Asia can be accessed at: http://tarshi.net/asiarsrc/plspk/2005_1/did_u_know.asp.

⁴⁷ Menon, Nivedita, 'Outing Heteronormativity: Nation, Citizen, Feminist Disruptions' in *Sexualities*, ed. Nivedita Menon: Kali for Women and Women Unlimited, Delhi: 2007

⁴⁸ Article 11 (2), *Constitution of the Republic of Ecuador*, (2008).

⁴⁹ http://www.ccd.org.np/new/constitution_in_progresss/concept_paper_fundamental_rights_directive_principles.ENG.pdf

⁵⁰ Ottosson, Daniel: *State sponsored Homophobia: a World Survey of Laws prohibiting Same Sex Activity between Consenting Adults: International Lesbian and Gay Association (ILGA): 2008*

considered to be mainstream, or normative, by those who have the power to make laws and policies.⁵¹ These build on existing structures of discrimination and inequality based on class, race, ethnicity and other differences to create communities of people who are marginalized from society and who face many disadvantages and obstacles in enjoying their full human rights as human beings and as citizens. At the same time, due to these obstacles and the discrimination, stigma, prejudice and violence faced by these communities, there is a growing and vibrant community of gays and lesbians, transgender and intersex, sex workers and single women who are challenging their exclusion from society.

A key challenge to laws and policies that criminalize homosexuality has been the approach taken by groups working on the prevention of HIV/AIDS and on the elimination of discrimination and violence against people living with HIV/AIDS. In November 2008, UNAIDS Director Peter Piot went on record as saying, "Homophobia - in all its forms - is one of the top five barriers to ending this epidemic, worldwide. If communities, NGOs, governments and international organizations do not respect and promote the rights of all people with diverse sexuality, we will not end AIDS".⁵² His argument was that countries that have non-discrimination laws against men who have sex with men, injecting drug users and sex workers have achieved higher rates of coverage of HIV prevention efforts. More recently, the independent Commission on AIDS in Asia urged governments across the region to revise laws that criminalise men who have sex with men, arguing that this would be an essential component in creating an enabling environment to address barriers to prevention, treatment and care of HIV.⁵³

6. Regional Overview

Out of the 44 countries in the Asia-Pacific region, this study set out to look at the status of non-normative sexual behaviors and practices in at least 12. However, the lack of information presented a major challenge.

6.1 Regional Realities

Among the countries chosen were India and China, because they represent two economic giants in the region, yet have vastly different political and social responses to issues of sexual orientation and gender identity. Thailand was selected because it has been traditionally flexible in terms of its response to diverse sexual practices, for example with the traditional acceptance of *tomboys* and *katoeys* (feminine men). Cambodia and Timor-Leste are emerging democracies in the region. In Cambodia, growing concerns regarding the sexual exploitation of children has led to a clampdown on all forms of 'deviant' sexualities. Also more recently, in Cambodia, a new anti-trafficking law was enacted in early 2008, which was interpreted to equate sex work with trafficking. In Timor-Leste, there is a process of creating many new laws and policies that must strike a balance between the religious faith of the majority of Timorese people, Roman Catholicism, and the desire to adhere to international

⁵¹ <http://ilga.org/>

⁵² UN AIDS: Geneva: Nov 27, 2008

⁵³ Commission on AIDS in Asia, *Redefining AIDS in Asia: crafting an effective response*, 2008, p. 187.

norms and standards. Indonesia, Malaysia and Bangladesh are countries where the tensions between women's rights and religion/culture are intense and resolved in diverse ways. Fiji has a vibrant women's rights movement supported in the Pacific which has also touched on issues relating to reproductive rights and sexual rights.

This study looks at existing laws that reflect the levels of sensitivity and willingness of the state to deal with issues relating to sexuality, such as laws on sex work, homosexuality, sodomy etc. as juxtaposed with constitutional guarantees and other legal guarantees of equality and non-discrimination.

In addition to the legal frameworks that may contribute to persistent and systemic discrimination against people with non-heteronormative sexual behavior and practices, were the policy frameworks that could marginalize such individuals and groups, when for example, it came to issues of access to public services such as health and education. Thus, failure of education services to be sensitive to incidents of bullying of 'effeminate' boys in school contributes to early drop out from schools of adolescents who are not conforming to the norm; this means they have a lower level of education that in turn has an impact on their employment potential. In the same way, the failure of health policy to be sensitive to non-normative sexualities leads to major problems for transgender and intersexed persons when they require hospitalization.

The study also probes into the factors that contribute to the lack of access and control over sustainable incomes and assets by non-heteronormative persons. The existing discourse on the inter-sectionality of discrimination and oppression enables us to understand the full complexity of discrimination and oppression experienced by those who are non-heteronormative on the basis of their sexual orientation or gender identity since it allows for consideration of the impact of other factors such as race, class, ethnicity, religion, ability, on the manifestation of discrimination and oppression.

The study also reviews the situation of persons of non-normative sexualities when confronting systems of law enforcement and justice, including community-based systems of justice. Sodomy laws effectively criminalize homosexuality in many of the countries in the region, and even though numbers of actual prosecution under these laws is very low, they provide justification for harassment and intimidation of these communities by law enforcement officers. The social stigma and practice of ostracism against these communities render them even more vulnerable to abuse and ill treatment. There are many instances of police brutality as well as attacks by members of their own families and communities that are confronted by members of groups discriminated against on the basis of their sexual orientation and gender identity.⁵⁴

The silence about the existence of people of non-normative sexualities in the media and their absence from the public arena perpetuates prejudice and discrimination against people on the basis of their sexual orientation and gender identity. Sri Lankan groups working for an end to discrimination against people from non-normative communities have documented reports

⁵⁴ See for example the report of the People's Union for Civil Liberties (Karnataka) India

from the media in which prejudicial and derogatory remarks against lesbians have generated some public debate. A Letter to the Editor published by the English daily *The Island*, went so far as to advocate the rape of lesbians by a team of convicted rapists. When the group that had proposed organizing a conference of lesbians filed a complaint against the newspaper with the Press Council of Sri Lanka, the Council in its turn condemned lesbianism as “sadistic and salacious.”⁵⁵ From India, there were two cases in which people elected to public office lost their seats because of challenges on the basis of their ‘indeterminate’ sex⁵⁶ while a popular woman athlete from South India had to surrender her silver medal at the Asia Games in Doha in 2006 because of testing that pointed to ambiguities as to her sex.⁵⁷

These silences are maintained in the public arena through the absence of any reference to these communities in public documents. National household surveys, for example, in all the countries of the region do not include consideration of the situation of members of non-normative sexualities even when the impact of other forms of diversity such as ethnicity, caste, religion and so on is well recognized in data gathering structures. This is the case, for example, when one looks at surveys regarding household poverty or distribution of resources. This is also the case in surveys conducted by international agencies. It is only in the arena of HIV/AIDS prevention that one finds some references being made to men who have sex with men and to sex workers.

There is also the reality of gendered differences within the communities that face discrimination on the basis of their sexual orientation and gender identity and in terms of responses to the needs and concerns of these communities that is shaped by the overall framework of male domination and patriarchy that prevails in all societies in the Asia-Pacific region. Thus the situation of female-to-male transgender is different from the situation of a male-to-female transgender. The situation of lesbians is different to that of gays. Gay men and male-to-female trans persons enjoy access to public space and social interaction in ways that are often not accessible and open to lesbians and female-to-male trans-persons.

In all countries, there is a tension between denial of the existence of non-normative sexualities and acceptance. In South Asia, there are two culturally visible and publicly institutionalized non-normative gender/sexual subcultures. One of these is known as the *Hijra*,⁵⁸ a community of ‘males’ mostly from lower classes who desire ‘macho’ males and often identify as ‘female’ or ‘non-man’. The second subculture is of ‘effeminate’ males who self-identify as *Kothi*. In Thailand, the *katoey* or ‘tomboy’ is an accepted part of mainstream society. In addition, in many societies of the Asia-Pacific region, marriage is an obligatory

⁵⁵ The Status of Lesbians, Bisexual Women and Transgendered Persons in Sri Lanka; NGO Shadow Report to the Committee on the Elimination of All Forms of Discrimination Against Women; Women’s Support Group, Sri Lanka January 2011

⁵⁶ In one case, Aasha Devi who won the elections for the post of Mayor of Gorakhpur in 2000 as a woman, was later disqualified due to a petition that claimed she was a man; she was later reinstated: see theviewspaper.net/the-fate-of-eunuchs-in-politics

⁵⁷ Indian silver medalist female runner at Asian Games fails gender test: International Herald Tribune: Dec 18 2006

⁵⁸ For a detailed analysis of the Hijra and Kothi and the rise of LGBT see Hossain, Adnan (fc) 2008 ‘socio-political review of LGBT Issues in Bangladesh’ in Greenwood Encyclopedia of LGBT Issues Worldwide. Greenwood Publisher, USA.

social institution, and many people with non-normative sexualities conform to social and family pressure and enter the institution of heterosexual marriage. This reality has led to the evolution of the category of ‘men who have sex with men’ (MSM) as distinct from homosexual men, being a category that encapsulates men who live within the bounds of heterosexual and monogamous marriage and engage in sex with other men as a regular part of their life.

In every country, there are reports of violence against people because of their sexual orientation and gender identity. *Hijra*, *Kothi* and other ‘effeminate’ males are often vulnerable to violations of their rights including abduction, arbitrary arrests, detention, beatings and gang rape by law enforcement agencies as well as by community policing. There are also extensive reports of physical and psychological molestation of ‘effeminate’ males in academic institutions and workplaces. In Bangladesh, most *Hijra* and *Kothi*-identified persons who attended schools cited bullying as one of the preeminent reasons for dropout from state sponsored primary schools. Many are reported to have turned suicidal and experienced acute psychological trauma. Left with no options, many turn to prostitution and drugs.⁵⁹

Transgender and intersexed persons confront especially difficult situations. There is no legal stance on transsexual surgery in most of the Asia-Pacific. Singapore being the exception and the site of much of the gender transformative surgery that takes place in the region.⁶⁰ Healthcare systems are also not sensitive to the needs of these specific communities and children born as intersex are known to be subjected to non-consensual “corrective surgeries” by doctors, most commonly at birth, with potentially long-term damage to their sexual and reproductive health and well-being.

The lack of appropriate sexuality education within the school system in most countries is also a factor that leads to ignorance and prejudice, especially against persons on non-normative sexualities. A survey conducted by the Family Planning Association of Sri Lanka in 1986-87 revealed that sexual myths and taboos--not solid information about human physiology and development--dominate young people's knowledge of reproductive health. Sex education is not a part of the curriculum in Sri Lankan schools, although 90% of the youth surveyed believed such courses should be offered.⁶¹

Lack of awareness regarding sexual orientation and gender identity among members of the medical and healthcare professions also lead to many problems for persons of non-normative sexualities. For example, human rights groups in Bangladesh have pointed out that although the psychiatric establishment in Bangladesh follows DSM (the Diagnostic and Statistical Manual) of the American Psychiatric Association, which has removed homosexuality from the list of diseases in 1973, many psychiatrists and psychologists in Bangladesh still consider homosexuality as an ‘aberrant’ condition and provide curative therapies often to the

⁵⁹ See Hossain, Adnan, 2005. *Hijras: An examination into the context of marginalization*. Unpublished MS thesis. North South University, Dhaka, Bangladesh.

⁶⁰ http://infopedia.nl.sg/articles/SIP_1828_2011-08-04.html

⁶¹ www.ncbi.nlm.nih.gov/pubmed/12281988

detriment of the mental wellbeing of the ‘patients’ who are persons of non-normative sexual orientation and gender identity. Awareness about marginal sexualities and gender identities among the medical professionals in government mental hospitals is very low, and many doctors consider homosexuality as a ‘psychotic’ disorder.⁶²

In addition, the idea that non-normative individuals can desire to reproduce and to have children is still a very contentious issue in the region. Although the principle of ‘surrogate’ motherhood is now protected by law in India, for example, the impact on same-sex couples is still unclear. The difficulties faced by lesbians who want to have access to reproductive health care, or by same-sex couples who want to adopt a child require careful and consistent attention if discrimination in this area is to be challenged.⁶³

6.2 Resistance in the Region

There is increasingly compelling evidence that shows that there is growing resistance to the marginalization of non-normative communities coming from within those communities as well as from the broader human rights communities in most countries in the Asia-Pacific region. There are many groups and networks working on sexual rights and sexuality related issues in general, within a broad human rights framework, as well as groups working with specific communities and on specific areas of rights of people of non-normative sexual orientation and gender identity. While the movements for sexual rights are quite advanced in countries like India and Thailand, even in countries that are newly emerging onto the global arena of debate on sexual rights, such as Mongolia and Lao People’s Democratic Republic, there are nascent groups that espouse the politics of sexual rights activism and are creating spaces for debate and discussion.⁶⁴

Global networks such as the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC) have regular and systematic links with groups in the region through their Asia-Pacific programmes.⁶⁵ The ILGA International Conference in 2007 was held in Thailand, for instance.⁶⁶ Regional networks on women’s rights have been at the forefront in creating the space for women of diverse sexual orientations and gender identities to raise their concerns. Other networks on human rights, on migration, and indigenous people’s issues have been slower to come on board.

HIV/AIDS prevention campaigns in many countries in the region have focused on the need to be more open to issues of discrimination and violence against people because of their sexual orientation and gender identity on the basis that criminalization of same-sex sexual activity, for example, leads to greater vulnerability to transmission of the virus. A report issued by the

⁶² Email correspondence by Hossain, Adnan with clinical psychologists practicing as interns in government mental hospitals on 11/8/08, quoted in Bangladesh UPR report, 2009

⁶³ *The Assisted Reproductive Technologies (Regulations) Bill 2010*

⁶⁴ For example, the Mongolian LGBT Rights Centre, and

⁶⁵ <http://asia.ilga.org/>; <http://www.iglhrc.org/cgi-bin/iowa/region/6.html>

⁶⁶ http://asia.ilga.org/3rd_ilga_asia_regional_conference_chiang_mai_thailand_24_27_january_2008/about_the_conference

Independent Commission on AIDS in Asia in March 2008 points out that 50 per cent of new HIV infections in the region would be among men having sex with men.⁶⁷

On Human Rights Day 2010, the United Nations Secretary-General Ban Ki Moon appealed for decriminalization and non-discrimination stating that: “Together, we seek the repeal of laws that criminalize homosexuality, that permit discrimination on the basis of sexual orientation or gender identity, that encourage violence. When individuals are attacked, abused or imprisoned because of their sexual orientation, we must speak out. We cannot stand by. We cannot be silent.”⁶⁸

Difficulties faced by Indian and global health programmes working for the prevention and eradication of HIV/AIDS in India have led to several senior UN officials calling on the Indian government to de-criminalise homosexuality. In the face of increased rates of infection among men who have sex with men in India, in November 2008, Jeffrey O’Malley, Director of the UNDP programme on HIV/AIDS called on the Indian government to reform its laws.⁶⁹ Within the same month, Peter Piot, Executive Director of UNAIDS repeated this call, reported as saying that an “outdated Indian law that criminalises sex between men is a major obstacle to curb the rising reach of HIV/AIDS in India”.⁷⁰ Union Health Minister of India Dr. Anbumani Ramadoss had earlier attempted to have this section of the Penal Code repealed, but following severe criticism from other Parliamentarians, the debate has now shifted to a reform of the existing law.⁷¹

Activity by civil society organizations and non-governmental organizations working in the field of HIV/AIDS and sexual health has created new arenas for discussion on sexuality related issues. A range of different groups and networks working on HIV/AIDS have been brought together under the aegis of the regularly held International Conferences on AIDS in the Asia Pacific (ICAAP). This space has enabled critical alliance building initiatives including the Asia Pacific Network on Sex Workers (APNSW) and the Asia Pacific Coalition on Male Sexual Health (APCOM), and has allowed for these issues to become a part of the public domain. For example, in the Community Forum at the 8th ICAAP held in Colombo in 2007, there was active representation by LGBTI groups from the Asia-Pacific region.⁷²

In South and Southeast Asia, celebrations around the International Day against Homophobia (IDAHO) in May 2008 saw more organizations participating for the first time, were simultaneously unfurled in Jakarta, Surabaya, Yogyakarta and Makassar in Indonesia.⁷³ In each city, there were a range of activities including art exhibitions, film screenings and discussions. In June 2008, Delhi saw its first Queer Pride demonstration and in Bangladesh,

⁶⁷ Commission on AIDS in Asia, *Redefining AIDS in Asia: crafting an effective response*, (2008)

⁶⁸ <http://www.un.org/apps/news/story.asp?NewsID=37026>

⁶⁹ <http://www.unaids.org/en/Resources/PressCentre/Featurestories/2009/July/20090707MSMLaw/>

⁷⁰ News Track India website, 17.11.2008

⁷¹ See Times of India, August 11, 2008

⁷³ International Day Against Homophobia Committee, *Annual Report 2008-2009*, p. 39.

the International Day against Homophobia was celebrated for the first time in a public lounge under the banner of a gay-identified group.⁷⁴

Information available also shows that the arena of research teaching and training is one in which the issues of sexuality may be opened up for greater public debate. In China, the Institute of Sexuality and Gender at Renmin University is actively promoting research on a range of topics including the ‘underground’ sex industry, and sexuality among youth and students.⁷⁵ Pan Suiming and Huang Yingying examine the ways in which rapid transformation of the social, cultural and economic environment in China has created new spaces and arenas for the exploration of sexuality. According to their research, traditional social systems have changed under the impetus provided by modernisation and the opening up of China to the outside world. As traditional family systems have altered and residency patterns have changed, social controls have loosened up and the potential for diverse forms of personal interaction emerge.⁷⁶ In April 2009, a conference on ‘Contested innocence: sexual agency in public and private space’ was organized in Hanoi, Vietnam by the International Association for the study of Sexuality, Culture and Society.⁷⁷ The South and Southeast Asia Resource Centre on Sexuality based in Delhi, India and working in China, Viet Nam and Indonesia, has played a critical role in supporting these initiatives.⁷⁸

At the national level too, there are many training activities that focus on issues of sexuality and on promoting the rights and equality of persons of non-normative sexual practices and behavior not only with non-heteronormative communities but with social justice and human rights activists in general. CREA and TARSHI (Talking About Reproductive and Sexual Health Issues), two groups working on sexuality and rights from a base in New Delhi, organized the first Sexuality And Rights Institute for Indian social movement activists in India in 2002. The Institute was a regular annual feature for eight consecutive years.⁷⁹ The South and Southeast Asia Resource Centre on Sexuality, for which TARSHI is the Secretariat, also organized Regional Institutes on Sexuality, Society and Culture in India, China, Indonesia and Vietnam over a period of 5 years from 2004 to 2009, seeking to promote conceptual understanding on sexuality and rights for participants from South and Southeast Asia.⁸⁰ In Sri Lanka, the Women’s Support Group organizes regular meetings and awareness raising discussions with women’s groups and other groups working on rights-based approaches to particular sectors of women through its Rainbow Coalition.⁸¹

Such initiatives create better public acceptance of the issues being discussed and also allow for media coverage of the groups and their work. At times, this has had a negative impact, as in the case of Sri Lanka where newspapers attacked a proposal to hold a lesbian conference,

⁷⁴ <http://www.time.com/time/world/article/0,8599,1818912,00.html>

⁷⁵ See website of Renmin University; www.english.ruc.edu.cn,

⁷⁶ A research paper titled ‘The Rise of Rights and Pleasure: Towards a Diversity of Sexuality and Gender’ by Pan Suiming and Huang Yingying

⁷⁷ <http://iasscs.com/VII-Conference>

⁷⁸ www.tarshi.net

⁷⁹ www.sexualityinstitute.org

⁸⁰ <http://www.tarshi.net/asiasrc/rinst/rinstitute.asp>

⁸¹ www.wgsrilanka.org

or in the case of Indian groups in Lucknow who had an AIDS awareness activity labeled as a promotion of homosexuality.⁸² But in general, the higher levels of visibility, especially in academic and official circles, is useful and necessary in an environment in which gaining acceptance for the principle of equal rights for all remains a challenge.

The issue of discrimination and violence against persons of non-normative sexualities has taken a huge step forward in Nepal with the election of Sunil Pant of the Blue Diamond Society as a member of the Constituent Assembly tasked with the drafting of the new Nepali Constitution. The Blue Diamond Society has been actively engaged in promoting the rights of persons of non-normative sexualities since its inception in 2001 and has offices in 20 districts of the country.⁸³

6.3 Legal frameworks in the region

Research shows quite clearly that Section 377 of the Indian Penal Code, created in 1860 by the British colonial regime, titled *Unnatural Offences* is replicated in every country that was a part of the British Empire, directly or as protectorates.⁸⁴

This law penalises ‘carnal intercourse against the order of nature: *Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*’ The Explanation that accompanies the text of the law defines the act of ‘carnal intercourse’ further: *Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*⁸⁵

In India, and in many other Commonwealth countries where this law prevails, judgments under this law show that *only* vaginal penetration by a penis is considered to constitute the ‘natural’ act of sexual intercourse. Thus, although the law has been loosely dubbed the ‘Sodomy’ laws, in fact it allows for the criminalization not only of anal intercourse – even between consenting married adults - but also of oral sex.⁸⁶

The broad nature of the definition has meant that the law could be used for harassment of anyone suspected by law enforcement officers to be of a non-normative sexuality and leads to arbitrary arrest and detention, torture and other human rights abuses. A newspaper report from Bangladesh in February 2008 for example stated that the law enforcement agencies in Bangladesh interfere with and harass men who have sex with men using Section 377 of the Penal Code.⁸⁷

⁸² Patralekha Chatterjee, ‘AIDS in India: police powers and public health’, *The Lancet*, Vol 367 Issue 9513, (2006), pp. 805-806.

⁸³ <http://www.bds.org.np/aboutus.html>

⁸⁴ Baudh, Sumit . 2008. *Human Rights and the Criminalization of consensual same sexual acts in the Commonwealth, South and Southeast Asia*: Working Paper. New Delhi. The South and Southeast Resource Centre on Sexuality

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Change mindset to ensure rights of MSM people in society: The Daily Star, 28 Feb 2008

A study of Indian judgments under Section 377 shows that in the period between 1860, when the law was first created, and 2000, there have been only 46 cases brought to trial so far under this law.⁸⁸ Of these, the majority dealt with child sexual abuse by men. Even in those cases that do involve consenting adults, there is no judicial discussion over the element of consent. Some men in these cases are called “habitual sodomites/catamites” but the judgments are emphatic that prior sexual history, or the fact that the accused male wore female attire is of no relevance.⁸⁹ Gender and sexuality have thus found little open articulation in the Indian judicial discourse.

In China, homosexual practices were “depathologised” only in 2001, to some extent as a result of pressure from American psychiatric and psychological associations which referred to the WHO’s International Classification of Diseases, and also probably because Chinese society was displaying more tolerance towards homosexuals who were also becoming more visible.⁹⁰ Greater openness to homosexuality in China can be attributed to the spread of HIV/AIDS. In 2004, activists from China at a regional consultation reported that ‘Because of the advent of HIV/AIDS, the government has begun to reach out to homosexuals in an attempt to stop the spread of the virus. Television programmes have incorporated discussion of gay and lesbian issues, the Ministry of Health has supported hotlines and information campaigns set up by NGOs, and the government has allowed the formation of new gay groups. AIDS has also helped bring gay and lesbian individuals together into a more cohesive movement, with many using the internet to expand and mobilise for better treatment’⁹¹. The first survey of gay men conducted by the government, took place as a collaborative effort between the national-level and Heilongjiang provincial Centers for Disease Control and Prevention in 2004⁹². In January 2006, long-awaited HIV/AIDS regulations were announced, bringing greater national attention to the plight of those who have contracted HIV, while also codifying anti-stigma and discrimination rules, including the rights and obligations of HIV-positive persons and their families⁹³.

In Indonesia, although same-sex relations are not prohibited according to the national Penal Code, there are a range of state laws which legitimize harassment of persons because of their

⁸⁸ Ramasubban, Radhika: ‘Culture, Politics and Discourses on Sexuality: A History of Resistance to the Anti-Sodomy Law in India’ in *Sex Politics: Reports from the front Lines* eds. Richard Parker, Rosalind Petchesky and Robert Sember

⁸⁹ *Ibid.*

⁹⁰ Micollier, Evelyne: *Collective mobilisation and transnational solidarity to combat Aids in China: local dynamics and visibility of groups sexual and social minorities*: Face to face. Perspectives on Health 7 (www.ssd.ubordeaux2.fr/faf), pp.30-38: 2005

⁹¹ Sexuality Matters: Report of a Regional Consultation on Sexuality in South and Southeast Asia, in Bali Indonesia: TARSHI; Delhi; Sept 2004

⁹² Gill, Bates, Huang, Yangzhong, Lu, Xiaoqing: Demography of HIV/AIDS in China: A report of the Task Force on HIV/AIDS of the Centre for Strategic and International Studies; July 2007; P vii of Abstract

⁹³ “China’s Gay Men Know Little about AIDS,” *China Daily*, December 15, 2004; quoted in above report.

sexual orientation and/or gender identity and expression.⁹⁴ In their report to the UN Human Rights Council during the Universal Periodic review (UPR) for Indonesia, groups representing lesbian, gay and trans communities in Indonesia submitted a report in which they pointed to cases of harassment and arbitrary arrest and detention of gay and trans persons under laws pertaining to the prohibition of prostitution and the commission of ‘sinful acts’.⁹⁵ The report specifically pointed to Regulation No. 2/2004 in the city of Palembang in South Sumatra, which dealt with the ‘Eradication of Prostitution’ and also criminalized same-sex relationships.⁹⁶ In 2009 the government of the state of Aceh in Indonesia passed a law that defined heavy penalties for homosexuality⁹⁷. The National law to deal with such relations is Article 292 of the Indonesian Penal Code, which prohibits sexual acts between persons of the same sex, if committed with a person under the legal age.⁹⁸

In countries in the region where *Sharia* law prevails, the situation of persons of non-normative sexual practices and behavior is particularly difficult because of the diverse ways in which laws and policies dictated by religion and the many interpretations of religious texts are imposed on communities.⁹⁹ In Bangladesh, for example, in the mid 1990s, ‘Fatwas’ (or religious sanctions) were imposed on girls’ education while in 2008 in Malaysia, where ‘sex against the order of nature’ is a crime, the National Fatwa Council issued a fatwa against women who were described as ‘tomboys’, aimed at women with short hair, and wearing male clothes.¹⁰⁰

The constitution of the People’s Republic of Bangladesh categorically guarantees a citizen’s fundamental rights and civil liberties, with different articles in Part III of the constitution prohibiting discrimination on the grounds of religion, race, sex and caste.¹⁰¹ However, Section 377 of the Penal Code criminalizes sexuality against the ‘order of nature’.¹⁰² Although there has not been any case tried or filed under this section in the history of Bangladesh, it is used by the law enforcing agencies to harass *Hijra*, *Kothi* and other communities engaging in non-normative sexual practices.

In Malaysia, Articles 377a and 377b of the Penal Code allow for discrimination against people of non-normative sexualities.¹⁰³ The Coalition of Malaysian NGOs (COMANGO) in their submission to the Universal Periodic Review of the Malaysian government by the UN Human Rights Council reported that the violation of freedom of expression through the regulation of sexuality is most often used against women and the transgendered.¹⁰⁴ Muslim

⁹⁴ Godwin, John. 2010. *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action*, UNDP, APCOM, pp. 68-70.

⁹⁵ International Gay and Lesbian Human Rights Commission, *Human Rights Abuses Against Sexual Minorities in Indonesia*, (2007), <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/124-1.pdf>

⁹⁶ *Ibid.*

⁹⁷ <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/975.html>

⁹⁸ *The Penal Code of Indonesia*

⁹⁹ Laws and legal frameworks based on the Koran

¹⁰⁰ www.asianews.it; 24.1.2008

¹⁰¹ *The Constitution of the People’s Republic of Bangladesh*, http://bdlaws.minlaw.gov.bd/pdf_part.php?id=367

¹⁰² Section 377, *The Penal Code*, 1860.

¹⁰³ Sections 377A and 377B, *The Criminal Procedure Code*, 1936

¹⁰⁴ http://www.wao.org.my/backup_v1_21.7.2011/Documents/COMANGO-Final.pdf

entertainers have borne the brunt of religious authorities' regulation of 'immoral activities' in pubs, bars and other entertainment outlets, while singers have been arrested, charged under *Sharia* offences and harassed. In 2006, the State Government of Kelantan imposed a ban on *Mak Yong* performances despite UNESCO certifying these as a world cultural heritage. No action was taken to challenge this ban by the Federal Government.¹⁰⁵

In Cambodia, the suppression of the rights of sex workers in the name of anti-trafficking efforts and its implications for HIV prevention creates yet another area of concern. The police started cracking down on brothels and arresting and harassing sex workers after the enactment of a new anti-trafficking law in 2008, which was interpreted to equate sex work with trafficking.¹⁰⁶ As a consequence, sex workers have been driven underground and HIV prevention efforts targeted at them have been disrupted. This has resulted in a 31 per cent reduction on condom distribution, a reduction in the number of entertainment sector workers accessing sexual health services and a 15 per cent reduction on the number of referrals to STI clinics.¹⁰⁷

6.4 Challenges to legal frameworks

Over the years, different states in the Asia-Pacific region have confronted diverse challenges to discriminatory laws, usually initiated by civil society groups. Many discriminatory laws have been repealed and reformed over the past years, especially those that had perpetuated discrimination against women, *dalits*, tribal and indigenous peoples. However, challenges to laws that discriminate against people on the grounds of sexual orientation and gender identity have been slower to gain ground. At times, the results of efforts at law reform have in fact reaffirmed the divide between normative and non-normative sexual practice and behavior.

In Sri Lanka, the text of the law criminalizing 'unnatural' sexual behavior was applicable only to men since it referred to 'He' throughout. However, a move to institute gender neutrality in the law in 1995, as a part of broad reforms of the Penal Code, resulted in the word being changed from 'he' to 'person'. Although this was done throughout the Penal Code, with regard to the Section defining 'unnatural' sexual acts, it made it applicable to women as well. Consensual sexual activity between adults of the same sex remains a crime under Article 365 and 365A of the 1883 Penal Code.¹⁰⁸

In October 2007, the chamber in Singapore passed a bill legalising oral and anal sex for the first time, but only between heterosexual couples. Thus, Section 377A in Singapore remains a valid law that criminalizes same sex behavior. Under the legislation, a man caught committing an act of "gross indecency" with another man could still be jailed for up to two

¹⁰⁵ <http://blogs.straitstimes.com/2010/07/13/malay-makyong-is-dying/>

¹⁰⁶ Human Rights Watch, *Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia*, (2010).

¹⁰⁷ Lisle, Tony. Presentation to the National Assembly/Senste Consultation: The Anti-Trafficking Campaign and Law: Public Health Impacts on Sex Workers and Women in the Entertainment Sector. 4 September 2008.

quoted in Roberts, J, *Preventing Spousal Transmission of HIV in Cambodia: A Rapid Assessment and Recommendations for Action*, UNIFEM East Asia and South East Asia Regional Office, (2009).

¹⁰⁸ Articles 365 and 365A, *Penal Code 1883*

years.¹⁰⁹ In Hong Kong, China (SAR), the age of consent for heterosexual people was 16 years whereas it was 21 for homosexual people. This law was however overturned by the Hong Kong Court of Appeals.¹¹⁰

However, there have been other cases in the region in which the laws have been reformed, and challenged, on the basis of the principles of equality and non-discrimination against persons of non-normative sexual practices and behavior.

In 2005 the High Court of Fiji struck down the Fijian sodomy laws as unconstitutional in so much as they applied to private and consensual sexual acts among persons who are 18 years and older. In the judgment in a case in which two adult men were charged under Sections 175 and 177 of the Fijian Penal Code, the judges acknowledged that the origin of these laws could be traced to England.¹¹¹ The judgment also stated that “while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law.”¹¹² The present case concerns the most intimate aspect of private life. Accordingly, it brings to bear the issue as to whether the State or community can interfere with an individual’s right to privacy. The judgment notes that “right to privacy [is] so important in an open and democratic society that the morals argument cannot be allowed to trump the Constitutional invalidity. Criminalizing private consensual adult sex acts against the course of nature and sexual intimacy between consenting adult males is not a proportionate or necessary limitation”.¹¹³

‘What the Constitution requires is that the law acknowledges difference, affirms dignity and allows equal respect to every citizen as they are’, the ruling said. “The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law. A country so founded will put sexual expression in private relationships into its proper perspective and allow citizens to define their own good moral sensibilities leaving the law to its duties of keeping sexual expression in check by protecting the vulnerable and penalizing the predator”.¹¹⁴

¹⁰⁹ Section 377A, *Penal Code*

¹¹⁰ *Secretary for Justice v. Leung TC William Roy (CACV317A/2005)*,

http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=54227&AH=&QS=&FN=&currpage

¹¹¹ *Section 175. Any person who – (a) has carnal knowledge of any person against the order of nature; or (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, is guilty of a felony, and is liable to imprisonment for fourteen years with or without corporal punishment.*

Section 177. Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a felony and is liable to imprisonment for five years, with or without corporal punishment. Source?

¹¹² *McCoskar v The State [2005] FJHC 500*, <http://www.paclii.org/fj/cases/FJHC/2005/500.html>

¹¹³ *Ibid.*

¹¹⁴ *Ibid*

In November 2008, the Nepali Courts delivered a final judgment on a writ petition filed by the Blue Diamond Society and three other Nepali organisations that called for the protection and defence of the equal rights of sexual and gender minorities.¹¹⁵ In the judgment, the Court issued directive orders to the Nepali government to ensure the right to life of these communities, to introduce laws providing equal rights to Lesbian, Gay, Bisexual, Transgender and Intersex persons (LGBTIs) and to amend laws that discriminated against them. It reiterated the diversity in physical growth, sexual orientation and gender identity in the country. Thus, according to the reasoning of the Court, equal rights, identity and expression must be ensured regardless of sex at birth. The Court also issued a directive order to form a seven-member committee including a doctor appointed by the Health Ministry, one representative each from the National Human Rights commission, the Law Ministry, the Nepal police, the Ministry of Population and Environment and one advocate as a representative from the LGBTI community, to conduct a study into legal standards on same-sex marriage.¹¹⁶

In India, although section 377 stands to decriminalize same-sex relationships between consenting adults, the matter remains in Court due to challenges to the petition by a number of right wing and extremist groups. In response to these challenges to the law and to social practice, laws in Nepal and India have been changed to enable the inclusion of a third category of gender into the national registration/identification card.

In the era of HIV/AIDS, the public health argument is being increasingly used as a basis for repealing the anti-sodomy law. Studies have indicated that HIV prevalence rates among gay men is significantly higher than among the heterosexual population.¹¹⁷ In India, 7.3% of men who have sex with men are reported to be HIV positive as opposed to less than one per cent of the general population.¹¹⁸ The standpoint of the argument is that the criminalization of homosexuality makes it increasingly difficult for HIV prevention activities to be carried out effectively and in a sustainable way. Criminalization in effect makes it impossible for gay people to come out publicly while health practitioners and epidemiologists find it extremely hard to study the behaviors of these groups and design effective programmes as almost all same sex activity is clandestine. In 2006, The Sexual Diversity Coalition, a coalition of activists working for sexual rights in Thailand, called for the inclusion of equality for persons of non-normative sexual practices and behavior within the new Constitution. The National Human Rights Commission supported this call.¹¹⁹ Although the process of creating the new Constitution saw this proposal being defeated, for the first time the topic became the matter of serious public debate. In 2007, the Coalition lobbied the Constitutional Drafting Committee to specify sexual orientation and gender identity as grounds for protection against

¹¹⁵ www.cnngo.com/life/fighting for gay rights in nepal

¹¹⁶ <http://www.hindustantimes.com/News-Feed/nepal/Nepal-SC-approves-same-sex-marriage/Article1-352722.aspx>

¹¹⁷ John Godwin, (2010), *op. cit.*, pp. 16-17.

¹¹⁸ HIV and AIDS Data Hub for Asia-Pacific, <http://www.aidsdatahub.org/en/country-profiles/india>

¹¹⁹ Godwin, John. 2010. *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action*, UNDP, APCOM, p. 85.

discrimination. These terms are now spelled out in the Letter of Intention to be included under the category of sexual discrimination in the Constitution.¹²⁰

In the Philippines, efforts to get an anti-discrimination law framed in the form of an equal protection clause in the Bill of Rights to prevent any kind of harassment, violence and discrimination towards non-heteronormative people is underway.¹²¹ In September 2008, Jennifer Cagandahan, who was classified as female at birth went to the Supreme Court of the Philippines to claim that she had 'naturally occurring male characteristics' and was granted leave by the Court to change her name and gender entries in her birth certificate. The trial court likewise ordered that Cagandahan's school records, voter's registry, baptismal certificate and other pertinent records amended to conform with the corrected data. The Court, in its decision, pointed out that in the 20th century, medicine adopted the term "intersexuality" to apply to human beings who cannot be classified as either male or female, or a state of a gonochoristic species whose sex chromosomes, genitalia and secondary sex characteristics are determined to be neither exclusively male or female. "In deciding this case, we consider the compassionate calls for recognition of various degrees of intersex as variations which should not be subject to outright denial", the Court ruled. "Ultimately, we are of the view that where the person is biologically or naturally intersex, the determining factor in his gender classification would be what the individual, like respondent, having reached the age of majority, with good reason thinks of his/her sex", the Court said in its 13-page decision penned by Senior Associate Justice Leonardo Quisumbing.¹²²

The Equal Opportunities Act of 2008 in Mauritius provides an innovative direction to the Asia-Pacific region. The Act in Article 2 defines the grounds of discrimination including 'any other status' and then defines that to include sexual orientation. Article 5 of the Act goes on to prohibit discrimination on the basis of the status of an aggrieved person.¹²³

6.5 Reflecting on the experiences: Lessons learned

As the preceding cases demonstrate, throughout the Asia-Pacific region there is a growing consensus that democratization calls for the recognition of the rights of all human beings to equality and non-discrimination as affirmed in international human rights laws. In addition, there is recognition of the richness of human diversity and of the valuable social, political and economic roles that can be played by persons of diverse sexual orientations and gender identities. These are crucial factors when considering the challenges of realizing the full potential of each and every human being in human development.

At the same time, experience shows that in spite of the silencing, the policing, the marginalizing, communities of people who express love and desire through non-normative sexual practices and behaviour are claiming their space in all the countries of the Asia-Pacific region through a range of activities. Some are challenging existing legal and policy frameworks that exclude and marginalize people on the basis of their sexual orientation and

¹²⁰ <http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/552.html>

¹²¹ http://tarshi.net/asiasrc/plspk/2006_4/campaign.asp

¹²² www.aprainbow.org, website of the Asia-Pacific Network of Lesbians, Gays, Bisexuals, Transgenders, Intersex and Queer People (APRainbow)

¹²³ <http://ipsnews.net/africa/nota.asp?idnews=45599>

gender identity, for example in India and Thailand. Other groups are organizing and mobilizing in public spaces in order to break existing silences and to challenge the denial of their existence. In Nepal, the case of MP Sunil Pant is an extraordinary one, as is the case of Ms. Southeyy in Cambodia. The growing strength of national and regional networks and alliances that bring together diverse groups working for equality and non-discrimination to include the issues of people discriminated against on the basis of sexual orientation and gender identity on the same agenda as all other forms of discrimination contributes to the growing visibility and acceptance of these communities at every level.

Organizing around HIV/AIDS prevention and awareness programmes seems to provide a collective space in which to organize for the recognition of sexual diversity, not only because of the availability of funding but because of the legitimacy gained from association with agencies such as UNAIDS that actively work for the rights of men who have sex with men.

Among the UN agencies, UNIFEM (now UNWOMEN), the UN agency with the mandate for the promotion of women's rights, has begun to integrate and include issues of discrimination and violence against women because of their sexual orientation and gender identity using the principles of equality and non-discrimination enshrined in CEDAW. In Viet Nam, a study on Gender and the Law sponsored by UNIFEM highlights the need for guarantees of equality to include non-discrimination on the basis of sex and gender as well as on the basis of other grounds of discrimination including sexual orientation.¹²⁴ A report prepared by UNIFEM for legal reform in the Solomon Islands proposes the inclusion of sexual orientation in the anti-discrimination clause in the Constitution.¹²⁵

However, it must not be forgotten that even within the communities that have common and shared experiences of marginalization and discrimination, there are levels of misunderstanding and chauvinism that create obstacles and barriers to the best possible collective activism. Lesbians, bisexual women and female-to-male trans persons perhaps face the greatest discrimination since they confront the multiple oppression that comes from their being people of non-normative sexualities. They are subject to all the forms of oppression and discrimination experienced by women in general and are also subject to discrimination and violence on the basis of their sexual orientation and gender identity. In addition, lesbian, bisexual women and male-to-female trans persons experience marginalization within the media, and in terms of access to resources.

In addition, we must take into consideration the fact that there is resistance to the recognition and legitimisation of non-normative sexualities by governments and large segments of society in the Asia-Pacific region as well. Challenging the legal and policy barriers as well as the prejudices and misconceptions that fuel the resistances remains a major undertaking in this arena, calling for cultural sensitivity and for greater outreach to strengthen consensus and understanding.

¹²⁴ Chiongson, Rea. 2009. CEDAW and the Law: A Gendered and Rights-Based review of Vietnamese Legal Documents through the Lens of CEDAW. UNIFEM

¹²⁵ Protecting Women's Human Rights in Solomon Islands Law. 2008. UNIFEM

The successes clearly point to the need to build political and social alliances around the issues of discrimination and violence against persons on the basis of their sexual orientation and gender identity. Most of the political and legal successes referred to above have emerged in the context of the broadest possible processes of alliance building. Linking all forms of discrimination has been critical in these processes, drawing in women, members of minority communities and marginalized social groups to reflect on the collective experience of discrimination and violence to develop a collective voice for equality. While there is no doubt that it is courageous individuals who have often come forward to break the silences and denials of centuries, their individual bravery would not have achieved the results they did without broad social and political support that develops out of broad and collective organizing and mobilizing. The case of MP Sunil Pant in Nepal is one such case.

There is also a need to engage in a more expanded public discourse that can challenge the many misconceptions and prejudices against people who express non-normative sexual behavior and practices. Improving the work that groups working to combat discrimination and violence against persons on the basis of their sexual orientation and gender identity calls for enhancing work with the media and with public education. It calls for greater outreach to media groups that espouse the principles of the freedom of expression, opinion and information as well as for greater collaboration with groups of professional educators and trainers. Developing creative and innovative methodologies for public outreach work remains a major challenge in this area. In particular, developing arguments that will help convince decision-makers, including senior policy makers that focus on the economic and political disadvantages of continuing to ignore the realities of non-normative sexualities. Focusing on the very real economic and social contribution of such communities to national economies and to strengthening social cohesion must form a substantial part of any campaign to win over public attitudes.

An area in which least progress has been made is in that of the greater economic equity and security for persons of non-normative sexualities. Many examples from around the region point to the fact that there is little legal protection for persons of non-normative sexual orientation and gender identity in terms of employment. Therefore, challenging dismissal from employment, or failure to recruit, because of sexual orientation or gender identity is extremely difficult. In several cases, we have seen that recruitment into the military is one area in which there have been some challenges. In Thailand, a decision to restrict recruitment to teacher training colleges to deliberately exclude homosexuals was challenged but this is still the exception rather than the rule in the Asia-Pacific region.¹²⁶

In addition, transgender persons face many challenges when it comes to issues of affirming their legal identities, which can have a direct and indirect impact on their capacity to hold a job and engage in economically productive activities. Although in some countries, like India, transgender persons have won the right to an identity that clearly states their specific 'trans' identity, in most of the region, trans persons continue to be boxed into the dual identity of

¹²⁶ Jackson, Peter (1999). *Lady Boys, Tom Boys, Rent Boys: Male and Female Homosexualities in Contemporary Thailand*. Haworth Press. pp. xv-xiv. ISBN 0789006561.

male and female.¹²⁷ In Muslim communities, male-to-female trans persons may confront challenges to their inheritance rights since there may be disputes regarding their male/female status, which has a critical impact on the determining their share of the inheritance. Kartini in Malaysia has cited this as a reason for her deciding NOT to reveal her trans identity to her community.¹²⁸

Trying to push public discourse without first having built up a substantial support base can often lead to reversals in this area. The experiences of the groups from Thailand that are engaged in the campaign to include non-discrimination on the basis of sexual orientation and gender identity in their new Constitution is a good example. Despite winning the support of the Thai Human Rights Commission and of regional and international groups working against discrimination on the basis of sexual orientation and gender identity, the Thai groups could not convince a sufficient number of Parliamentarians and politicians of the usefulness of this addition to the Constitution. They continue their campaign, having absorbed the lessons of their first rebuttal.

7. Challenges and potential solutions for the future

The continued absence of persons who are openly able to espouse a call for protection of rights of persons of non-normative sexual orientations and gender identities, including of persons who themselves are of a non-normative sexuality, from decision-making arenas remains a major challenge for the future. Prejudice and the traditional practice of social exclusion of anyone who challenges the norms set out by a particular society and/or community play a key role in the perpetuation of this form of discrimination and marginalization. There is a need to address the dual arenas of legal and institutional structures that are discriminatory along with social and customary practices that support and facilitate the existence of discriminatory laws and policies. While there can be no question of the need to develop strategies that address both arenas, it is clear that legal protection of the rights of persons of non-normative sexual practices is an imperative factor that can enable the full participation of these individuals and communities in the economic, social and political life of their societies.

Once the principle of equality is established in law, it becomes easier to create spaces for the inclusion of persons of non-normative sexual orientation and gender identity in the public arena, through the media and through social programming. There may also be lessons to be learned from the strategies adopted by the women's movements in the region to secure enhanced representation of women in decision-making structures. The most successful initiatives have been at the local and community levels, with millions of women becoming members of the *panchayat* system in India and thousands becoming members of Ward Committees in Nepal in the 1990s.¹²⁹ This proved that it is easier to capture the attention of

¹²⁷ John Godwin, *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action*, UNDP, APCOM, (2010)

¹²⁸ http://tarshi.net/asiasrc/plspk/2008_1/interview.asp.

¹²⁹ UNDP Human Development Report 2010

the public in the face of historical marginalization and discrimination when one appeals to communities directly.

The process of transformation for full acceptance of persons of non-normative sexual practices and behavior into the national mainstream and for the recognition of their rights to equality and non-discrimination at every level in the social, political and economic life of a society is undoubtedly a long and arduous one.

In the legal arena there must be steps taken to repeal discriminatory laws and to guarantee the equality including equal opportunities and equal access to every sphere and arena of life to persons of non-normative sexualities. Judicial and other official procedures and structures that allow for discrimination on the basis of sexual orientation and gender identity must also be subject to reform and amendment. This will bring the countries of the Asia-Pacific region into consonance with the global community where the principle of non-discrimination against persons on the basis of sexual orientation and gender identity has been well established in law, and in practice.

At every level in the social arena, in the community as well as in the family, and at the national level, there must be a series of initiatives that can present the non-normative person as a full and equal member of society and of the community. Prejudice and stigma and persons of non-normative sexual orientation and gender identity should be confronted and combated on the understanding that their exclusion diminishes the society and the community as a whole and leaves us unable to access and enjoy the richness that their full participation will bring to every aspect of our lives.

Concrete strategies that seek to enhance access to opportunities and resources for persons and communities of persons of non-normative sexual orientation and gender identity should be promoted. These can include funding accompanied by strategies that affirm inclusion of diversity as a fundamental principle of democratic society through legal and other institutional mechanisms and structures that pave the way for sustained and long-term changes in attitudes and perceptions in this regard.

If one were to distil five messages for the promotion of equality of persons of non-normative sexual orientation and gender identity and enhance their capacity to enjoy and contribute to human development, one would have to identify the following:

- Guarantee and affirm the legal protection of people on the basis of non-discrimination on grounds of sexual orientation and gender identity, through the reiteration of existing guarantees for equality in Constitutions and other laws; bringing the country in line with international norms and standards as well as establishing respect for human rights and human dignity as a principle if national laws and law-making processes can be critical results of such a step.
- Create and strengthen legal standards that guarantee equal rights in employment and access to economic resources including land and property for persons of non-normative sexualities.

- Create legal frameworks and promote statistical and data gathering frameworks that take into consideration the existence of trans persons including protection of their rights to engage in processes of physical transformation and their rights to an identity that is not confined to the male/female paradigm. Issuing identity cards that allow for a person to specify a ‘third gender’ as an option could be a vital first step in this direction.
- Support creative and innovative public education and media strategies that would promote a positive image of persons of non-normative sexual orientations and gender identities and also present social analysis of an inclusive world. These could focus on the fact that all forms of discrimination create social inequalities and dissonances that have long-term impacts on human development.
- Amend and reform existing directives and policies on sexual health to ensure that appropriate and effective consideration is paid to the specific needs of persons of non-normative sexual orientation and gender identity when seeking help from medical and health professionals and institutions.

In June 2011, responding to a spate of homophobic rapes in South Africa, the UN High Commissioner for Human Rights Ms Navaneethan Pillay said: “Recognizing that lesbians, gays and bisexuals, transgender and intersex persons are vulnerable to violence and discrimination is an important step towards realizing the basic rights of all people. I understand that, in some countries, homosexuality is something that runs against the grain of majority sexual mores. As High Commissioner, I must stay true to universal standards of human rights and human dignity, which are overriding. And let there be no confusion: in speaking up for the rights of those who are lesbian, gay, bisexual, transgender or intersex, we are not calling for the recognition of new rights or trying to extend human rights into new territory. We are simply making the point that existing international law protects everyone from violence and discrimination, including on grounds of their sexuality or gender identity. States are responsible for ensuring that everyone can enjoy the same rights—no matter who they are, where they come from, what they look like, or whom they love’.¹³⁰ Ensuring that this becomes a reality is the challenge posed by her words to the world.

¹³⁰ www.ohchr.org

Case Studies

China

In China, the dramatic changes in attitudes and behavior toward sex, in conjunction with growing consumerism and relaxed state control, have contributed to the resurgence of the commercial sex industry¹³¹. Although the phenomenon of male sex workers is common, because of the intense stigma against male-to-male sex and the illegal status of prostitution in China, male brothels are much more discrete than the venues hosting female sex workers. In August 2010 reports surfaced about a widespread crackdown on sex workers in different parts of the country and a protest by female sex workers in Wuhan in central Hubei province. Shanghai Leyi, an organization supporting male sex workers, also went on record commenting on the gravity of the crackdown and its repercussions on the community they work with.¹³²

Cambodia

In 2008, Sou Southevy, a 70-year-old transgendered sex worker activist from Cambodia became the first person to lodge a civil complaint with the ECCC- "the Khmer Rouge Tribunal" - citing instances of gender based crimes during the Pol Pot regime which came under scrutiny for human rights abuses in the course of this Tribunal. In doing so she not only challenged the silence in her society about matters relating to sexuality but for the first time pushed an investigation into allegations of mass killings of transgendered persons during the conflict in Cambodia¹³³.

Southevy is a transgendered person (male-to-female) who was imprisoned several times in re-education camps as well as in prisons during the Khmer Rouge regime by Khmer Rouge soldiers and cadres. She was punished for having committed "moral offences" and for "behaving as a woman", by being forced to cut her long hair and to wear men's clothing. She was threatened with death if she refused to marry a woman, and the Khmer Rouge ordered the performance of sexual intercourse as part of the marital obligation. Her experience during the Khmer Rouge period was a major factor in her decision to become an activist for the rights of transgenders, gays, lesbians and sex workers. Southevy is now the Director of a local NGO, the Cambodian Network of Men and Women's Development (CNMWD), that fights for the rights of sex workers and sexual minorities.

¹³¹ Gill, Bates, Huang, Yangzhong, Lu, Xiaoqing: Demography of HIV/AIDS in China: A report of the Task Force on HIV/AIDS of the Centre for Strategic and International Studies; July 2007; p 14

¹³² www.guardian.co.uk/world/2010/august O3

¹³³ www.ipsnews.net/news: Khmer Rouge trials bare sexual abuse: Phnom Penh September 8 2008

BIBLIOGRAPHY

Books

Blackwood, Evelyn and Wieringa, Saskia. 1999. *Female Desires: Same Sex Relations and Transgender Practices across Cultures*. New York. Columbia University Press

Dāsa, Harihara & Mahāpātra, Sasmitā 1996. *The Indian renaissance and Raja Rammohan Roy*. Aavishkar Publishers' Distributors

Godwin, John. 2010. *Enabling Environments for Effective HIV Responses: A leadership challenge for the Commonwealth*, Commonwealth HIV/AIDS Action Group & the HIV/AIDS Alliance.

Godwin, John. 2010. *Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: an agenda for action*, UNDP, APCOM

Human Rights Watch. 2008. *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism*. New York: Human Rights Watch

Jackson, Peter. 1999. *Lady Boys, Tom Boys, Rent Boys: Male and Female Homosexualities in Contemporary Thailand*. Haworth Press. pp. xv-xiv. ISBN 0789006561.

Menon, Nivedita. Ed. 2007. *Sexualities*. New Delhi: Women Unlimited

Menon, Nivedita. 2007. 'Outing Heteronormativity: Nation, Citizen, Feminist Disruptions' in *Sexualities*, ed. Nivedita Menon. New Delhi: Women Unlimited

Ottosson, Daniel. 2008. *State sponsored Homophobia: a World Survey of Laws prohibiting Same Sex Activity between Consenting Adults*: New York: International Lesbian and Gay Association (ILGA)

Reddy, Gayatri. 2005. *With Respect to Sex: negotiating Hijra Identity in South India*. University of Chicago Press, Chicago.

Sharma, Arvind, 1998. *Sati: historical and phenomenological essays*. Motilal Banarsidass Press, Delhi.

Thadani, Giti. 1996. *Sakhiyani: Lesbian Desire in Ancient and Modern India*. Cassell Academic Publishers

Vanita, Ruth and Kidwai Saleem. 2002. *Same Sex Love in India: Readings from Literature and History*. London. Palgrave MacMillan

Vanita Ruth. 2001. *Queering India: Same Sex Love and Eroticism in Indian Culture and Society*. New York. Routledge.

E-books

Parker, Richard, Petchesky, Rosalind and Sember, Robert. 2007. *SexPolitics: Reports from the Front Lines*. New York: Sexuality Policy Watch

Articles and Papers

Boellstoff, Tom. 2007. 'Queer Studies in the House of Anthropology' in Annual Review of Anthropology. University of California at Davis. Available online at www.anthro.annualreviews.org

Baudh, Sumit. 2008. *Human Rights and the Criminalization of consensual same sexual acts in the Commonwealth, South and Southeast Asia*: Working Paper. New Delhi. South and Southeast Resource Centre on Sexuality

Chiengson, Rea. 2009. CEDAW and the Law: A Gendered and Rights-Based review of Vietnamese Legal Documents through the Lens of CEDAW. UNIFEM

Hossain, Adnan, 2005. Unpublished MS thesis. *Hijras: An examination into the context of marginalization*. Dhaka: North South University

Miller, Alice. 2008. unpublished paper: 'Unresolved Issues – Human Rights and Sexuality'. Switzerland: The International Council on Human Rights Policy

Patralekha Chatterjee, 'AIDS in India: police powers and public health', *The Lancet*, Vol 367 Issue 9513, (2006), pp. 805-806

Sanders, Douglas. 2007. *Human rights and Sexual Orientation in International Law*.

Sanders, Douglas. 2008. *The Role of the Yogyakarta Principles*.

Schilt, Kristen & Wiswall, Matthew (2008) "Before and After: Gender Transitions, Human Capital and Workplace Experiences," *The B.E. Journal of Economic Analysis & Policy*: Vol. 8: Iss. 1 (Contributions), Article 39. Available at: <http://www.bepress.com/bejeap/vol8/iss1/art39>

Documents

The Yogyakarta Principles: The Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: view at www.yogyakartaprinciples.org

UN Documents

Human Development Report: 2000

Human Development Report: 2005

Human Development Report 2010

Human Rights, Sexual Orientation and Gender Identity. Human Rights Council, A/HRC/17/L.9/Rev.1, (2011)

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Asma Jahangir. 1999. Doc No. E/CN.4/1999/39

Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Abid Hussain. 2002. E/Cn.4/2002/75/Add.1

Report of the Special Rapporteur on the Right of Everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. 2004. E/CN.4/2004/49 E/CN.4/2002/106/Add.2

Report of the Special Rapporteur on Torture, Sir Nigel Rodley. 2002. E/CN.4/2002/76

Report of the Special Representative of the Secretary General, Hina Jilani. 2002.

Reports

Annual Report 2008-2009 International Day Against Homophobia Committee

Human Rights Abuses Against Sexual Minorities in Indonesia, International Gay and Lesbian Human Rights Commission, 2007

Off the Streets: Arbitrary Detention and Other Abuses against Sex Workers in Cambodia, Human Rights Watch, 2010

Protecting Women's Human Rights in Solomon Islands Law. 2008. UNIFEM

Report of the Commission on AIDS in Asia: Redefining AIDS in Asia crafting an effective response, 2008

UNAIDS Guidance note on HIV and Sex Work, 2009

Laws

The Assisted Reproductive Technologies (Regulations) Act 2010

The Criminal Procedural Code 1936 (Malaysia)

The Constitution of the People's Republic of Bangladesh,

Constitution of the Republic of Ecuador

The Equal Opportunities Act 2008 (Mauritius)

The Penal Code (Singapore)

The Penal Code (Fiji)

The Penal Code 1860 (Bangladesh)

The Penal Code 1883 (Sri Lanka)

The Penal Code of Indonesia

Cases

McCoskar v The State [2005] FJHC 500 (Fiji)

Secretary for Justice v. Leung TC William Roy (CACV317A/2005) (Hong Kong)

Websites

<http://www.aidsdatahub.org/>

<http://www.bds.org.np/>

<http://www.creaworld.org>

<http://www.ccd.org.np/>

<http://www.english.ruc.edu.cn>

<http://www.guardian.co.uk/>

<http://www.hindustantimes.com/>

<http://www.hrw.org>

<http://www.ilga.org>

<http://www.iglhrc.org>

<http://www.lawyerscollective.org>

<http://www.nazindia.org/>

<http://www.newstrackindia.com/>

<http://www.ohchr.org>

<http://www.ohchr.org/english/bodies/chr/special/sexualorientation>

<http://www.sodomylaws.org>

<http://www.straitstimes.com/>

<http://www.tarshi.net>

<http://www.telegraph.co.uk/>

<http://www.thedailystar.net/>

<http://www.time.com/>

<http://www.un.org/events/humanrights/udhr60/>

<http://www.wao.org.my>

<http://www.wsgsrilanka.org>