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Human Rights Protections for Sexual Minorities in Insular Southeast Asia:

Issues and Implications for Effective HIV Prevention

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Preface

There is increasing recognition by the international community that punitive legislation, policies and regulations have a negative effect on the uptake and use of HIV prevention, treatment, care and support services.

The strategy of the Joint UN Programme on HIV/AIDS (UNAIDS) for 2011-2015 places human rights and gender equality for the HIV response as one of three strategic directions. It calls for the UNAIDS Cosponsors, including UNESCO, and the UNAIDS Secretariat to join efforts to reduce by half the number of countries worldwide with punitive laws and practices around HIV transmission, sex work, drug use or homosexuality.

In Asia and the Pacific, such laws are unfortunately all too common. According to UNAIDS, nearly 90 percent of nongovernmental sources in this region report the existence of laws that pose obstacles to effective HIV responses among those at higher risk of HIV exposure.

This desk review examines the human rights situation for sexual minorities in six countries in insular Southeast Asia, namely Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Timor-Leste. It considers domestic laws and practices, as well as the international human rights instruments and obligations that each country is signatory. It concludes with recommendations to improve the rights framework in the sub-region so that HIV prevention and health programmes can be more accessible and responsive to the needs of sexual minorities.

The review was commissioned by UNESCO and I would like to thank the HIV Prevention and Health Promotion unit staff at UNESCO Bangkok for their valuable contributions to this publication.

In the response to AIDS, policy-makers have the responsibility to take bold steps and to be prepared to ensure special protections to those who are most vulnerable and at higher risk of HIV exposure. I urge Member States in the region to review their legal and policy frameworks, and to take action to create protective and enabling legal and policy environments for an effective AIDS response.

Gwang-Jo Kim

Director

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Acknowledgments

UNESCO Bangkok's HIV Prevention and Health Promotion Unit, formerly known as the HIV Coordination, Adolescent Reproductive and School Health Unit, initiated this desk review to analyze the status of human rights protections in six countries in insular Southeast Asia, namely: Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Timor-Leste.

This review was initially conducted for input into the 2009 International Congress on AIDS in Asia and the Pacific (ICAAP) for the Insular Southeast Asia Consultation on Male to Male Transmission of HIV and was further updated at the end of 2010 following human rights developments in the sub-region and in the international arena.

UNESCO Bangkok wishes to acknowledge James Anderson, who conducted this analysis, and the University of Ottawa, Faculty of Law, for the support provided to Mr Anderson during his 2008 Summer Social Justice Fellowship.

Guidance and technical support for this review was provided by the Chief of the HIV Prevention and Health Promotion Unit, Justine Sass (present) and Jan W de Lind van Wijngaarden (former).

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Acronyms

AFP	Armed Forces of the Philippines
AICHR	ASEAN Intergovernmental Commission on Human Rights
AIDS	Acquired Immune Deficiency Syndrome
ASEAN	Association of Southeast Asian Nations
AU	African Union
BND	Brunei Dollars
CAT	Convention Against Torture
CCPR-OP1	Optional Protocol to the ICCPR
CCPR-OP2-DP	Second Optional Protocol to the ICCPR, aimed at the abolition of the death penalty
CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CEDAW-OP	Optional Protocol to the CEDAW
CPF	Central Provident Fund
CRC	Convention on the Rights of the Child
CRC-OP-AC	Optional Protocol to the CRC on the involvement of children in armed conflict
CRC-OP-SC	Optional Protocol to the CRC on the sale of children, child prostitution and child pornography
ECHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EU	European Union
HIV	Human Immunodeficiency Virus
ICCPR	International Covenant on Civil and Political Rights
ICD	International Classification of Diseases
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR	International Covenant on Economic, Social, and Cultural Rights
ICJ	International Court of Justice
IDR	Indonesia Rupiah
IGLHRC	International Gay and Lesbian Human Rights Commission
ILGA	International Lesbian and Gay Association
IO	International Organization
LGBT	Lesbian, Gay, Bisexual, and Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender, and Intersex
MDA	Media Development Authority
MSM	Men who have Sex with Men
MYR	Malaysia Ringgit
NGO	Non-governmental Organization
OAS	Organization of American States
OIC	Organization of the Islamic Conference
PHP	Philippines Peso
SGD	Singapore Dollar
STI	Sexually Transmitted Infection
UN	United Nations
UNAIDS	Joint United Nations Programme on HIV/AIDS
UNDHR	United Nations Universal Declaration of Human Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHCR	United Nations High Commission for Refugees
UNTAET	United Nations Transitional Administration for East Timor
US	United States (of America)
USD	United States Dollar

Terminology

Gender identity: 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". [1]

LGBTI: LGBTI is an abbreviation that refers to individuals self-identifying as lesbian, gay, bisexual, transsexual, transgender, transvestite, and/or intersex people. Although it is preferable to avoid acronyms when possible, LGBTI (or LGBT) has gained recognition because it emphasizes a diversity of sexuality and gender identities.

MSM: The term "men who have sex with men" (MSM) is used from a health sector-based behavioural perspective. The Joint United Nations Programme on HIV/AIDS (UNAIDS) defines MSM as "males who have sex with males, regardless of whether or not they have sex with women or have a personal or social gay or bisexual identity." This concept also includes men who self-identify as heterosexual but have sex with other men.[2]

Sexual minority: The term "sexual minority", or "sexual minorities", refers to people whose sexual orientation or practices differ from the dominant heterosexual paradigm.[3] This term encompasses sexual orientation and gender identity, including those who identify as being lesbian, gay, bisexual, transgender or intersex, or are MSM or women who have sex with women.

Sexual orientation: As defined in the Yogyakarta Principles, "Sexual orientation refers 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". [4]

Transgender: "Transgender" describes people whose innate sense of gender identity is different from the gender (female or male) assigned to them at birth. "Transgender" includes people who adopt or seek gender modification or social identities to reflect their self-identified gender.

1 International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity. 2007. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, p.6. http://www.yogyakartaprinciples.org (Accessed 5 December 2010).

2 Joint United Nations Programme on HIV/AIDS (UNAIDS). 2011. Terminology Guidelines. Geneva, UNAIDS.

3 Huamusse, L. E. F. 2006. *The Right of Sexual Minorities Under the African Human Rights System*, LL.M. dissertation, Faculty of Law, University of the Western Cape, South Africa. pp. 6-7. http://etd.uwc.ac.za/usrfiles/modules/etd/docs/etd_gen8Srv25Nme4_8722_1190370382.pdf (Accessed 5 December 2010).

4 International Panel of Experts in International Human Rights Law and on Sexual Orientation and Gender Identity, op. cit.

Executive summary

The recent Commission on AIDS in Asia Report has sounded the alarm. If HIV prevention programmes in the Asian region do not change their target groups, by 2020 three risk behaviours will account for nearly all new infections in the region: unsafe sex between men, sharing of needles, and unprotected sex in the context of sex work. Of these, unsafe sex between men will account for the majority of new infections.

To prevent HIV infection, prevention programmes must reach the groups that are most at risk. This is not currently the case in many Asian countries. The denial of the human rights of sexual minorities, through stigma and discrimination, means that sexual minorities are not being reached, which is greatly impeding HIV prevention programmes. State-sponsored homophobia, especially the criminalization of homosexual behaviour, is driving those at greatest risk of infection underground. Furthermore, criminalization of such behavior makes it nearly impossible to promote the use of condoms and lubricant, or to provide outreach, education, testing and treatment to those engaging in same-sex behaviour.

Recognizing that protecting the human rights of sexual minorities is vital for effective HIV programmes, this publication aims to provide an overview of the situation regarding protection of the rights of sexual minorities in six countries in insular[5] Southeast Asia (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Timor-Leste).

The modern international human rights movement began after the atrocities committed during World War II. Unfortunately, sexual orientation and gender identity were not initially recognized as important human rights issues. Gradually, however, one country at a time, the world began to recognize and protect human rights for sexual minorities. The first major international case was the United Nations (UN) Human Rights Committee's decision in Toonen v. Australia (1994). The Committee was asked to determine whether or not the criminalization of homosexuality in Tasmania discriminated against Mr. Toonen's right to privacy on the basis of his sexual orientation. The Committee found that Mr. Toonen was discriminated against, and that "sexual orientation" is included under "sex", one of the enumerated grounds protected from discrimination in the International Covenant on Civil and Political Rights.

In 2006, legal scholars from around the world met in Indonesia and developed the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity. The principles do not express any new rights, but rather, they state existing international human rights law, illustrate how it applies to sexual minorities, and clearly articulate the nature of a State's duty to implement their legal obligations. Since the Yogyakarta Principles were launched, many courts, human

5 "Insular" refers to islands or archipelagos.

rights groups, treaty monitoring bodies of the UN, and special rapporteurs for the UN have referred to the principles and support them.

In 2011, the United Nations Human Rights Council passed a historic resolution on human rights violations based on sexual orientation and gender identity. The resolution (A/HRC/17/L.9/Rev.1) calls on the office of the United Nations High Commissioner for Human Rights to review discriminatory laws, practices and acts of violence on the basis of individuals' sexual orientation and gender identity. The results will be presented during the 19th session of the Human Rights Council, and appropriate follow-up will be identified.

In insular Southeast Asia, protection of the human rights of sexual minorities is currently inadequate. The existence of laws criminalizing homosexuality, the lack of antidiscrimination laws for sexual minorities, and societal and cultural factors result in a situation that runs counter to effective HIV prevention programming.

This review finds that Brunei Darussalam criminalizes homosexuality, with a maximum penalty of 10 years in prison and large fines. There is no anti-discrimination protection, and freedom of expression and assembly are generally restricted, especially when the subject matter is sexual orientation. The State has not ratified any of the major international human rights treaties, leaving only customary international law to protect sexual minorities. Brunei Darussalam may not be bound by any customary international law protecting sexual minorities, however, because they have consistently voted against its development.

Indonesia has ratified all the major international human rights treaties and has domestic legislation making the rights enshrined in those treaties binding. Indonesia does not criminalize homosexuality, but the federal government has allowed certain municipal governments to adopt Sharia law. Sharia law, which applies to Muslim citizens, bans homosexuality. Transgender individuals, called waria in Indonesia, are reported to suffer serious discrimination, exposure to violence and sexual exploitation.

Malaysia criminalizes homosexuality and cross-dressing, and it is the strictest of the six countries examined in this study. The maximum penalty is 20 years in prison, with fines and lashes. Sharia law is commonly practiced in Malaysia. Freedom of speech is restricted when the subject is homosexuality. On the other hand, there is case law that supports post-operative transgender individuals to have their identification cards changed to reflect their new gender. Until affirmed by a higher court, however, lower courts are free to deny such a request. Malaysia has voted consistently against developments in international law regarding sexual orientation and gender identity. The State has not ratified the main international human rights treaties, and, like Brunei Darussalam, Malaysia has voted against resolutions to protect sexual minorities.

Regarding sexual orientation and gender identity, the Philippines is by far the most liberal

and progressive of the six nations covered under this study. Homosexuality is legal and there have been more than 15 attempts to pass anti-discrimination legislation to protect sexual minorities. However, the strong influence of the Catholic Church and particular notions of masculinity that are part of Filipino culture, are believed to have contributed to the failure of all attempts to pass proposed anti-discrimination bills. The Philippines has signed almost every international human rights treaty, but unlike Indonesia, lacks domestic legislation to give them effect.

Singapore recently amended their criminal code to legalize consensual anal and oral sex between heterosexual couples, but retained section 377A of the Penal Code which criminalizes "outrages of decency" between male homosexuals. The Prime Minister has said that they will not actively enforce this offence, but by keeping the law on the books the government seems to indirectly condone homophobia. On the other hand, Singapore is the only State in insular Southeast Asia to allow transgender individuals who have completed their sex reassignment surgery to legally marry. Singapore has yet to ratify the major international human rights treaties.

Homosexuality is legal in Timor-Leste. The early draft of their new Constitution included a clause providing protection against discrimination on the basis of sexual orientation and gender identity. When the National Assembly voted, they decided to remove that clause, however. On the other hand, the Labour Code protects against discrimination on the basis of sexual orientation, gender identity, and HIV status. Timor-Leste has signed all the major international human rights treaties and is also the only country in insular Southeast Asia to have supported the 2008 UN Joint Statement on Human Rights, Sexual Orientation and Gender Identity.

Knowing where we are today in terms of human rights for sexual minorities, and where we ought to be, can help realize human rights for sexual minorities. When the rights of sexual minorities are upheld, HIV prevention programming can become more accessible and more responsive to the sexual health needs of men who have sex with men and transgender people throughout insular Southeast Asia. To expedite this, the following changes are recommended:

1. Decriminalize homosexuality. This will reduce the harassment and stigmatization that MSM face and enable health workers to implement HIV prevention programmes targeting MSM.
2. Permit post-operative transgender people the right to change the sex recorded on their identification documents, so that they can function as full citizens.
3. Improve anti-discrimination protection for sexual minorities either through court challenges, legislation, or both.

4. Ratify all the major international human rights treaties, especially the International Covenant on Civil and Political Rights and International Covenant on Economic, Social, and Cultural Rights.
5. Strengthen the mandates of national human rights bodies, allowing them to use international human rights instruments.
6. Develop a robust and inclusive ASEAN Declaration of Human Rights, and commit to establishing an ASEAN Court of Human Rights with the mandate to enforce the Declaration.
7. Adhere to the nature of a State's duty to implement its international legal obligations as expressed in the Yogyakarta Principles.

PART 1

Part 1 - Introduction: A need for respect for human rights in HIV prevention

Ideally, health workers and community outreach groups should be able to address issues related to the transmission of HIV freely and provide the public, especially young people, with the information, skills and tools they need to protect themselves. Unfortunately, in many Asian countries these kinds of conditions are not present in HIV programmes, or efforts are only directed at heterosexuals. Many governments in the Asian region have been slow to recognize the need to target prevention programmes towards those people engaging in the three main high risk behaviours that drive Asian AIDS epidemics: unprotected male-to-male sex, sharing of needles, and unsafe sex in the context of sex work.[6] Currently, spending on HIV prevention is disproportionately directed towards preventing transmission in heterosexual relationships, in which HIV transmission is less common.

In some countries in Asia, any topic related to sexual orientation is so taboo that, for such topics, freedom of speech and freedom of assembly are restricted. Other countries go further and criminalize behaviours such as male to male sex. Both the individual who is at risk of infection and the health worker trying to implement an HIV prevention programme are hampered by such criminalization, because under such circumstances it is nearly impossible to openly discuss homosexual behaviour and HIV risk.

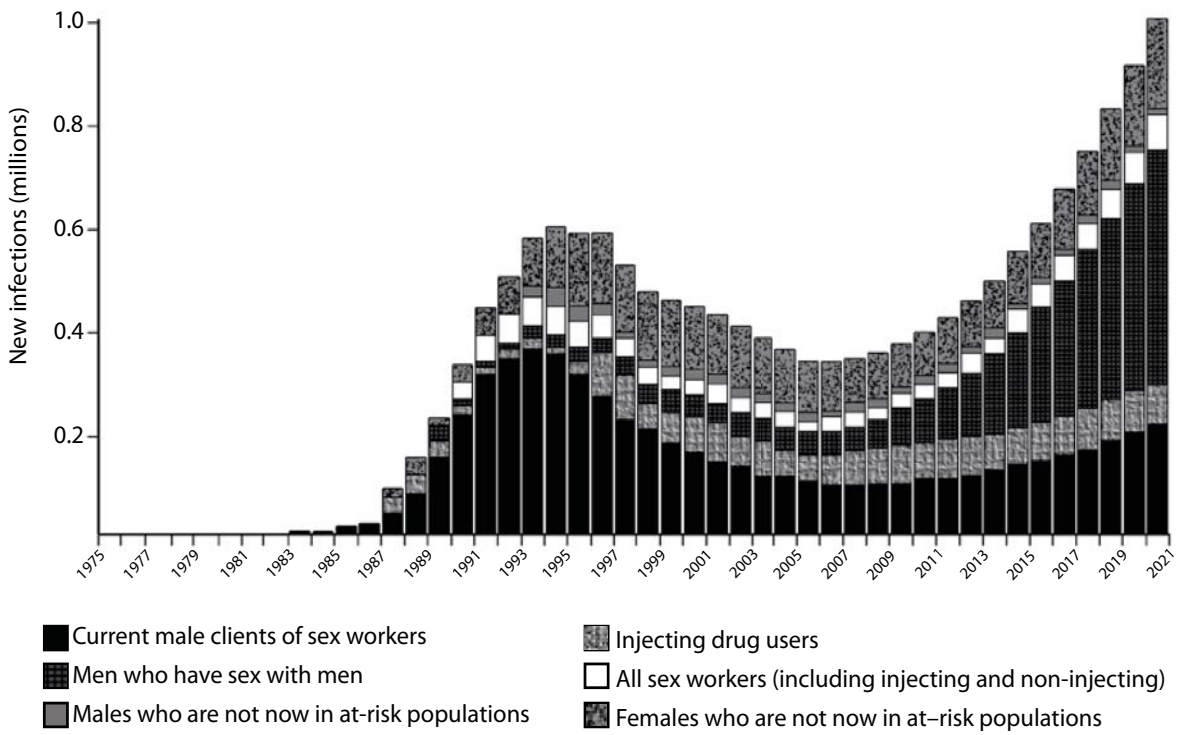
This publication examines the situation with regard to sexual minorities in six countries in insular (archipelagic) Southeast Asia: Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Timor-Leste. The first section briefly reviews the epidemiological trends of HIV in Asia, the characteristics of punitive laws on same-sex sexual activity and the consequences of these laws for HIV prevention programming. The following section examines the legal situation relating to the rights of sexual minorities in the six countries. Part 3 reviews international law relating to sexual minorities and Part 4 examines the international obligations of the six countries. Finally, in Part 5, a number of recommendations are made to the governments of the countries of insular Southeast Asia with regard to protecting their populations against HIV infection.

6 Commission on AIDS in Asia. 2008. Redefining AIDS in Asia: Crafting an Effective Response, New Delhi, Oxford University Press, p. 2.

1.1 Epidemiological trends of HIV in Asia

HIV prevention and access to treatment is becoming a paramount concern for men who have sex with men (MSM) in Asia. According to models developed by the Commission on AIDS in Asia (see Figure 1 below), MSM could account for the majority of new HIV infections by 2020 unless effective prevention strategies are implemented and scaled up.[7]

Figure 1: Projected annual new HIV infections in adults, by population group, if current practices remain unchanged



Source: Commission on AIDS in Asia. 2008.

The Commission on AIDS in Asia report indicates that, as a result of social taboos and discrimination, many MSM hide their sexual preference and many get married to women, while continuing to have sex with men[8]. The combination of social taboos, discrimination, high partner turnover rates, and the secrecy in which this all takes place provides for an environment in which HIV epidemics thrive.

Indeed, recent studies show advanced HIV epidemics among MSM in many Asian countries. For example, cross-sectional studies found that in Thailand 17.3 percent to 30.8 percent of MSM were found to be HIV infected and in Myanmar HIV prevalence in MSM ranged from about 23.5 percent to 35 percent.[9]

7 Ibid. p.57.
8 Ibid. pp. 48-49.
9 Van Griensven, F., de Lind van Wijngaarden, J. W., Baral S. and Grulich, A. 2009. "The global epidemic of HIV infection among men who have sex with men" Current Opinion in HIV and AIDS, Vol.4, pp. 300-307.

These studies also show that men are more likely to use condoms with female sex workers than with male sexual partners, even though the risk of HIV infection in anal sex is higher than in vaginal sex. Studies also suggest that male and transgender sex workers have many partners and are sometimes paid more money when they forgo condom use. In addition, the studies show that some MSM use drugs, which, as well as the risk associated with sharing needles, can lead to increased sexual risk behaviour.[10]

1.2 Punitive laws on same-sex sexual activity

Unfortunately, it is all too common to see the enactment of laws that persecute or discriminate against homosexuals and other sexual minorities. These laws can mean that sexual minorities are denied some of the rights and benefits that are normally granted to heterosexual citizens, especially when there is a religious or cultural stigma against sexual minorities. A state may also have laws that restrict freedom of speech, expression, association and assembly on the basis of one's sexual orientation or gender identity.[11]

Some states justify criminalizing homosexual behaviour as a component of their HIV prevention strategy, assuming that if the behaviour is banned, HIV will not be transmitted. This rationale has been consistently and uniformly rejected by experts around the world. For instance, in the case of Toonen v. Australia (1994), the UN Human Rights Committee stated:

> *"The Australian Government observes that statues criminalizing homosexual activity tend to impede public health programmes 'by driving underground many of the people at the risk of infection'. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus".*[12]

According to the International Lesbian and Gay Association's (ILGA) 2010 report on state-sponsored homophobia, homosexual acts are punishable by death in five countries, and are illegal, punishable by fines, lashings or imprisonment, in 76 countries in the world.[13] Although many of these countries do not systematically enforce these laws, "their mere existence reinforces a culture where a significant portion of the citizens need to hide from the rest of the population out of fear. A culture where hatred and violence are somehow justified by the state and force people into invisibility or into denying who they truly are".[14]

10 Monitoring the AIDS Pandemic Network. 2007. Male-Male Sex and HIV/AIDS in Asia, 2007 Report, MAP Network, p. 3.
11 See the Appendix for the ILGA's 2010 World Map of Persecution, Protection and Recognition.
12 Toonen v. Australia, 1994, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 s. 8.5.
13 Ottoson,D. 2010. State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults. ILGA, p.4. http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf (Accessed November 2010).
14 Ottoson, D. 2008. State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults. ILGA. p. 4. http://www.ilga.org/statehomophobia/ILGA_State_ Sponsored_Homophobia_2008.pdf (Accessed 5 December 2010).

1.3 Punitive laws on same-sex sexual activity impede HIV prevention

The criminalization of consensual homosexual behaviour, along with general societal discrimination against sexual minorities, impedes HIV prevention programmes and increases vulnerability to HIV infection.

Criminalization forces homosexual behaviour underground, and limits or denies access to public health facilities, risk reduction programmes and HIV testing. UNAIDS has stated categorically that "vulnerability to HIV infection is dramatically increased where sex between men is criminalized".[15]

It is contradictory to have a publicly funded HIV prevention programme targeting MSM while maintaining harsh penalties, including imprisonment and even death, for same-sex behaviour. How can voluntary confidential counselling and testing, public awareness campaigns or peer support groups be set up when MSM fear arrest, defamation, societal isolation, or worse? Under such circumstances new infections often go undetected and can spread rapidly, including among female partners. Therefore, "reducing discrimination of people on the basis of their sexual orientation or gender identity will improve not only their health, but also the health of the broader society".[16]

Punitive laws not only limit access of MSM to sexual health services but also inhibits the ability to effectively organize and respond to the HIV epidemic. According to Dennis Altman, in his article, "HIV, Homophobia and Human Rights",[17]

> *"In almost all of the 'developing' world – and in a few 'developed' countries – denial of the existence of homosexuality has made it very difficult for either government or community organizations to reach homosexual men effectively. There are, of course, strong parallels here with the link between HIV transmission and the use of needles for illicit drug. In both cases, many governments and donor agencies are discomforted by the need to address behaviors which are both illegal and embarrassing to admit are widespread".*

Punitive laws can even force individuals to flee their homes and seek asylum in other countries. According to the UN High Commission for Refugees (UNHCR), a state can actively persecute sexual minorities by criminalizing homosexuality, or passively persecute them by being unwilling to provide protection to them from non-state actors.[18] The UNHCR has identified many forms of persecution of sexual minorities, including exposure to physical

15 UNAIDS. 2006a. Report on the Global AIDS Epidemic, p. 112.

16 Dittrich, B. O. 2008. "Yogyakarta Principles: Applying existing human rights norms to sexual orientation and gender identity" in "AIDS 2008: Law, Ethics and Human Rights", HIV/AIDS Policy & Law Review, Vol. 13, No. 2/3, p. 93.

17 Altman, D. "HIV, Homophobia, and Human Rights", Health and Human Rights, Vol. 2, No. 4, pp. 18-19.

18 United Nations High Commission for Refugees (UNHCR), "Guidance Note of Refugee Claims Relating to Sexual Orientation and Gender Identity", 21 November 2008, p. 13. For example, a sexual minority who has been exposed to physical or sexual violence may hesitate to approach the police for protection because he or she may be regarded as an offender instead of a victim.

and sexual violence, extended periods of detention, medical abuse, threat of execution and honour killings.[19] UNHCR is also concerned that when a person of a sexual minority seeks asylum in a country where same sex relations are criminalized, such laws can influence whether asylum is granted or not.[20]

Universal access to HIV prevention programmes, treatment, care and support by 2010, as committed to by Member States in the Political Declaration on HIV/AIDS in 2006,[21] can only be achieved through upholding the human rights of all members of society. The Open Society Institute's 2007 report urges nations to protect human rights as way to protect public health. The authors note that the worst affected receive the least attention in national responses to HIV. "Criminalized populations, such as MSM, people who use drugs, and sex workers, are driven from HIV services by discrimination and violence, often at the hands of police officers and judges charged with enforcing sodomy, narcotics, and prostitution laws."[22] Years after the 2001 Declaration of Commitment on HIV/AIDS, "human rights abuses of vulnerable populations continue unabated, denying them access to services and effective tools for preventing HIV infection and to life-saving AIDS drugs that will keep them alive".[23]

In light of the alarming epidemiological trend of new HIV infections among MSM in Asia, improving the efficacy of HIV prevention programming targeting MSM is imperative. Decriminalizing homosexuality and upholding the human rights of sexual minorities are vital for effective HIV prevention programming.

19 *Ibid.* p. 9.
20 *Ibid.*
21 UNAIDS. 2006b. *Political Declaration on HIV/AIDS*, http://www.unaids.org/en/AboutUNAIDS/Goals/2006Declaration/default.asp (Accessed 5 December 2010).
22 Jürgens, R. and Cohen, J. 2007*Human Rights and HIV/AIDS: Now More Than Ever*, New York, Open Society Institute, p. 1.
23 *Ibid*, p.10.

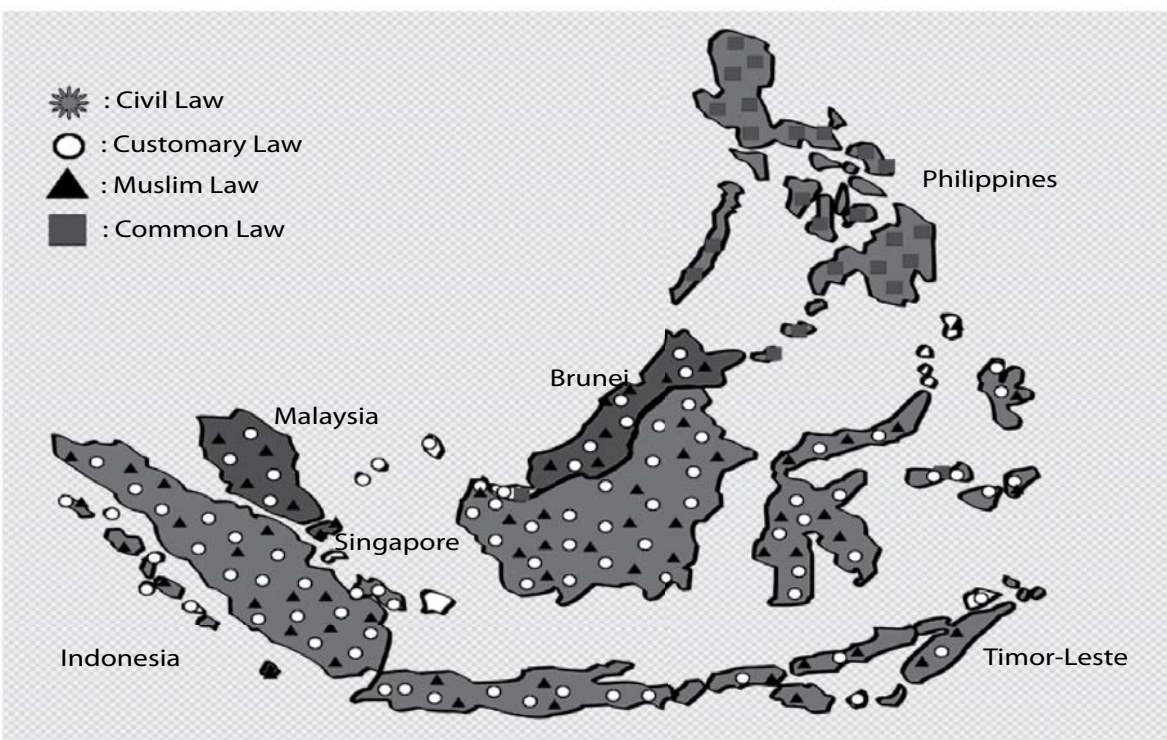
PART 2

Part 2 - Domestic laws and practices in insular Southeast Asia

This section examines the current legal situation in insular Southeast Asia, specifically in Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Timor-Leste. In particular, domestic legislation, recent political developments, success stories, and examples of human rights violations against sexual minorities are reviewed. This review was limited to resources available in the English language.

As the figure below shows, four types of legal systems exist in this region: civil law, customary law, Muslim (Sharia) law and common law.

Figure 2: Legal systems in insular Southeast Asia



Source: The University of Ottawa, JuriGlobe.

The two main legal systems in the world are civil law and common law. Civil law developed in continental Europe and spread throughout the world through French, Dutch, Spanish, Portuguese and German colonization and adaptation by other countries. Today, civil law is the most used legal system in the world. The primary source of law in a civil law country comes from legislation; judges apply the written law to a situation. Judges cannot evolve the law in a civil law system, but they can strike down legislation that is unconstitutional.

Common law developed in Britain and spread throughout the British colonies. While common law judges do interpret legislation, like their civil law counterparts, common law judges also have to power to make new law in the absence of any legislation. This 'judge-made' law is called *stare decisis* (the obligation to respect precedents established by prior decisions). Essentially, decisions from higher level courts are binding on lower level courts. Decisions from other common law countries can also be very persuasive (but not binding) for a common law judge when exploring a novel area of the law. Thus, the sources of law in common law countries are legislation and judicial decisions. Common law judges can also strike down legislation that they deem unconstitutional.

Some countries allow religious groups to use religious law within their communities. The most common type of religious law is Sharia law (Islamic law), which only applies to Muslim citizens. Some countries also allow a form of customary law, which is a traditional legal system that generally applies only to specific ethnic groups. It should be noted that some countries mix all four types of legal systems.

2.1 Brunei Darussalam

Summary:

- Homosexuality is illegal, punishable by up to 10 years in prison or a fine of up to 30,000 BND (approximately 22,000 USD). Limited protection for boys against sexual exploitation.
- No anti-discrimination protection for sexual minorities or anyone else.
- Restricted freedom of assembly and freedom of expression.
- HIV positive foreigners are required to leave.

Brunei Darussalam is an absolute monarchy, where the Sultan is both head of state and head of government. Brunei has a legislative body that has only consultative tasks. They have a common law legal system mixed with Sharia law for Muslim citizens.

2.1.1 Legal status of homosexuality

Brunei Darussalam's criminal laws came from the Indian Penal Code, which is one of

the legacies of British colonization in Asia. Section 377, "unnatural offences", criminalizes penetrative sexual acts other than vaginal intercourse (i.e. oral and anal sex) for both heterosexuals and homosexuals.

Unnatural offences

S. 377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal, shall be punished with imprisonment for a term which max extend to 10 years, and shall also be liable to fine. [24]

Explanation – Penetration (oral or anal) is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

Although section 63 of the Penal Code says that fines can be unlimited (but not excessive) for offences which do not specify a maximum, most available sources indicate that 30,000 Brunei Dollars (roughly 20,500 USD) is the maximum fine for homosexual acts.[25] For less "serious" offences, the police could also use Section 294 (Obscene acts and songs) or Section 294A (Loitering or soliciting for purposes of prostitution, etc.) to arrest suspected homosexuals. Both of these provisions use vague language, which can easily be interpreted to outlaw homosexuality, inviting extortion, blackmail and sexual abuse by law enforcement officers. For example, "obscene", in Section 294, is defined as anything that is likely to deprave or corrupt people.[26]

Obscene acts and songs.

S. 294. (1) Whoever, to the annoyance of others —

(a) does any obscene act in any public place; or

(b) sings, recites or utters any obscene song, ballad or words, in or near any public place, shall be guilty of an offence: Penalty, a fine of not less than $500 and not more than $5,000 and imprisonment which may extend to 3 years, and in the case of a second or subsequent conviction, a fine of not less than $1,000 and not more than $30,000 and imprisonment which may extend to 5 years.

Loitering or soliciting for purpose of prostitution etc.

S. 294A. Whoever loiters or solicits in any place for the purpose of prostitution or for any other immoral purpose shall be guilty of an offence and shall be punished with a fine of not less than $500 and not more than $5,000 and imprisonment which may extend to one year, and in the case of a second or subsequent conviction, with a fine of not less than $1,000 and not more than $10,000 and imprisonment which may extend to 3 years.

2.1.2 Legal status of transgender people

Very few sources were found that reference transgender issues in Brunei Darussalam. Section 377 (Unnatural offences) equally applies to transgender people, however, there by

24 *Penal Code*, Laws of Brunei, Chapter 22, revised 2001, at section 377.

25 Verlag, B. G. 2007. *Spartacus International Gay Guide*, Berlin, p. 1216. Also cited in Wikipedia, "LGBT rights in Brunei". http://en.wikipedia.org/wiki/LGBT_rights_in_Brunei. And in Richmond, S. et. al. 2007. Lonely Planet: Malaysia, Singapore and Brunei, 10th edition, Melbourne, Lonely Planet, p. 610.

26 *Penal Code*, Laws of Brunei, op. cit., section 294 and 294A.

criminalizing any sexual contact between a transgender person and his or her consensual partner. The legal status of cross-dressing is unclear: cross-dressing is generally not accepted in Islam, but the country's law enforcement allegedly "turns a blind eye to cross-dressing on the street corners of its capital at night".[27]

2.1.3 Protection from sexual exploitation

The age of consent for sexual activities in Brunei Darussalam is 16 years old. However, this only applies to girls.[28] Sections 372 and 373, which prohibit the selling and buying of minors for sex, use gender inclusive language but the explanation notes refer only to female persons. Therefore, it is unclear whether or not the Penal Code can adequately protect minor boys from sexual exploitation. Protection from rape is also gender specific in the Penal Code; men are the perpetrators and women are the victims.[29] In a same-sex rape case, however, section 377 (Unnatural offences) would only apply to the perpetrator, since the victim (male or female) did not voluntarily have carnal intercourse.

2.1.4 Anti-discrimination protection

The Constitution of Brunei Darussalam has no enshrined rights, freedoms or anti-discrimination protection. Brunei Darussalam has been criticized for not ratifying any of the core conventions on labour standards after joining the International Labour Organization in 2007. As such, "The [existing] law does not contain specific provisions prohibiting discrimination based on race, sex, disability, language, or social status".[30]

2.1.5 Civil liberties

Section 83 allows the Sultan to proclaim a state of emergency when the security or economic life of Brunei Darussalam is threatened, whether by war, external aggression or internal disturbance. The Sultan exercised the State of Emergency powers in 1962, suspending all democratic elections. In 2004, a series of constitutional amendments were initiated, indicating that the legislative council will be partly elected in the future.

Brunei Darussalam was ranked 142nd out of 178 countries in the 2010 Press Freedom Index.[31] Some examples of restrictive laws regarding freedom of association and freedom of expression include:

- *The Newspapers Act (1958)*, which requires newspapers to apply for annual permits. The Minister of Home Affairs has the discretionary power to grant or deny the permits.

27 Haddad, S. G. F. 2005. "Pornography and the Shariah: Why must things be banned in society?", 3 July 2005. http://qa.sunnipath.com/issue_view.asp?HD=1&ID=1739&CATE=91 (Accessed 5 December 2010).

28 Unlawful Carnal Knowledge, Laws of Brunei, Chapter 29, revised 1984, section 2.

29 *Penal Code*, Laws of Brunei, op. cit., section 375-376.

30 International Trade Union Confederation. 2008. *Internationally Recognized Core Labour Standards in Brunei Darassulam: Report for the WTO General Council Review of the Trade Policies of Brunei Darussalam*, Geneva, p. 6.

31 Reporters without Borders. 2010. Press Freedom Index. Paris, Reporters without Borders.

The Act also allows the Minister to file criminal charges against printers, publishers, editors and writers who "maliciously publish any false news".[32] In a society where homosexuality is taboo and criminalized, it is unlikely that the government would allow MSM related material to be published, even in the interests of public health.

- *The Societies Order (2005)*, which mandates that a public gathering of 10 or more requires a permit; otherwise the police have the authority to break it up.

The Registrar of Societies and the Commissioner of Police both have discretionary powers to refuse a permit if they deem "the society is being used or is likely to be used for any unlawful purpose or for any purpose prejudicial to or incompatible with the peace, public order, security or public interest of Brunei Darussalam".[33] Since homosexuality is illegal, a LGBTI-rights group or a MSM health group would, by definition, be deemed to be used for an unlawful purpose.

- The *Internal Security Act* "allows an individual to be held without charge or trial for a period of up to two years: this is renewable indefinitely".[34]

2.1.6 Regulations on HIV status

According to the 2008 report, "Travel and residence regulations for people with HIV and AIDS", short-term tourists visiting Brunei Darussalam are not required to undergo an HIV test, but if their status were disclosed they would be denied entry.[35] According to residency regulations, HIV testing is required for student and work visas, and if HIV is detected the individual will be deported. Physicians are requested to notify the Ministry of Health of any HIV positive test results.[36]

Immigration Act (Cap. 17)

Prohibited Immigrants

8. (1) Any person who in the opinion of the Controller — [...]

(b) is a member of any of the prohibited classes, as defined in subsection (2),

(2) The following persons are members of the prohibited classes — [...]

(c) any person — [...] (ii) certified by a Government medical officer or a medical practitioner, after examination under the provisions of section 29, to be suffering from a contagious or infectious disease which makes his presence in Brunei Darussalam dangerous to the community

32 International Trade Union Confederation. 2008. *Internationally Recognized Core Labour Standards in Brunei Darassulam: Report for the WTO General Council Review of the Trade Policies of Brunei Darussalam*, Geneva, p. 6.

33 *Ibid*, p. 5.

34 *Ibid*, p. 3.

35 Deutsche AIDS-Hilfe e. V. 2008. *Travel and residence regulations for people with HIV and AIDS: Information for counselors in AIDS service organisations 2008-2009*, 8th Ed., Berlin, p.15. http://www.hivtravel.org (Accessed 5 December 2010). See also: UNAIDS, IPPF, GNP+, IHAR, ILGA. 2010. Making the Law Work for the AIDS Response. Geneva, UNAIDS.

36 *Ibid.*

2.1.7 Human rights violations against sexual minorities

There have not been any recently documented cases of human rights violations against sexual minorities in Brunei Darussalam, nor have there been any recent cases of invoking Section 377 of the *Penal Code*. Citizens in Brunei Darussalam likely self-censor in an effort to avoid being ostracized by their community and to avoid arrest.

2.2 Indonesia

Summary:

- Homosexual acts in private are legal.
- Local governments are allowed to adopt Sharia law, which prohibits homosexuality and cross-dressing.
- Male-to-female transgenders (waria) are classified as mentally handicapped under the "cacat law" (Mentally Disabled Law).
- Constitutional protection against discrimination based on "any grounds whatsoever".
- Anti-pornography bill labels homosexual acts as "deviant" along with necrophilia and bestiality.

With 90 percent of the population being Muslim, Indonesia is the most populous Muslim country in the world. While there is more tolerance of homosexuality in Indonesia, the Immigration & Refugee Board of Canada has argued that there is strong societal pressure to marry and have a family. Hence, "same sex relationships are often maintained alongside obligatory heterosexual marriages" .[37]

2.2.1 Legal status of homosexuality

Homosexual acts (between consenting adults, in private) are legal, and appear to have never been a crime in Indonesia. In 2003, there was a failed attempt to amend the Penal Code to criminalize homosexuality. Under the amended law, sodomy and oral sex would have been punishable by three to 12 years in jail.[38]

37 Immigration and Refugee Board of Canada. 2004. "Indonesia: Update to IDN34972 of 19 July 2000 regarding the treatment of Muslim homosexuals in Indonesia, both by the Muslim community and the authorities, especially the police; available state protection". 28 May 2004. IDN42668.E.

38 Gay and Lesbian Archives of the Pacific Northwest (GLAPN). 2003. "Indonesian Lawmakers Seek Gay Sex Ban", 1 October 2003. http://www.glapn.org/sodomylaws/world/indonesia/idnews001.htm (Accessed December 2010); Wikipedia, "LGBT rights in Indonesia". http://en.wikipedia.org/wiki/LGBT_rights_in_Indonesia; Utopia. 2003. "Gay Asia News by Utopia: Indonesia Plans to Criminalize Peaceful Citizens' Sexual Relations", 2 October 2003. http://www.utopia-asia.com/unews/article_2003_10_2_181016.htm (Accessed 5 December 2010).

As of December 2010, the age of consent for sexual activity is 19 for men and 16 for women. The draft Penal Code, now pending, would change the age of consent laws to 16 for heterosexual acts and 18 for homosexual acts, "a blatant discrimination" in the words of Dédé Oetomo, a human rights activist in Indonesia.

As a part of Jakarta's decentralization policy, local governments were given more autonomy in 1999 through law UU No. 22/1999. As a result, in 2002 Aceh province became the first province to adopt Sharia law (UU No. 18/2001). In 2007, 10 percent of the regencies[39] in Indonesia had some form of Islamic law.[40] This is of great concern for sexual minorities because the majority of Sharia jurisprudence equates homosexuality with adultery and accords it equal punishment.[41] So far, only two provinces have criminalized homosexuality: Aceh and South Sumatra.

The City of Palembang (South Sumatra province) has passed a bylaw designed to eliminate prostitution. Critics say it goes well beyond the recognized definition of "prostitution" and can be easily used to target sexual minorities, not only with jail time and fines, but also by encouraging societal discrimination.

Perda Kota Palembang No. 8/2004, RE: Eradication of Prostitution[42]

Article 8

1) Prostitution is defined as an act committed on purpose by any individual or a group with the intention to seek sexual pleasure outside legal marriage with or without receiving gratification, either in the form of money or in other forms.

2) The acts of prostitution include:

a) Homosexual acts

b) Lesbian acts

c) Sodomy

d) Sexual harassment

e) Other pornographic acts

On 14 September 2009, Aceh Province passed a revised criminal code based on Sharia law (Qanun, Jinayat), with harsh penalties for crimes such as adultery, homosexuality, alcohol consumption and gambling. The Governor hasn't agreed to sign the bylaw but if he agrees to do so punishments for homosexuality could include up to 100 cane lashes and a maximum fine of 1,000 grams of fine gold, or imprisonment of up to 100 months.[43]

39 Regencies are like cities, but instead of being governed by mayors they are governed by regents (Bupati).

40 Zidni, F. 2008. "Sharia Law in Indonesian Local Context: Motivation and Implementation, Case: Banten, West Java, South Sulawesi and Aceh", 8 February 2008. http://bukittimahschool.blogspot.com/2008/02/sharia-law-in-indonesia.html (Accessed 5 December 2010). Some predict that by 2011 half of the states of Indonesia will be under some form of Islamic law.

41 Wikipedia, "LGBT issues and Islam". http://en.wikipedia.org/wiki/Homosexuality_and_Islam (Accessed 5 December 2010).

42 Translation from: Oey, K. and Arus Pelangi. 2009. "What to do with the Yogyakarta Principles". http://www.geocities.com/arus_pelangi/statement/ what_todo_with_yogyaprinciples.pdf (Accessed 5 December 2010).

43 The Global Campaign to Stop Killing and Stoning Women! 2009. "Indonesia: New law in Aceh makes adultery punishable by stoning", 17 December 2009. http://www.stop-stoning.org/node/695 (Accessed 5 December 2010); and Amnesty International. 2009b. "Indonesia: Repeal 'cruel' new stoning and caning law", Public Statement, 17 September 2009. ASA 21/016/2009.

2.2.2 Legal status of transgender people

In Indonesia, transgender people are known as waria (from *wanita* meaning woman and pria meaning man). The Department of Social Affairs classifies waria as mentally handicapped under the federal 'cacat law' (*Mentally Disabled Law*). This effectively denies waria the right to work or reduces them to working in low-paid jobs in the hidden economy.[44] Furthermore, the public is reported to be tolerant of waria working in "traditional" waria professions, such as hairdresser, beautician and street performer. Outside these jobs, *waria* are heavily discriminated against.

According to Dédé Oetomo, it is possible for inter-sex and post-operative transsexuals to legally change their gender on their identity cards, but the mechanism to change one's name requires documentation that most *waria* do not have. Consequently, "almost 70 percent of *waria* living in Jakarta do not possess any legal citizenship documents, including identity cards".[45]

Another problem facing *waria* is how to practice their religion, given their situation. Transgender citizens who are Muslim do not feel comfortable praying at a mosque with either men or women. To partially address this issue, some *waria*, such as Maryani, have established Koran schools specifically for *waria*.[46]

2.2.3 Protection from sexual exploitation

Article 292 of the Indonesian *Penal Code* criminalizes "obscene acts" with a minor of the same sex, thereby criminalizing homosexual behaviour between minors.

There is no protection for adult male victims of sexual assault or rape. The rape provision (Article 285) only criminalizes rape of women. Even if a male rape victim tried to press charges, it is likely the police would be unwilling to help. Victims have reported that they "were unable to file a police report because they were either blamed for the incident or told that it was their fault for being *banci*[47] or gay".[48] In some instances, the police are allegedly the perpetrators of such assaults themselves.

44 International Gay and Lesbian Human Rights Commission (IGLHRC). 2007d. Human Rights Abuses Against Sexual Minorities in Indonesia, Report submitted to the UN Human Rights Council for its 2007 Universal Periodic Review on 19 November 2007, pp.3-4.

45 Ibid, p. 3.

46 Williamson, L. 2009. "Indonesia's waria. Religious quandary", BBC News, March 2009. http://news.bbc.co.uk/2/shared/spl/hi/picture_gallery/08/asia_pac_indonesia0s_waria/html/3.stm (Accessed 5 December 2010).

47 Banci is considered a more derogatory term for waria.

48 Immigration and Refugee Board of Canada. 2008. "Indonesia: The situation of homosexuals; state protection and availability of support groups", 3 July 2008, IDN102828.E. http://www.unhcr.org/refworld/country,,IRBC,,IDN,4562d8cf2,49b92b411e,0.html (Accessed 5 December 2010).

2.2.4 Anti-discrimination protection

The second amendment to the Constitution of Indonesia (August 2000) added a wide range of human rights guarantees which enshrine most of the provisions in the *International Covenant* on Civil *and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.[49] Most importantly, a powerfully worded and broad anti-discrimination clause, Article 28I(2), was added.

> *Article 28I (2) – Every person shall have the right to be free from discriminative treatment based upon any grounds whatsoever and shall have the right to protection from such discriminative treatment.*

As the Constitution of Indonesia is the highest law of the land, and all other laws that are in conflict with it are null and void, challenging human rights violations through the Constitutional Court can be an effective way to protect one's rights.[50] In practice, however, this broad, and perhaps vague, guarantee against discrimination has not been applied to sexual minorities.

2.2.5 Civil liberties

The Federal Government of Indonesia recently passed the *Pornography Bill* (*UU No. 44/2008*), which bans pornography in Indonesia. Article 4(1)(a) prohibits pornography containing sexual intercourse and "deviant" sexual intercourse. The explanatory note groups oral sex, anal sex, gay sex and lesbian sex with bestial sex and necrophilia as "deviant" acts. According to the Indonesian Guidelines for Categorization and Diagnosis of Psychological Disorders, however, consensual homosexual acts are not deviant, as "homosexuality" was removed from the list of mental disorders in 1983.[51] LGBTI activists in Indonesia argue that labelling homosexual activities as deviant will increase the stigmatization of the LGBTI community.

2.2.6 Regulations on HIV status

According to the "Travel and residence regulations for people with HIV and AIDS" report, in Indonesia there are no travel or residence restrictions for people living with HIV.[52]

49 Faiz, P. M. 2008. "Human Rights Protection and Constitutional Review: A Basic Foundation of Sustainable Development in Indonesia", Indonesian Students' Scientific Meeting 2008, held by ISTEC, 13-15 May 2008, Delft, The Netherlands. http://panmohamadfaiz.files.wordpress.com/2008/04/human-rights-protection-and-constitutional-review-by-pan-mohamad-faiz-pdf-format.pdf (Accessed 5 December 2010).

50 Ibid.

51 Oey, K. and Arus Pelangi, 2009. op. cit, p. 4.

52 Deutsche AIDS-Hilfe e. V., op. cit, p.24. See also: UNAIDS, IPPF, GNP+, IHRA, ILGA. 2010, op. cit., p. 16

2.2.7 Human rights violations against sexual minorities

There have been many cases of human rights violations against sexual minorities in Indonesia, including the following accounts:

- A man named Hartoyo was tortured by the police of Banda Aceh because he was gay. Four suspects were arrested and put on trial. When Hartoyo was called to testify, the judge lectured him on his "sinful" behaviour, and forced Hartoyo to forgive the suspects.[53]
- Michelle Saraswati went to the United States (US) as a gay man and later had a sex reassignment surgery. After overstaying her visa, she applied for asylum because of fear of being harmed if she were sent back to Indonesia. The immigration judge agreed.[54]
- On 22 and 23 January 2007, local citizens invaded the house of two gay men at night and brutally attacked them, leaving them tied together with a sarong until the police arrived. The Banda Raya police allegedly forced them to strip naked, perform oral sex and other sexual acts in front of them, sprayed them with a hose with cold water for about 15 minutes wearing only their underwear, forced one man to urinate on the head of his partner, and physically beat them.[55]
- After a 28 year old man was caught engaging in sexual activities with his male partner, he was repeatedly beaten and threatened with death and mutilation by family members of his partner (male) and his fiancée (female). He was approached by men carrying a traditional knife used for sirik (honour killing), but escaped. His mother's home was stoned and vandalized. He fled Indonesia because he feared he would be killed if he remained and he claims that the Indonesian government would not interfere in "traditional practices". In their own report to the UN, Indonesia admitted that it is powerless to deal with these types of private, culturally motivated practices that violate human rights.[56]
- On 11 November 2000, about 350 gay men and *waria* were gathered in Kaliurang (central Java) for an evening of artistic performances and comedy skits. At 9.30 pm about 150 men burst into the hall, shouting, "God is Great! Look at these men done up like women. Get out *banci*!" These men attacked the guests with knives, machetes and clubs. No one was killed, but at least 25 people were injured, and three were hospitalized. Later, 57 men were arrested, but all were soon released without charges being filed.[57]
- Lenny Sugiharto, Director of the Srikandi Sejati Foundation (an organization for transgender people in Indonesia) was detained by police from South Jakarta, who were seeking to arrest sex workers, because she was *waria*. She protested and showed

53 Arus Pelangi. 2009. "Annual Report 2008", p. 5. http://www.aruspelangi.or.id/statement/annual_report_AP_2008.pdf (Accessed 5 December 2010)
54 *Ibid*, p. 6.
55 Amnesty International. 2007. "Indonesia (Aceh): Torture of gay men by the Banda Raya police", 20 June 2007.
56 Immigration and Refugee Board of Canada, 2000. op. cit.
57 Boellstorff, T. 2004. "The Emergence of Political Homophobia in Indonesia: Masculinity and National Belonging", Ethnos, Vol. 69, No. 4, pp. 465-86.

the police a letter from the head office of the Jakarta police confirming that she was an NGO worker. This did nothing to stop the police from violating her human rights. They pulled off her *jilbab* (headscarf) and verbally abused her; she was not permitted to go to the toilet, to rest, to eat or drink for four hours, and her attackers extorted 20,000 IDR from her (approximately 2 USD).[58]

- In 2010, Indonesia witnessed demonstrations against two conferences aiming to discuss the rights of lesbian, gay, bisexual and transgender (LGBT) people. The first occurred in response to the fourth regional meeting of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), scheduled to take place in Surabaya, East Java on 26-28 March 2010 and supported by Indonesia's leading LGBT organisation, GAYa NUSANTARA. A month later in Depok, West Java, a workshop on transgender issues sponsored by the National Commission for Human Rights (Komnas HAM) found itself in the same predicament. In both of these incidents, religious fundamentalist groups led by the Islamic Defenders Front (Front Pembela Islam, FPI), forced the cancellation of these events.

58 International Gay and Lesbian Human Rights Commission (IGLHRC). 2007c. *Violations of the Rights of Freedom of Expression, Assembly, and Association Related to Sexual Orientation, Gender Identity, and Gender Expression*, Report submitted to the United Nations Special Rapporteur on the Promotion of the Rights to Freedom of Opinion and Expression and the Special Representative of the Secretary General for Human Rights Defenders, 30 October 2007, p. 8.

2.3 Malaysia

Summary:

- Homosexuality is illegal – penalties include a maximum of 20 years in prison, fines and lashes.
- Cross-dressing is illegal.
- Transgender people are permitted to change their gender under common law but not under Sharia law.
- LGBTI civil rights (freedom of expression, association, etc.) are restricted.
- The military refuses to accept sexual minorities.
- Deportation within three days for HIV positive migrant workers.

Malaysia is a federation, with Islam as the official religion. Approximately 60 percent of the Malaysian population is Muslim, and the Constitution explicitly declares ethnic Malays as Muslim. The legal system is based predominantly on common law, but Sharia law is used in matters relating to Muslim citizens in several states.

2.3.1 Legal status of homosexuality

Homosexuality has been criminalized in Malaysia since Britain introduced the *Penal Code of the Straits Settlements*[59] in 1871, which was essentially the *Indian Penal Code* of 1861. The current *Malaysian Penal Code* has retained much of the ancient Section 377, which criminalizes acts "against the order of nature", and has added some less serious offences which are easier to prove. Section 377A criminalizes anal and oral penetrative sexual acts, which are punishable by lashes and up to 20 years in prison. For less serious acts, Section 377D criminalizes "indecency", which is not clearly defined, and carries a maximum penalty of two years in prison.

Malaysian Penal Code, Unnatural Offences[60]

Carnal intercourse against the order of nature.

377A. Any person who has sexual connection with another person by the introduction of the penis into the anus or mouth of the other person is said to commit carnal intercourse against the order of nature.

Explanation—Penetration is sufficient to constitute the sexual connection necessary to the offence described in this section.

Punishment for committing carnal intercourse against the order of nature

377B. Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

59 Later, the Penal Code of the Straits Settlements was split into the Malaysian Penal Code and the Singapore Penal Code. Amirthalingam, K. 2008. "Criminal Law and Private Spaces: Regulating Homosexual Acts in Singapore" in S. Bronitt, B. McSherry and A. Norrie (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law*, Oxford, Hart Publishing, p. 187.

60 *Penal Code*, Laws of Malaysia, 1936 (revised 1997, Act 574) current to January 1, 2006..

Outrages on decency

377D. Any person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be punished with imprisonment for a term which may extend to two years.

In 1995, the State of Sabah adopted Sharia law for criminal offences. Intercourse "against the order of nature" carries a maximum penalty of up to six strokes of caning, a fine up to 5,000 MYR (1,500 USD), and three years in prison. Lesbian sexual acts and cross-dressing both carry maximum penalties of a fine of 1,000 MYR (300 USD) and six months in prison. Gay sexual acts carry maximum penalties of a fine of 3,000 MYR (900 USD) and three years in prison. There is also a vague crime titled "to encourage sin", and since homosexual acts are considered sinful in Islam, sexual minorities can also be charged under that law.

Syariah Criminal Offences Enactment 1995 (No. 3 of 1995), State of Sabah[61]

Definitions:

"liwat" means sexual intercourse between a man and a man.

"musahaqah" means sexual intercourse between a woman and a woman.

"taz'ir" means an offence not prescribed by Al-Quran or Hadith.

76. Intercourse against the order of nature

Whoever has sexual intercourse against the order of nature with any man, woman or animal, shall be liable to taz'ir and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to caning not exceeding six strokes or to any combination of such punishment.

77. Musahaqak

Any woman who wilfully commits musahaqah with another woman shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

82. Liwat

Any male person who wilfully commits an act of liwat shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

89. To encourage sin

Whoever promotes, coaxes or persuades any person to commit any sinful act shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both.

61 Syariah Criminal Offences Enactment 1995, Malaysia (Sabah). http://www.sabahlaw.com/Syariah_Criminal_Offences_Enactment_1995.html.

92. Male posing as woman or vice versa

Any male person who, in any public place, wears a woman's attire and poses as a woman or vice versa shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one thousand ringgit or to imprisonment for a term not exceeding six months or to both.

There is no clear separation of religion and the State in Malaysia. Religious edicts, called *fatwa*, take on law-like qualities. In fact, the *Sharia Criminal Offences Enactment* had been amended to include this statement, "Anyone who gives, propagates, and/or disseminates any opinion contrary to any *fatwa* in force commits a criminal offence".[62] Muslim leaders have issued a fatwa declaring homosexuality a sin, thus, Muslim Malaysians risk being arrested if they make any statements supporting gay rights.[63] In 2008, Malaysia's National Fatwa Council announced a ban on "'tomboyish' behaviour and lesbianism".[64] At this time, it is unclear what the penalty would be for breaching this fatwa, and merely objecting to this *fatwa* would already risk arrest.

In 1993, the State of Kelantan adopted a very strict form of Islamic law, one which punishes theft with cutting off hands and feet, and punishes adultery and sodomy with death by stoning. According to available sources, these laws have not been enforced, however, because the federal government strongly opposes them. Despite this, the State of Terengganu adopted a similar law in 2002. There appear to have been no reported cases of anyone being stoned to death for sodomy as of yet, but the law remains of concern for the LGBTI community.[65]

2.3.2 Legal status of transgender people

The local terms for transgender people are mak nyah for men who identify as females and pak nyah for women who identify as males. Sex reassignment surgery and gender reassignment therapy are legal in Malaysia, although transgender people cannot change their identity cards to reflect their new gender.[66] In November 2004, the government declared that "the *Birth and Death Act* of 1957 will be studied for amendments to cater to transsexuals who have undergone sex changes".[67] But as of 2009, the government still had not enacted any legislation to formally give transsexuals the right to change their identity cards.

62 Kasim, Z. M. 2004. "Sexuality Under Attack: The Political Discourse of Sexuality in Malaysia" presented at the Sexuality and Human Rights in Muslim Societies in South/Southeast Asia Conference, Jakarta, 23-26 September 2004; reprinted in Isis International, 16 October 2007. http://www.isiswomen.org/index.php?option=com_content& task=view& id=270&Itemid=163 (Accessed 5 December 2010).

63 Williams, W. 2009. "Strategies for Challenging Homophobia in Islamic Malaysia and Secular China", Nebula, Vol. 6, Issue 1, pp. 1-20. http://www.nobleworld.biz/images/Williams.pdf (Accessed 5 December 2010).

64 AsiaNews.it. 2008. "In Malaysia fatwa condemns tomboy", 24 October 2008. http://www.asianews.it/index.php?l=en&art=13569 (Accessed December 2010).

65 Yoong, S. 2002. "Malaysian State Legislature Passes Bill on Strict Islamic Criminal Code", 8 July 2002. http://www.glapn.org/sodomylaws/world/malaysia/mynews033.htm (Accessed 5 December 2010)

66 Teh, Y. K. 2005. "Country Report: Malaysia", Transgender Asia Papers. infra note 70, prior to 1996 a mak nyah could change his name to a female name, but after 1996 the female name must appear in front of his male name. The change in regulation was due to the fact that in Islam a transsexual male cannot marry another man. Sometimes the Islamic Authority was not sure if the person was a male transsexual since his identification card had only a female name.

67 Immigration and Refugee Board of Canada. 2005a. "Malaysia: Treatment of sexual minorities (August 2004-August 2005)", 30 August 2005, MYS100434.E. http://www.unhcr.org/refworld/docid/45f148012.html.

> *[transsexuals] face constant harassment and persecution from the police and religious authorities, cannot undergo burial rites in accordance with their religious beliefs, are often refused employment, are deprived the right to marry lawfully although they are fully functioning members of their chosen sex and are exposed to other dangers such as hate crimes when their sex at birth is revealed.*[68]

Without proper documentation, Islamic law forbids sex reassignment surgery for Muslim *mak nyah* and *pak nyah*, but natural hermaphrodites (*khunsa*) are permitted to undergo sex reassignment. In 1983, the "Conference of Rulers in Malaysia decided that a *fatwa* prohibiting the sex change operation should be imposed on all Muslims as it was against the Islamic religion".[69] Prior to the 1983 *fatwa*, there were some reported cases of Muslim *mak nyah* who had undergone sex reassignment surgery, married a man, and adopted children.[70] Today, adoption regulations discriminate against *mak nyah*, but it is still possible for *mak nyah* to adopt.[71]

In 2005, two similar cases concerning an application to change one's gender were heard that had completely opposite outcomes. According to one source, both cases are pending appeal. As such, while it appears that a change of gender in one's identification papers is not permitted, it remains debatable whether or not it is legal to change one's gender in Malaysia. The two cases are described below.

- *Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara*, heard by the Ipoh High Court, involved a female-to-male transsexual who submitted a request to change gender (from female to male). The applicant was born with both male and female sexual organs, but her parents registered her birth as a female. The applicant had undergone sex reassignment surgery (to become male) and wanted his identification papers to reflect this change. As this was a novel case, there was no Malaysian jurisprudence to assist the trial judge. The court followed the English precedents set by Corbette v. Corbette[72] and Bellinger v. Bellinger.[73] The English cases suggest a judge look at: (1) the chromosomal factor; (2) the gonadal factor; (3) the genital factor; and (4) psychological factor – with emphasis on the first three criteria. The judge sympathized with the applicant's situation but denied the applicant's request to change gender, and suggested that the court is not the right place to grant this request but rather the legislature.[74]
- *J-G v. Pengarah Jabatan Pendaftaran Negara*, heard by the Kuala Lumpur High Court, involved a male-to-female transsexual who submitted a request to change gender (from male to female). The applicant was supported by three medical practitioners who provided evidence supporting her claim that "she feels like a woman, lives like one, behaves as one, has her physical body attuned to one, and most important of all, her psychological thinking is that of a woman".[75] In granting the request, the trial judge followed the dissenting opinion in *Bellinger v. Bellinger*, that the psychological

68 *Ibid.*
69 Teh, Y. K. 2005. op. cit.
70 *Ibid.*
71 *Ibid.*
72 See *Corbette v. Corbette*. 1970. 1 All ER 33.
73 See *Bellinger v. Bellinger*. 2003. 2 All ER 593.
74 *Wong Chiou Yong v. Pendaftar Besar/Ketua Pengarah Jabatan Pendaftaran Negara*. 2005. 1 CLJ 622.
75 *J-G v. Pengarah Jabatan Pendaftaran Negara*. 2005. 4 CLJ 710.

factor has not been given much prominence in the determination of gender. The psychological factor cannot be considered or determined at birth because it has not manifested itself, however, in time it may become the overriding consideration as the individual develops.[76]

2.3.3 Protection from sexual exploitation

In Malaysia, rape provisions are gender specific (male as perpetrator; female as victim), but Sections 377C and 377CA deal with non-consensual carnal intercourse "against the order of nature" and "by object". The punishment is the same as the rape provisions, carrying a minimum sentence of five years in prison and a maximum of 20 years, with whipping.

Committing carnal intercourse against the order of nature without consent, etc.

377C. Whoever voluntarily commits carnal intercourse against the order of nature on another person without the consent, or against the will, of the other person, or by putting the other person in fear of death or hurt to the person or any other person, shall be punished with imprisonment for a term of not less than five years and not more than twenty years, and shall also be liable to whipping.

Sexual connection by object.

377CA. Any person who has sexual connection with another person by the introduction of any object into the vagina or anus of the other person without the other person's consent shall be punished with imprisonment for a term which may extend to twenty years and shall also be liable to whipping.

Exception: This section does not extend to where the introduction of any object into the vagina or anus of any person is carried out for medical or law enforcement purposes.

The age of consent in Malaysia is 16 for both males and females. Sections 372, 372A, 372B and 373 of the *Penal Code* criminalize sex work. They apply equally to men and women of all ages.

2.3.4 Anti-discrimination protection

As in most countries, the Constitution of Malaysia is the supreme law of the land, and in theory, any law that is inconsistent with the Constitut ion can be deemed void. In practice, however, the liberties enshrined in the Constitution are subject not only to limits within the Constitution but also to ordinary laws.[77]

Article 8 of the Constitution clearly states that "all persons are equal before the law and entitled to equal protection of the law". This equality provision seemingly includes sexual minorities.

76 Ibid.

77 Tan, P. 2001. "Human rights and the Malaysian constitution examined through the lens of the Internal Security Act 1960", in *Constitutions and Human Rights in a Global Age: An Asia-Pacific Perspective*, Australia National University, December 2001, p. 2.

Part II of the Constitution, entitled "Fundamental Liberties", enshrines a number of human rights which reflect international human rights: the right to life and personal liberty; the right to equality and non-discrimination; the right to freedom of speech, peaceful assembly and association; freedom of religion; the right to non-discrimination in education; the prohibition of slavery; and various rights related to arrest and trial.

As for the anti-discrimination clause, it is much more limited in scope compared to other constitutions. It only protects religion, race, descent or place of birth from discrimination in relation to laws regulating property, trade, and education.[78] It is an exhaustive list, with no reference to "sex" or "other status". Thus, it would be difficult to make an argument that sexual orientation is analogous to one of the enumerated grounds.

In 1999, the federal government established the *Human Rights Commission of Malaysia (Act 597)*. The Act defines human rights as the fundamental liberties enshrined in Part II of the Federal Constitution. As such, the Commission probably will not hear cases of human rights violations against sexual minorities since the anti-discrimination clause fails to adequately protect them. One of the promising functions of the Commission is to "recommend to the government with regard to the subscription or accession of treaties and other international instruments in the field of human rights".[79] This could potentially lead Malaysia to ratify the main international human rights instruments. The Act requires that the Commission pays due regard to the *Universal Declaration of Human Rights 1948* in so far as it is not inconsistent with the Constitution.[80]

2.3.5 Civil liberties

Constitutional protection for freedom of speech has been significantly restricted in Malaysia as a result of the increasing use of Sharia law and adherence to *fatwa*. Consequently, researchers and professors are hesitant to talk about sexual orientation in Malaysia's universities.

In 1994, the government issued a ban on known gays, lesbians or transvestites appearing on television. The Information Minister said, "Any artist who is proven to be a gay will come under the ban. We do not want to encourage any form of homosexuality in our societies".[81]

The government censorship board prevents the publication of "malicious news". As Williams points out, this means that, "Since the Malaysian government considers homosexuality to be an affront to Islam, any news relating to gay and lesbian rights, especially calls for ending discrimination against homosexuals, is suppressed".[82]

78 *Federal Constitution of Malaysia*, 1957 article 8.
79 *Human Rights Commission of Malaysia*, Laws of Malaysia, Act 597, 1999 article 4(1)(c).
80 *Ibid* at 4(4).
81 Williams, W. op. cit., p. 13.
82 *Ibid.*

According to various sources, the chief of the Royal Malaysian Navy has stated that the Navy would never accept homosexuals. Similarly, the deputy Defence Minister has said, "gays and lesbians would never be allowed to join the military because their behaviour is against Islam and also against the laws of Malaysia".[83]

2.3.6 Regulations on HIV status

According to the "Travel and residence regulations for people with HIV and AIDS" report, people living with HIV and AIDS face no restrictions for short-term tourist visits to Malaysia, but immigration officers can demand an HIV test (usually only if they suspect someone is sick, because of a large quantity of medication in their luggage). Foreigners seeking a work visa are required to undergo a full medical examination, including an HIV test. The General Director of Migration can withdraw entry permits if individuals violate national security, public health or "moral standards".[84] Migrant workers are deported within three days of a positive HIV result.

2.3.7 Human rights violations against sexual minorities

There have been many cases of human rights violations against sexual minorities in Malaysia, including the following:

- In 2000, the former Deputy Prime Minister, Anwar Ibrahim, was charged with sodomy. He was convicted and sentenced to nine years. After serving six years in prison and suffering physical beatings, the Federal Court of Malaysia reversed the sodomy charges. In 2008, he was again charged with sodomy, and his trial is currently pending. It is noteworthy that since 1938, Section 377 has only been used seven times, four of which have involved Mr. Anwar.
- Malaysian universities have allegedly expelled "non-masculine males" (believed to be homosexuals) and these men were "told to come back when they become real men".[85]
- When transsexuals are detained by police, many report being victims of sexual violence, such as being forced to strip naked.[86]
- Gay men are subject to flogging, which reportedly can leave permanent scars.[87]

83 Immigration and Refugee Board of Canada, 2005a . op. cit.
84 Deutsche AIDS-Hilfe e. V., op. cit., p. 28.
85 Williams, W., op. cit., p. 13.
86 Immigration and Refugees Board, 2005a , op. cit.
87 Williams, W., op. cit., pp. 6-7..

2.4 Philippines

Summary:

- Homosexuality is legal.
- The legal status of transgender and intersex people is unclear.
- Anti-discrimination legislation has been stalled in committee for years.
- Discrimination exists in the private sector and in wider society.
- As of 2009, homosexual people may join the army.

The Philippines is a democratic State in which, under Article II, Section 6 of the Constitution, "the separation of Church and State shall be inviolable". Although LGBTI experience more freedom in the Philippines with regard to expressing their sexual orientation and gender identity, compared to other countries in insular Southeast Asia, many believes that the views of the Catholic Church regarding condoms and homosexuality hinder progressive HIV prevention programming.

2.4.1 Legal status of homosexuality

Homosexual acts in private have been legal for a very long time in the Philippines. One report claims the Philippines legalized homosexuality as early as 1823.[88] Despite this, police can charge homosexuals who openly display their affection in public with committing a "grave scandal", under Article 200 of the *Revised Penal Code*.

Revised Penal Code of the Philippines

Grave scandal.

Article 200. The penalties of arrest or mayor and public censure shall be imposed upon any person who shall offend against decency or good customs by any highly scandalous conduct not expressly falling within any other article of this Code.

According to the International Lesbian and Gay Association (ILGA), the police have been known to threaten homosexuals with arrest under Article 200 or 202 (vagrancy) of the Revised *Penal Code*.

2.4.2 Legal status of transgender people

In 2007, the Supreme Court of the Philippines denied a transsexual's petition to change his gender and first name in the Civil Registrar.[89] In 2008, however, in an exceptional case,

88 Ottoson, D. 2009. *State-sponsored Homophobia: A world survey of laws prohibiting same sex activity between consenting adults*, ILGA. p. 48.

89 *Silverio v. Republic*, GR No. 174689, 22 October 2007.

the Supreme Court allowed Jennifer (Jeff) Cagandahan to change the name and gender on his birth certificate. Cagandahan was born with congenital adrenal hyperplasia, which gives a person both male and female characteristics, and had male hormones, causing the female organs to remain undeveloped. The Court took note that Cagandahan "has simply let nature take its course and has not taken unnatural steps to arrest or interfere with what he was born with".[90] The Court went on to say, that while Philippines law requires a person to be classified as male or female, "this Court is not controlled by mere appearances when nature itself fundamentally negates such rigid classification".[91] It is unlikely that the case would have been decided in favour of Cagandahan had he taken "unnatural steps", such as sex reassignment surgery. As such, this case may only be a useful precedent for intersex cases, and not for transgender cases. The Court also echoed the analysis of other countries such as Singapore and Australia, saying that, "Sexual development in cases of intersex persons makes the gender classification at birth inconclusive. It is at maturity that the gender of such persons, like [the] respondent, is fixed".[92]

2.4.3 Protection from sexual exploitation

The Philippines has uniform age of consent laws for both men and women (18 years old), and laws governing child-sexual exploitation apply equally to men and women. Recently, the laws governing rape were updated to include men as potential victims. Prostitution laws appear to only apply to women, so male prostitutes are sometimes arrested for "vagrancy".

Despite the existence of legal protections for all genders, many sexual minorities experience sexual abuse. Abuse within families is a serious concern and there are some indications that "girls, in particular, are pressured into abandoning their homosexuality..."[93]

2.4.4 Anti-discrimination protection

The Constitution of the Philippines declares that "the State values the dignity of every human person and guarantees full respect for human rights".[94] Some of the enumerated rights include the right to life, liberty and property, freedom from unreasonable search and seizure, the right to privacy of communication and correspondence, freedom of speech, expression, and the press, freedom to assemble peacefully, freedom of religion, free access to the courts, and freedom from cruel, degrading, and inhumane punishment.

References to "sexual orientation" or "sexual preference" appear in several pieces of legislation as well as Supreme Court decisions. For instance, the Republic Act No. 9432, *An Act Providing for a Magna Carta of Social Workers*, protects a public social worker from discrimination based on sexual orientation.[95] *The Code of Judicial Conduct for the Philippine*

90 Republic of the Philippines v. Jennifer B. Cagandahan, G.R. No. 166676, 12 September 2008.
91 Ibid.
92 Ibid.
93 Immigration and Refugee Board of Canada. 2005b. "Philippines: treatment of homosexuals and state protection available (2000-2005)", 15 September 2005, PHL100477.E. http://www.unhcr.org/refworld/category,COI,,QUERYRESPONSE,PHL,440ed74ba,0.html (Accessed 5 December 2010).
94 Constitution of the Republic of the Philippines, 1987, article 2, section 11.
95 An Act Providing for a Magna Carta of Social Workers, Rep. Act No. 9432, April 11, 2007, section 17 (a).

Judiciary declares that "Judges shall be aware of, and understand, diversity in society and differences arising from various sources, including but not limited to race, color, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes".[96]

The government states that there is "no discrimination over criminal offenders in the Philippines. Everyone is punished for committing any form of crime regardless of sexual orientation".[97] In a case in 1998, *People v. Ignacio*, the Supreme Court declared that a victim of rape, regardless of sexual preference, would suffer physical pain, emotional outrage, mental anxiety and fright.[98] Likewise, in deciding a custody case involving a lesbian mother (*Pablo-Gualberto v. Gualberto V.*) the Supreme Court noted that "sexual preference or moral laxity alone does not prove parental neglect or incompetence".[99]

The Philippines electoral system includes seats for historically marginalized and disadvantaged groups. Until recently, however, the Commission on Elections prohibited LGBTI political groups from running in elections, on the grounds of "immorality". In a 2010 Supreme Court victory, "Ang Ladlad", a LGBTI political group founded in 2003, was granted the right to run in elections under the Party List. The Supreme Court found that the Commission had erred, and said that, "the denial of *Ang Ladlad's* registration on purely moral grounds amounts more to a statement of dislike and disapproval of homosexuals, rather than a tool to further any substantial public interest".[100] Thus, there have been some positive developments in both Philippines legislation and jurisprudence, leading to improved protection for sexual minorities.

There is no specific legislation to protect the rights of sexual minorities, however. There is a pressing need to enact anti-discrimination legislation in the Philippines because of the persistent gender-based discrimination against effeminate men and lesbians in the private sector. According to the Immigration and Refugee Board of Canada (which conducts background research on a wide array of topics to help evaluate refugee claims), "some companies (in the Philippines) will not hire 'effeminate' male applicants or will ask pointed questions about marital status during a job interview to determine applicants' sexual preference".[101]

In the education sector, "private schools prohibit homosexual behaviour and refuse admittance to students [and teachers] who are perceived to be gay".[102] Ging Cristobal from ILGA Philippines, points out that some schools have "masculinity tests" for new students, and if a male student fails the test he is put on probation for the first year.[103] Teachers sometimes have to sign a contract giving up their right to sue if they are fired for

96 Supreme Court of the Philippines, Adopting the New Code of Judicial Conduct for the Philippine Judiciary, A.M. No. 03-05-01-SC (27 April 2004), cannon 5, sec. 1. Emphasis added.
97 Gay and Lesbian Archives of the Pacific Northwest (GLAPN). no date. "Philippines". http://www.glapn.org/sodomylaws/world/philippines/philippines.htm (Accessed 5 December 2010) .
98 *People of the Philippines v. Alvin J. Ignacio,* G.R. No. 114849, 24 August 1998.
99 Joycelyn Pablo-Gualberto v. Crisanto Rafaelito Gualberto V, G.R. No. 154994, 28 June 2005.
100 Ang Ladlad v. Comelec, G.R. No. 190582, 8 April 2010.
101 Immigration and Refugee Board of Canada, 2005b. op. cit.
102 Ibid.
103 Ging Cristobal, Personal Communication (Skype Interview, 25 March 2009).

"immorality", a term which applies to being a single mother or being homosexual.[104]

In 1998, the Philippines National Police was reformed by *House Bill No. 8551*. Section 59 of the bill establishes a gender sensitivity programme and explicitly prohibits discrimination on the basis of gender or sexual orientation. In a news conference in 2004, however, the newly appointed Chief of Police discouraged homosexuals from becoming police officers. His statements were later clarified to mean that homosexuals are welcome so long as they do not reveal their sexual orientation.[105]

In the House of Representatives, 20 percent of the seats are reserved for specific "sectors", such as elderly, peasants, labour, youth, etc. A lengthy, and ultimately unsuccessful, campaign to enshrine gay rights in Philippines law began in 1995 with a bill that would have recognized the gay and lesbian community as a sector. Introduced by Representative Angara-Castillo, the "*Lesbian and Gay Rights Act of 1999*" was the first effort to legislate significant rights for gays and lesbians. It was defeated, however, probably because it included domestic partnerships.[106]

Since then, over 15 bills have been introduced which would provide protection from discrimination based on sexual orientation and gender identity. Unfortunately, all have been stalled in committees. Ironically, the Chairperson of the Committee on Civil, Political and Human Rights has been the most vocal opponent of these impressive and progressive bills. He argues that it would "mean the death to the ideals and aspirations enshrined in [the] constitution; death to a just and humane society that promotes the common good; death to the most cherished Filipino values of Godliness and moral rectitude".[107] He also argues that anti-discrimination legislation would result in discrimination against heterosexuals.

2.4.5 Civil liberties

Parallel to the pro gay-rights movement, in 2006 several politicians introduced bills against same sex marriage, which are also pending in committees in the Senate and House of Representatives. Currently, the Philippines does not recognize same-sex marriages, civil unions or domestic partnerships. This includes opposite-sex relationships in which one partner is a post-operation transgender person.

In 2009, the Armed Forces of the Philippines (AFP) announced that gay men and lesbians may join the military. They are expected to follow the *Military's Code of Ethics*, however, which deems homosexuality as unethical, punishable by being dishonourably discharged.

104 *Ibid.*
105 Immigration and Refugee Board of Canada, 2005b. op. cit.
106 Wikipedia, "LGBT rights in the Philippines". http://en.wikipedia.org/wiki/LGBT_rights_in_the_Philippines.
107 Abante, B. 2006. "Rejecting a Culture of Death", Speech given on 20 November 2006, House of Representatives, Government of the Philippines. http://lagablab.files.wordpress.com/2006/11/abante-speech.pdf (Accessed 5 December 2010).

AFP Code of Ethics – Article 5 (Military Professionalism) Section 4.3 (Unethical Acts)

Military personnel shall likewise be recommended for discharge/separation for reason of unsuitability due to "all acts or omissions which deviate from established and accepted ethical and moral standards of behavior and performance as set forth in the AFP Code of Ethics. The following are examples: Fornication, Adultery, Concubinage, Homosexuality, Lesbianism, and Pedophilia.[108]

It is believed that once inside the military, gays and lesbians must therefore hide their sexuality in order to remain there.[109] The Filipino LGBTI community welcomed the change in position from top military officials, but they continue to campaign to remove the discriminatory provisions from the Code of Ethics.

2.4.6 Regulations on HIV status

According to the "Travel and residence regulations for people with HIV and AIDS" report, there are no restrictions for people living with HIV in the Philippines.[110] The *Philippine AIDS Prevention and Control Act* of 1988 "requires written informed consent for HIV testing and prohibits compulsory HIV testing. It also guarantees the right to confidentiality, prohibits discrimination on the basis of actual, perceived or suspected HIV status in employment, schools, travel, public service, credit and insurance, health care and burial services".[111]

2.4.7 Human rights violations against sexual minorities

Human right violations against sexual minorities in the Philippines are less common than in other countries in insular Southeast Asia. This is perhaps because "Most Filipinos appear to be comfortable with gays as long as they fit to certain stereotypes and behave according to accepted, non-threatening norms".[112]

One serious violation of the human rights of a sexual minority was noted in paper prepared by Grace Poore for the Asia Pacific Forum, "Staff at a hospital in Cebu made fun of a gay man while he was having rectal surgery. A nurse videotaped the surgery and posted it on YouTube. The patient's identity and medical condition were made public, causing him and his family emotional and mental anguish".[113]

108 *Ibid.*

109 IGLHRC. 2009. "The Philippines: Acceptance of Gays in the Military does not Mean Equality (Yet)", 18 March 2009. http://www.iglhrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/876.html (Accessed 5 December 2010).

110 Deutsche AIDS-Hilfe e. V., op. cit., p. 32.. See also: UNAIDS, IPPF, GNP+, IHRA, ILGA,2010, op. cite., p. 16

111 *Philippine AIDS Prevention and Control Act of 1998*, Rep. Act No. 8504, 13 February 1998.

112 Jane Roseman, et. al. 2005. "HIV/AIDS & Human Rights in a Nutshell", Program on International Health and Human Rights; François-Xavier Bagnoud Center for Health and Human Rights; Harvard School of Public Health; and International Council of AIDS Service Organizations. http://hurilink.org/tools/HIVAIDS_and_HRinNutshell-Webversion1.pdf (Accessed 5 December 2010).

113 Poore, G. 2009. "Human Rights Abuses in Asia On The Basis of Sexual Orientation, Gender Identity and Gender Expression (2008-2009)", IGLHRC Briefing Paper 5-7 May 2009. http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/317-1.pdf (Accessed 5 December 2010).

2.5 Singapore

Summary:

- Homosexuality is illegal, but the Prime Minister has said the government will not actively enforce the law.
- Sex reassignment has been legal since 1973.
- Since 1996, transgender people, who have completed their sex reassignment surgery, can legally marry someone of the opposite sex.
- Mass media's freedom of speech with respect to portraying homosexual lifestyles is heavily restricted and may result in large fines.
- Homosexual civil servants are allowed to hold sensitive positions within the Singapore civil service.
- The Singapore Armed Forces allows homosexuals to join the military, but they are classified in terms of their masculinity.

Singapore became self-governing within the British Empire in 1959. In 1963, Singapore merged with Malaya, Sabah and Sarawak forming Malaysia. Singapore's union with Malaysia was short-lived, however, and in 1965 Singapore was expelled from the Federation. While Malaysia and Singapore have a shared colonial history, and both are common-law countries, Singapore has a much clearer separation of State and religion. Sharia courts only have jurisdiction over divorce cases involving Muslim citizens, and not over local ordinances on social behaviour. Judges and politicians often refer to Singapore's diverse multi-religious and multi-ethnic composition, especially when defending minority rights.

2.5.1 Legal status of homosexuality

As in their other colonies in Asia, Britain criminalized homosexual behaviour in Singapore in the *Penal Code of the Straits Settlements* of 1871.[114] Like the *Indian Penal Code* of 1861, the *Singapore Penal Code* included Section 377 which criminalized voluntary carnal intercourse "against the order of nature" with any man, woman, or animal. Courts have interpreted this to include anal intercourse and, until 1996, oral sex (primarily fellatio). In 1996, the High Court in *P.P. v. Tan Kuan Meng* ruled that "fellatio as an end in itself was caught under Section 377, whereas fellatio as foreplay culminating in heterosexual vaginal intercourse fell outside its scope".[115]

As societal norms changed, consensual oral sex between heterosexual partners became increasingly acceptable. Legal historians have noted a contradiction in the enforcement of Section 377, "since married or courting couples have never been convicted for oral sex under Section 377, only those charged with rape are convicted of oral sex".[116] In light of the

114 Later, the Penal Code of the Straits Settlements was split into the Malaysian Penal Code and the Singapore Penal Code. Amirthalingam, K. op. cit., p. 187.
115 Shing, L. J. C. K. 2003. "Saying No: Sections 377 and 377A of the Penal Code", Singapore Journal of Legal Studies, Issue July 2003, p. 219. P.P. v. Tan Kuan Meng, 30 January 1996); C.C. No. 62 of 1994 (H.C.).
116 Leong, L. W. 1997. "Singapore" in D. West and R. Green, (eds.), Sociolegal Control of Homosexuality: A Multi-Nation Comparison, New York, Plenum Press, p. 130.

recent case law legalizing heterosexual consensual fellatio, and as part of a major revision of the Penal Code in 2007, Singapore repealed Section 377 and replaced it with a new Section 377 which criminalizes sex with dead bodies (necrophilia).

While the former offences of Section 377, i.e. anal intercourse and oral sex, become legal for heterosexuals, the same cannot be said for homosexual men. In 1938, *Singapore's Penal Code* was amended to include a new offence targeting homosexuality, Section 377A (Outrages on decency), which is similar to Malaysia's section 377D. Unlike the former Section 377, or Malaysia's section 377D, which are gender inclusive, Singapore's new Section 377A applies only to men. Consequently, sexual acts between men are illegal (those between women appear to be legal).

Singapore Penal Code (Cap. 224, 2008 Rev Ed)

Section 377A: Outrages on decency

Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

During the 2007 Penal Code revision, Section 377A was hotly debated in parliament and in the media. The Prime Minister, Lee Hsien Loong, emphasized the pre-eminence of the "family unit" in Singaporean society, and cautioned that repealing Section 377A would polarize society. He called for patience, and said that the recognition of gay rights could not be rushed but that the situation could evolve in time. The Prime Minister also said that the law would not be actively enforced, allowing homosexuals to live their private lives without harassment.[117]

There has been much criticism regarding retaining Section 377A. The decision to not actively enforce the offence is said to risk bringing the entire criminal justice system into disrepute, and undermine its integrity.[118] Kumaralingam Amirthalingam, a legal scholar, noted that, "It suggests that there is something amiss with the law. If a law is not to be enforced, then it should not be retained".[119] People Like Us (an LGBTI organization in Singapore) adds that, "the retention of s. 377A, even if not enforced, will signal to many that homophobia is justifiable and acceptable and has the support of the State".[120] Also, there is much uncertainty as to what acts are prohibited by Section 377A. Kumaralingam Amirthalingam, writing at the time of the 2007 *Penal Code* reform, opined that,

The 'unnatural offences' in s. 377 criminalised the more serious offences of penetration of the anus or mouth, while section 377A criminalised less serious acts of 'gross indecency' between males that fell outside s. 377. [Based on the principle of statutory interpretation, the rule against redundancy,] it can be argued that the s. 377A does not include the acts in s. 377, namely anal and oral sex. This raises

117 Lee, H. L. 2007. "Speech on Section 377A", Official Parliamentary Reports (Hansard), 23 October 2007. http://www.yawningbread.org/apdx_2007/imp-360.htm (Accessed 5 December 2010).
118 Law Society of Singapore. 2007. "Executive Summary of Council's Report on the Proposed Amendments to the Penal Code", 30 March 2007, at para. 3.4..
119 Amirthalingam, K. op. cit., p. 205.
120 People Like Us, 2006. "Government should repeal both Sections 377 and 377A of the Penal Code", 8 November 2006. http://www.plu.sg/society/?p=63 (Accessed 5 December 2010).

the possibility that anal and oral sex between consenting males may be left unregulated under the reform plan. Based on established principles of legality and the maxim nulla crimen sine lege [no crime without law], it is arguably impermissible to reinterpret s. 377A to include what was not originally there.[121]

As Section 377 was only repealed recently, and the government is not actively enforcing Section 377A, there is currently no case law to argue one way or another. The Law Society of Singapore came to the conclusion that "retaining s. 377A in its present form cannot be justified. [...] Criminal law's proper function is to protect others from harm by punishing harmful conduct. Private consensual homosexual conduct between adults does not cause harm recognizable by the criminal law".[122]

If Section 377A does not include oral and anal sex, then non-penetrative acts, such as sexual touching, could be covered by the provision. The maximum penalty for a Section 377A conviction is 2 years in jail. As with most offences, however, the maximum is rarely sought. According to Laurence Wai-Teng Leong, a senior lecturer at the National University of Singapore, in 1991 and 1992 the sentencing norm for gross indecency was two or three months, but from 1993 onward it was set at six months.[123] And, "Contrary to popular belief that homosexual crimes are tried under sections 377 or 377A, most are convicted under section 354 of the Penal Code, known in common language as 'molest' or 'outrage of modesty'. The crime carries a maximum jail sentence of 2 years, a fine, caning, or a combination of any two such punishments." [124]

Singapore Penal Code (Cap. 224, 2008 Rev Ed)

Assault or use of criminal force to a person with intent to outrage modesty

s. 354. (1) Whoever assaults or uses criminal force to any person, intending to outrage or knowing it to be likely that he will thereby outrage the modesty of that person, shall be punished with imprisonment for a term which may extend to 2 years, or with fine, or with caning, or with any combination of such punishments.

Often the accused is a victim of police entrapment.[125] Evidence acquired through entrapment is legal in Singapore. In cases where the police fail to induce someone to commit an assault or use criminal force with the intent to outrage modesty, they may still charge him under Section 294(a) of the *Penal Code* (doing an obscene act in public) or Section 19 (soliciting in a public place) of the *Miscellaneous Offences (Public Order and Nuisance)* Act. In theory, lesbians could be charged under these provisions but, "there has been no case yet of lesbian acts having been tried".[126]

121 *Ibid* , p. 190.

122 Law Society of Singapore, op. cit.

123 Leong, L. W. op. cit., pp. 130-131. Professor Jack Lee from the Singapore Management University points out that these cases involved non-consensual "outrages on decency". He is unaware of any reported cases of consensual "outrages on decency", but believes that the sanction would be less.

124 *Ibid* , p. 131.

125 United States Bureau of Citizenship and Immigration Services. 1999. "Singapore: Human Rights Situation of Homosexuals". 20 December 1999. SGP00001.ZNK. http://www.unhcr.org/refworld/category,COI,USCIS,,SGP,3ae6a6a38,0.html (Accessed 5 December 2010).

126 Gay and Lesbian Archives of the Pacific Northwest (GLAPN). no date. "Singapore" http://www.glapn.org/sodomylaws/world/singapore/singapore.htm. (Accessed 5 December 2010).

Singapore Penal Code (Cap. 224, 2008 Rev Ed)

s. 294. Whoever, to the annoyance of others (a) does any obscene act in any public place, [...] shall be punished with imprisonment for a term which may extend to 3 months, or with fine, or with both.

Miscellaneous Offences (Public Order and Nuisance) Act (Cap. 184)

Soliciting in public place

s. 19. Every person who in any public road or public place persistently loiters or solicits for the purpose of prostitution or for any other immoral purpose shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000 and, in the case of a second or subsequent conviction, to a fine not exceeding $2,000 or to imprisonment for a term not exceeding 6 months or to both.

2.5.2 Legal status of transgender people

The Singapore *Women's Charter* was amended in 1996, in a very progressive way, to explicitly allow transgender individuals who have completed sex reassignment surgery the right to marry someone of the opposite sex. However, the same Amendment added a provision that voids same-sex marriages. The Amendment came after a 1992 case in which a woman married a man and later discovered that he had been born a woman and had undergone a sex reassignment operation. The woman sought to annul the marriage arguing that she had been misled and her consent had been voided. The court granted the annulment on the grounds that both parties were female.[127]

Before 1996, a transgender person could have his or her identity card changed to reflect his or her new sex, but that was insufficient for the purposes of marriage. If the sex reassignment was not disclosed before marriage, legal scholars submit that it would not amount to a mistake of identity (for example, if you marry your fiancée's twin sister) but rather to a mistake of attribute (for example, a blonde who dyed her hair black).[128] Only a mistake of identity may void one's consent.

Women's Charter (Cap. 353)

Avoidance of marriages between persons of same sex

12. —(1) A marriage solemnized in Singapore or elsewhere between persons who, at the date of the marriage, are not respectively male and female shall be void.

(2) It is hereby declared that, subject to sections 5, 9, 10, 11 and 22, a marriage solemnized in Singapore or elsewhere between a person who has undergone a sex reassignment procedure and any person of the opposite sex is and shall be deemed always to have been a valid marriage.

(3) For the purpose of this section —

127 *Lim Ying v. Hiok Kian Ming Eric*, 1 SLR: 184-196; 1992, cited in Leong, L. W. op. cit., p. 134.

128 Ong, D. S. L. 1998. "The Test of Sex for Marriage in Singapore", *International Journal of Law, Policy and the Family*, Vol. 12, No. 2, pp. 174-175.

(a) the sex of any party to a marriage as stated at the time of the marriage in his or her identity card issued under the National Registration Act (Cap. 201) shall be prima facie evidence of the sex of the party; and

(b) a person who has undergone a sex reassignment procedure shall be identified as being of the sex to which the person has been re-assigned.

2.5.3 Protection from sexual exploitation

Section 376 criminalizes non-consensual sexual assault by penetration. This provision applies to all people regardless of gender and sexual orientation. The maximum penalty is up to 20 years in prison accompanied by fines and lashings.

Section 376A criminalizes sex with a minor under the age of 16. This provision applies to everyone regardless of gender or sexual orientation. With respect to prostitution, it is illegal to purchase the commercial sexual services of a person who is under 18 years old, and it also appears to be illegal to buy or sell sex with someone under the age of 21.[129]

2.5.4 Anti-discrimination protection

While Singapore does not have any anti-discrimination protection for private sector employment, the Constitution of Singapore does provide some protection in the public sector. Article 12(2) of the Constitution states that, "there shall be no discrimination against citizens of Singapore on the grounds only of religion, race, descent or place of birth in any law or in appointment to any office or employment under a public authority". This equality provision does not include mention of discrimination on the grounds of "sex" or "sexual orientation", so does not adequately protect sexual minorities.

The Singapore Armed Forces allows homosexuals to join the military but homosexuals are subjected to medical and psychological tests, and "are evaluated on a scale of effeminacy based on mannerisms such as gait and speech patterns".[130] Category 302 is a medical code given to personnel who have sexual "disorders", such as homosexuality and gender confusion.[131] They can be deemed medically unfit for combat, or downgraded to a non-sensitive unit, and have restricted access to classified documents.[132]

129 *Penal Code* (Cap. 224, 2008 Revised Edition Singapore) ss. 372, 373, and 376A.

130 *Ibid* , p. 135.

131 Category 302 comes from the International Classification of Diseases, Ninth Revision (ICD-9), which lists homosexuality (along with lesbianism, transvestism, transsexuality, and others) as psychological disorders. In 1992, the World Health Organization removed homosexuality from the ICD, which is reflected in the International Classification of Diseases, Tenth Revision (ICD-10).

132 Leong, L.W., op. cit., pp. 134-135.; Wikipedia, "LGBT rights in Singapore", op. cit.; Lo, L. 2007. *From Leonard to Leona: A Singapore transsexual's journey to womanhood*, Singapore, Select Books p.7; Lim, C. 2002a. "Serving Singapore as a gay man – Part 1: A personal experience of disclosing homosexuality to the Singapore Armed Forces", September 2002. http://www.yawningbread.org/guest_2002/guw-080.htm (Accessed 5 December 2010); and Lim, C. 2002b. "Serving Singapore as a gay man – Part 2: A personal experience of disclosing homosexuality to the Singapore Armed Forces", October 2002. http://www.yawningbread.org/guest_2002/guw-081.htm (Accessed 5 December 2010).

In 2003, the Prime Minister announced that homosexual civil servants are now allowed to hold sensitive positions.[133] It is unclear whether or not this policy change includes the Singapore Armed Forces or the Ministry of Foreign Affairs.

With regard to the Ministry of Foreign Affairs,

> *self-acknowledged homosexuals are barred from appointments involving access to classified information, while 'outed' homosexuals are dismissed or exiled to another ministry. These arrangements range from the top of the hierarchy to the bottom, from diplomats or attachés to the dispatch clerk who handles confidential documents. The grounds for dismissal or refusal to hire stem from the assumption that gays are subject to blackmail because of the secrecy and stigma of their sexual orientation and would, under pressure, leak secrets of state to enemies or foreigners.*[134]

2.5.5 Civil liberties

In January 2003, the government merged the Singapore Broadcasting Authority, the Films and Publications Department, and the Singapore Film Commission into the Media Development Authority (MDA). As Singapore's media regulatory body, in 2004 the MDA developed the *Free-to-Air Television Programme Code*, which prohibits broadcasting any programme that "promotes, justifies or glamorizes" gay lifestyles.

> *Media Development Authority: Free-to-Air Television Programme Code*
>
> *Part 5: Public Morals and Social Values*
>
> *5.2 Information, themes or subplots on lifestyles such as homosexuality, lesbianism, bisexualism, transsexualism, transvestism, paedophilia and incest should be treated with utmost caution. Their treatment should not in any way promote, justify or glamorise such lifestyles. Explicit depictions of the above should not be broadcast.*

Recent examples of the MDA's enforcement of this code include a free-to-air station being fined 15,000 SGD (approximately 11,000 USD) for airing a programme that showed a gay couple and their adopted baby.[135] Likewise, a cable television channel was fined 10,000 SGD for airing a commercial that showed two women kissing.[136]

Several events during the 2007 IndigNation (annual month-long gay pride event in Singapore) were banned, including Canadian law professor Douglas Sanders' talk on sexual orientation in international law, and a photo exhibit depicting gay couples kissing. The reason given was that these events promoted a gay lifestyle.[137] Professor Sanders was eventually allowed to give his lecture at the National University of Singapore.

133 Elegant, S. 2003. "The Lion in Winter" TIMEAsia Magazine, 7 July 2003. http://www.time.com/time/asia/covers/501030707/sea_singapore.html (Accessed December 2010).
134 Leong, L. W. op. cit., pp. 134-135.
135 Media Development Agency. 2008a. "MediaCorp TV Channel 5 fined for breaching Programme Code". http://www.mda.gov.sg/NewsAndEvents/PressRelease/2008/Pages/24042008.aspx (Accessed 5 December 2010).
136 Media Development Agency 2008b. "Starhub Cable Vision fined for breaching the TV Advertising Code". http://www.mda.gov.sg/NewsAndEvents/PressRelease/2008/Pages/9042008.aspx (Accessed 5 December 2010).
137 IGLHRC. 2007a. "Singapore: Religious Homophobia, Gay Activism & Repealing the Sodomy Law", 9 October 2007. http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/465.html (Accessed 5 December 2010).

Freedom of assembly and association are also restricted for sexual minorities. Because homosexuality remains an offence, a meeting of a LGBTI group may be construed as an unlawful assembly. To legally form a society, the *Societies Act* (Cap. 311) requires all societies to be approved and registered with the State. People Like Us tried to register as a society in 1997 and again in 2004. Both applications were rejected. The first rejection did not specify the reasons. The second rejection was based on the grounds that the society would be likely to be prejudicial to public peace, welfare or good order, and that it would be contrary to the national interest.[138]

Societies Act (Cap. 311)

4 (2) The Registrar shall refuse to register a society if he is satisfied that [...]

(b) the society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Singapore; [...]

(d) it would be contrary to the national interest for the society to be registered

As of 19 July 2005, the Central Provident Fund (CPF) Board has allowed "non-related members to jointly purchase private residential properties using CPF savings".[139] Previously, same-sex couples could only buy Housing Development Board public housing if they were both unmarried and over 35 years old. Public housing for single citizens is typically small, older apartments in undesirable locations.[140] This change in the private housing policy will allow friends, such as two men, two women, or a man and a woman, including same-sex couples, to use their CPF savings to buy private homes and condominiums in better locations.

2.5.6 Regulations on HIV status

According to the "Travel and residence regulations for people with HIV and AIDS" report, there is no HIV testing for tourists staying up to 30 days in Singapore, "unless they look unhealthy". For any long-term visas, an applicant must undergo a medical examination, including a Tuberculosis X-ray and an HIV test. Foreigners testing positive for HIV will be deported, unless they are married to a Singaporean.[141]

Immigration Act (Cap. 133)

Prohibited immigrants

8. —(1) Any person, not being a citizen of Singapore, who is a member of any of the prohibited classes as defined in subsection (3) or who, in the opinion of the Controller, is a member of any of the

138 People Like Us, 2004. "History of PLU: the second registration attempt, 2004". http://www.plu.sg/society/?p=32 (Accessed 5 December 2010).

139 Central Provident Fund Board. 2005. "Ministerial Statement on Police Changes Affecting Property Market", 19 July 2005. http://mycpf.cpf.gov.sg/CPF/ News/News-Release/NR_19Jul2005.htm (Accessed 2009). Reported in news articles such as: Fridae.com. 2009. "Change in Singapore private housing policy advantageous to gay couples", 20 July 2005. http://www.fridae.com/newsfeatures/2005/07/20/1456.change-in-singapore-private-housing-policy-advantageous-to-gay-couples (Accessed 5 December 2010).

140 Leong, L. W. op. cit., p. 136.

141 Deutsche AIDS-Hilfe e. V., op. cit., p. 36. See also: UNAIDS, IPPF, GNP+, IHRA, ILGA. 2010, op. cit., p. 16

prohibited classes, is a prohibited immigrant. [...]

(3) The following persons are members of the prohibited classes: [...]

(ba) any person suffering from Acquired Immune Deficiency Syndrome or infected with the Human Immunodeficiency Virus

The Singapore National Employers' Federation, "permits termination of an HIV-positive employee if a large number of colleagues are unwilling to work with this person".[142] This regulation applies both to heterosexuals and sexual minorities.

2.5.7 Human rights violations against sexual minorities

In recent years there have not been many reported cases of human rights violations against sexual minorities in Singapore. There are no recorded cases of police entrapment after 2004. According to the ILGA, however, between 1990 and 1994, there were 67 convictions of homosexuals arising from police entrapment.[143] Professor Sanders' research indicates that in recent years, "prosecutions have been concerned with public activity, underage partners, sexual assault or extortion. Cases since 2001 only involve minors or extortion". According to government figures, the numbers of prosecutions in the years 2002 through 2006 were 25 in 2002 and 11, 13, four and seven in the following years.[144]

2.6 Timor-Leste

Summary:

- Homosexuality is legal.
- There is no explicit constitutional protection for sexual orientation.
- The Labour Code prohibits discrimination on grounds of sexual orientation and HIV status.

Timor-Leste (East-Timor), a former Portuguese colony, was occupied by Indonesia in 1975 and was a province of Indonesia, operating under Indonesian law, until it gained its independence in 1999. Between 1999 and 2002, Timor-Leste was governed by the UN Transitional Administration in East Timor (UNTAET). Until it is replaced by legislation developed by a democratically elected government, the legal system existing prior to 1999 will remain in effect, providing it does not conflict with international human rights law.

142 Leong, L. W. op. cit., p. 135. Leong's article was published in 1997 and no more recent sources have been found confirming or contradicting his research.
143 United States Bureau of Citizenship and Immigration Services. 1999. op. cit.
144 Sanders, D. 2009. "377 and the Unnatural Afterlife of British Colonialism in Asia", *Asian Journal of Comparative Law*, Vol. 4. No. 1, p. 42

2.6.1 Legal status of homosexuality

It is unclear when Timor-Leste decriminalized homosexuality, but some sources place it around 1975,[145] others even earlier, at 1858.[146] In any case, homosexuality has been legal in Timor-Leste for quite some time. There appears to be no discrimination between homosexual and heterosexual acts with respect to age of consent laws. However, there is a difference in the age of consent for women and men; for women it is 15 whereas it is 18 for men.[147]

2.6.2 Legal status of transgender people

Although no sources explicitly mention the legal status of transgender people, it is likely that cross-dressing is legal because homosexuality is legal. No sources were found to indicate whether or not a post-operative transgender person could have their identity cards changed to reflect their new gender.

2.6.3 Protection from sexual exploitation

Timor-Leste has developed a *Penal Code* which was passed in June 2009.[148] According to the "Trafficking in Persons Report 2009 – Timor-Leste", Timor-Leste has "a growing internal trafficking problem, mainly women and children lured to Dili from rural areas or camps for internally displaced persons with offers of employment and subsequently forced into prostitution".[149] *Penal Code* establishes strong legal protection from sexual exploitation, including for witnesses and victims. The government also uses the *Immigration and Asylum Act*, which criminalizes all forms of forced labour, including sexual exploitation.

Immigration and Asylum Act (Law No. 9/2003)

Article 81, Human Trafficking

1. All persons who under threat of force or any other form of coercion, fraud, deceit, abuse of power or by taking advantage of the victim's vulnerability, recruit, transfer, lodge or keep persons with the purpose of exploiting them or placing them in sexual exploitation, forced labour, slavery or human organ trafficking networks, shall be punished by imprisonment of not more than 8 years or fewer than 3 years.

2. The same penalties shall apply to those who, through payment either in cash or in kind, buy consent from a third party in control of the victim, to perform the activities provided for in item 1 of the present Article.

145 Ottoson, D., op. cit., p. 48.

146 Wikipedia. no date. "Timeline of LGBT History". http://en.wikipedia.org/wiki/ Timeline_of_LGBT_history (Accessed December 2010).

147 Children's Rights Information Network, "Timor-Leste: Committee on the Rights of the Child considers situation of children in Timor-Leste", 1 January 2008. http://www.crin.org/resources/infoDetail.asp?ID=16202 (Accessed December 2010).

148 For the English translation see http://www.protectionproject.org/wp-content/uploads/2010/09/TIMOR-LESTE.pdf

149 United States Department of State. 2009. Trafficking in Persons Report - Timor-Leste, 16 June 2009. http://www.unhcr.org/refworld/country,,,,TMP,4562d8cf2,4c1883bec,0.html (Accessed 5 December 2010).

3. If the victim of the activities provided for in items 1 and 2 of the present Article is a minor under 18 years of age, the mere transportation, recruitment, transfer, lodging or keeping of persons for the purposes described in item 1, constitutes a crime that shall be punishable by imprisonment of not more than 12 years or fewer than 5.

2.6.4 Anti-discrimination protection

In an early draft of the 2002 Constitution of Timor-Leste, "sexual orientation" was included as one of the grounds upon which discrimination is prohibited. The National Assembly decided to remove those words however, by a vote of 52 to 36. The current anti-discrimination provision in the Constitution (Section 16(2)) reads, "No one shall be discriminated against on grounds of colour, race, marital status, gender, ethnical origin, language, social or economic status, political or ideological convictions, religion, education and physical or mental condition".

Section 16(1) states, "All citizens are equal before the law, shall exercise the same rights and shall be subject to the same duties". Thus, although the National Assembly voted to remove "sexual orientation" from the anti-discrimination section of the constitution, the universality of section 16(1) clearly extends all constitutionally enshrined rights to every citizen. These rights encompass many of the internationally recognized human rights, for instance: the right to life, the right to personal freedom, security and integrity, the right to honour and privacy, freedom of speech and information, freedom to assemble, freedom of conscience, the right to work, the right to health and medical care, the right to housing and the right to education.

2.6.5 Civil liberties

Another positive development in Timor-Leste was the passing of the *Labour Code* in 2002. The *Labour Code* includes several anti-discrimination clauses for the private sector. According to the *Labour Code*, "discrimination" means any distinction, exclusion or preference based on race, colour, national extraction, sex, sexual orientation, maternity, family responsibility, religion, political opinion, social origin, health status including HIV and AIDS, disability, language or age which directly or indirectly nullifies or hinders equality of opportunity or treatment in access to training, access to jobs and terms and conditions of employment, but does not include specific requirements based on the inherent nature of the particular job.[150]

Section 35.2 of the *Labour* Code clearly states that, "Actions or circumstances which shall not constitute valid reasons for terminating a contract of employment include, but are not limited to, the following: (d) race, colour, gender, sexual orientation, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin". Thus, LGBTI workers do have protection from discrimination.

150 *Labour Code* of the Democratic Republic of Timor Leste, UNTAET/REG/2002/5 "Discrimination" section 2.

2.6.6 Regulation on HIV status

There is no available information on regulations pertaining to HIV status in Timor-Leste. The *Labour Code* protects against discrimination on the grounds of HIV status, and it is therefore likely that immigration regulations do not deny entry for people living with HIV. According to the 2008 Human Rights Report on Timor-Leste, there were no reported incidents of discrimination against homosexuals or those living with HIV.[151]

2.6.7 Human rights violations against sexual minorities

There have been no reported cases of serious violations of the human rights of sexual minorities. The 2008 Human Rights Report on Timor-Leste mentions general abuse of power by the police and a weak judiciary, however, including a lack of will to thoroughly investigate rape cases.[152]

151 United States Department of State. 2008. Human Rights Reports: Timor-Leste. http://www.state.gov/g/drl/rls/hrrpt/2008/eap/119059.htm (Accessed 5 December 2010).
152 Ibid.

PART 3

Part 3 - International law and the rights of sexual minorities

Before examining the developments in insular Southeast Asia with regard to international human rights law relating to sexual orientation and gender identity, it would be prudent to clarify the differences between domestic and international law.

Domestic law can be described as a vertical system, with a legislative body that creates law, an executive body that implements and enforces the law, and a judicial body that interprets the law and settles disputes. The subjects of domestic law have very little say in the actual development of the law, except through democratic elections.

International law is often described as a horizontal system; since there is no world parliament, no world police and no world court. According to section 38 of the *Statute of the International Court of Justice*, the sources of international law are: international conventions, international customs, general principles of law and, as subsidiary means for the determination of the rules of law, judicial decisions and teachings of the most qualified publicists.

International conventions, or treaties, are the most common and primary source of international law and the United Nations is one of many international forums used to draft new treaties. Unlike domestic law, where everyone is subject to the law, international treaties are only legally binding in those states that have chosen to ratify them. Furthermore, the subjects of international law (i.e. States) are also the ones who make and develop it.

Another source of international law is called "customary international law", which is developed through the consistent practice of States acting out of a belief that the law requires them to do so (called *opinio juris*). As opposed to treaty law, customary international law can have legally binding effects on states that did not have a part in its creation (e.g. newly independent States).

With respect to enforcement, the Security Council sometimes has the authority to enforce treaties, but in general, States must police each other and, according to the *Charter of the United Nations*, use peaceful means to settle disputes. One such mechanism is the International Court of Justice (ICJ), which unlike domestic courts, does not have universal jurisdiction. This means that States must voluntarily submit to the Court's jurisdiction before the Court's decisions are binding. ICJ decisions are enforceable by the Security Council.

There are many other regional courts and tribunals for specific matters such as international trade, human rights and international criminal law.

Although international law is quite different from domestic law, both create a behaviour modifying effect. It may seem easy for a state to violate international law, but there is pressure on States to remain within the law so as to have access to the privileges of being members of the international community, especially lucrative credit markets.

3.1 International human rights instruments

3.1.1 The International Bill of Rights

The events following the Second World War gave birth to the modern international human rights movement. In the face of the atrocities committed against civilians during the War, the international community voiced their outrage through the *Charter of the United Nations*, making the protection of human rights a central component of the new world order. During the following decades, the international human rights movement gathered momentum and international treaties were enacted and signed. These include the *Universal Declaration of Human Rights* (UDHR), the *International Covenant of Civil and Political Rights* (ICCPR) and the *International Covenant of Economic, Social and Cultural Rights* (ICESCR), together referred to as the *International Bill of Rights*.[153]

The preambles of the UNDHR, the ICCPR, and the ICESCR each recognizes that the "inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". All three also have the same lists of grounds on which discriminations is prohibited: all the rights contained in the covenants are guaranteed "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".[154] The phrase "without distinction of any kind" is all-encompassing, and the enumerated list is non-exhaustive, evidenced by the words "such as". LGBTI rights activists would argue that since these legally binding documents apply to everyone without distinction, then all the rights therein apply equally to everyone, including sexual minorities.

The tables on the following pages are simplified lists of rights contained in the UNDHR, the ICCPR and the ICSECR.

153 Declarations such as the UNDHR are not legally binding, unlike the ICCPR and the ICESCR which are treaties.

154 United Nations. 1948. *Universal Declaration of Human Rights*, General Assembly Res. 217A (III), U.N. Doc A/810; United Nations. 1966a. *International Covenant on Economic, Social and Cultural Rights*. 16 December 1966. Treaty Series, vol. 993. Entered into force 3 January 1976; United Nations. 1966b. *International Covenant on Civil and Political Rights*. General Assembly Resolution 2200A [XX1]. 16 December 1966. Entered into force 23 March 1976.

Table 1: Rights contained in the ICCPR and UNDHR

Specific Right	ICCPR	UNDHR
The right to life	Art. 6	Art. 3
Freedom from inhuman or degrading treatment	Art. 7	Art. 5
Freedom from slavery, servitude and forced labour	Art. 8	Art. 4
Right to liberty and security	Art. 9	Art. 3
Right of deprived to be treated with humanity	Art. 10	Art. 5
Freedom from imprisonment for inability to fulfill contractual obligations	Art. 11	Art. 11
Freedom of movement and to choose one's residence	Art. 12	Art. 13
Freedom of aliens from arbitrary expulsion	Art. 13	Art. 9
Right to a fair trial	Art. 14	Art. 10
Non-retroactive application of criminal law	Art. 15	Art. 11
Right to recognition as a person before the law	Art. 16	Art. 6
Right to privacy, family, home or correspondence	Art. 17	Art. 12
Freedom of thought, conscience and religion	Art. 18	Art. 18
Freedom of opinion and expression	Art. 19	Art. 19
Prohibition of propaganda of war	Art. 20	Art. 20
Right of peaceful assembly	Art. 21	Art. 20
Freedom of association	Art. 22	Art. 20
Right to marry and found a family	Art. 23	Art. 16
Rights of the child	Art. 24	----
Right to take part in the conduct of public affairs, to vote and to be elected	Art. 25	Art. 21
Equality before the law	Art. 26	Art. 7
Rights of minorities	Art. 27	----

Table 2: Rights contained in the ICESCR and UNDHR

Specific Right	ICESCR	UNDHR
Right to work	Art. 6	Art. 23
Right to just and favourable conditions of work	Art. 7	Art. 23
Right to form and join trade unions	Art. 8	Art. 23
Right to social security	Art. 9	Art. 22
Right relating to motherhood, childhood, marriage and the family	Art. 10	Art. 25

Right to adequate food, clothing, housing and standard of living and freedom from hunger	Art. 11	Art. 25
Right to physical and mental health	Art. 12	Art. 25
Right to education including a plan for implementing compulsory primary education	Art. 13	Art. 26
Undertaking to implement the principle of compulsory education free of charge	Art. 14	Art. 26
Right relating to science and culture	Art. 15	Art. 27

3.1.2 How these rights apply to sexual minorities

Despite these developments in upholding human rights, rights relating to sexual orientation and gender identity were largely overlooked.[155] Considering that homosexuals were persecuted during the Holocaust, it is disappointing that the international community did not to include sexual orientation as one of the enumerated grounds of non-distinction and equality.[156] At the time the Bill of Rights was drawn up, however, the general opinion was that sexual orientation was either a choice or a mental illness, as opposed to an immutable characteristic like ethnicity. Thus, early LGBTI activists had to rely on alternative interpretations of the wording in human rights instruments to protect their rights, such as freedom from discrimination on the basis of "sex" or "other status", and the right to privacy and equality.

Below are explanations of how some of the rights can be applied to sexual minorities:

Right to life, liberty, and security of the person requires States to protect people from systemic and life-threatening persecution based on their sexual orientation; to prosecute sexual orientation based violent offenders; and repeal arbitrary laws that criminalize homosexual behaviour.

Right to be free from torture or cruel, inhumane or degrading treatment requires states to protect sexual minorities from abusive police practices and hold the police accountable for such practices.

Right to privacy is often violated by laws prohibiting private and consensual sexual activities. When the law only prohibits same-sex private sexual activities, it is discriminatory and offends the right to equality.

Right to freedom of thought, conscience, opinion, and expression requires States to allow private and public expressions of one's sexual orientation. Policies such as the "Don't Ask, Don't Tell" (currently pending repeal), of the US Military, violate this right.

155 Note: This section is adapted from DeLaet, D. L. 1997. "Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?", *Law and Sexuality*, Vol. 7, pp. 31-53.

156 United States Holocaust Memorial Museum, "Nazi Persecution of Homosexuals 1933-1945". http://www.ushmm.org/museum/exhibit/online/hsx/ (Accessed 5 December 2010).

Right to equal protection of the law requires states to afford sexual minorities the same legal protection from hate crimes, in child custody cases, and in exercising their civil liberties, such as their freedom of expression, free from arbitrary restriction. Sexual minorities also have the right to a fair trial.

Right to work and equal pay requires states to safeguard sexual minorities' right to work, equal pay, promotion, and protection from termination based on their sexual orientation. This applies to both the private and public sectors, including military service.

Right to physical and mental health includes protection from violent hate crimes and freedom from policies that effectively force sexual minorities to repress their identity, thereby hindering an individual's health rights.

Right to education requires states to allow the promotion of understanding, tolerance and friendship. Some sexual minorities report being afraid to attend school or university because of an unsafe or unwelcoming climate.

Right to asylum requires states to offer refugee protection to sexual minorities from persecution that is based on their sexual orientation or gender identity.

3.1.3 Other human rights treaties

Apart from the *International Bill of Rights*, other important human rights treaties include the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention on the Rights of the Child* (CRC) and the *Convention Against Torture* (CAT). The CEDAW and ICERD are especially relevant to sexual minorities, because often sexual minorities suffer double discrimination on account of their race and gender. With respect to children, usually one's sexual orientation is not entirely clear in childhood but becomes clearer in adolescence. Thus, the CRC is critical to safeguard the natural development of children to become the adult they wish to be. Finally, the CAT provides additional protection from violence, specifically when it occurs inside State-controlled detention centres.

Each human rights treaty has a monitoring body that examines compliance with the treaties and develops comments about the treaties, which clarify and interpret the meaning of articles. The general comments, concluding observations and findings of these monitoring bodies are not legally binding in international law, but they are highly persuasive as interpretive guides for the meaning and the extent of the treaty's international obligations. There are also Optional Protocols to the ICCPR and CEDAW which give their monitoring bodies judicial powers, and their decisions are binding on the parties involved.

Table 3: International treaties and their respective monitoring bodies

Treaty	Monitoring Body
ICCPR	UN Human Rights Committee
ICESCR	Committee on Economic, Social and Cultural Rights
ICERD	Committee on the Elimination of Racial Discrimination
CEDAW	Committee on the Elimination of Discrimination against Women
CAT	Committee against Torture
CRC	Committee on the Rights of the Child

Recalling that none of these treaties explicitly mention "sexual orientation" or "gender identity", over the years the monitoring bodies have all interpreted their respective treaties to include such protection from discrimination.[157] For example, in 1999, the Committee on the Elimination of Discrimination against Women recommended that "lesbianism be reconceptualized as a sexual orientation and that penalties for its practice be abolished".[158] In 2000, the Committee on Economic, Social and Cultural Rights added "sexual orientation" as a prohibited ground for discrimination in their General Comment No. 14.[159] In 2004, the Committee on the Rights of the Child recognized that children and adolescents under the age of 18 who are subject to discrimination are more vulnerable to abuse and their health and development are put at risk. The Committee expanded the enumerated grounds for protection against discrimination in Article 2 to "cover adolescent's sexual orientation and health status (including HIV/AIDS and mental health)".[160]

In an advanced unedited version of the upcoming General Comment No. 20, the Committee on Economic, Social and Cultural Rights officially lists recognized groups that must be included under Article 2(2) "other status" in the ICESCR. Paragraph 32 includes sexual orientation and gender identity, and refers to the Yogyakarta Principles for defining these two terms. It goes on to include "Health Status" (at para. 33) and, as an example, the Committee uses the discrimination commonly faced by HIV positive individuals.

E/C.12/GC/20 General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2 para. 2)

32.Sexual orientation and gender identity: "Other status" as recognized in article 2(2) includes sexual orientation. States parties should ensure that a person's sexual orientation is not a barrier to realising Covenant rights, for example, in accessing survivor's pension rights. In addition, gender identity

157 Lau, H. 2004. "Sexual Orientation: Testing the Universality of International Human Rights Law", The University of Chicago Law Review, Volume 71, p. 1702 footnote 84.

158 Committee on the Elimination of Discrimination Against Women (CEDAW). 1999. "Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Kyrgyzstan", 27 January 1999, UN Doc. CEDAW/A/54/38, paras. 127-128.

159 Committee on Economic, Social and Cultural Rights (CESCR). 2000. "General Comment No. 14: The right to the highest attainable standard of health", 11 August 2000, UN Doc E/C.12/2000/4, para. 18.

160 Committee on the Rights of the Child (CRC). 2003. "General Comment No. 4. Adolescent health and development in the context of the Convention on the Rights of the Child", 1 July 2004, UN Doc. CRC/GC/2003/4, para. 6.

is recognized as among the prohibited grounds of discrimination; for example, persons who are transgender, transsexual or intersex often face serious human rights violations, such as harassment in schools or in the work place.

33. Health Status: Health status refers to a person's physical or mental health. State parties should ensure that a person's actual or perceived health status is not a barrier to realizing the rights under the Covenant. [... For] example, when HIV status is used as the basis for differential treatment with regards to access to education, employment, health care, travel, social security, housing and asylum.

3.1.4 Customary international law

The second primary source of international law is customary international law. Although the ICCPR and ICESCR have not been ratified by every country in the world, many of the provisions contained within them have been recognized as being customary international law. For instance, the UN Human Rights Committee has listed the following rights and freedoms of the ICCPR as having become customary international law: freedom from slavery; freedom from torture and cruel, inhumane or degrading treatment or punishment; freedom from arbitrary arrest and detention; right to life and liberty; freedom of thought, conscience and religion; the right to be presumed innocent until proven guilty; freedom from execution for pregnant women and children; freedom from advocacy of hatred based on nationality, race, or religion; freedom to marry; and the right of minorities to enjoy their own culture, religion or use their own language.[161]

Currently there is no specific customary international law that prohibits discrimination based on sexual orientation or gender identity. But customary international law applies to all humans, regardless of sexual orientation and gender identity, so sexual minorities ought to reason by analogy that their rights are universal, indivisible, interdependent and interrelated. This has not yet been legally tested, however.

Countries that have objected to a norm of international law consistently since its inception are sometimes considered "persistent objectors". International tribunals are very sceptical of the "persistent objector" argument, however, and require significant evidence that all of the State's actions, statements, voting records, policies and laws support their objection to a new and emerging customary international law.

3.2 International jurisprudence

National courts and legislatures around the world have been gradually decriminalizing homosexuality since the 1960s, and have started recognizing post-operative transgender persons' new gender since the 1970s. Some countries, such as Australia, Britain and Canada, simply repealed antiquated criminal legislation. Other countries had to challenge existing criminal provisions through their domestic courts. States that follow the principle of

161 United Nations Office of the High Commissioner for Human Rights (OHCHR). 1994. "General Comment 24(52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 or the Covenant, Fifty-second session", UN Doc. CCPR/C/21/Rev.1/Add.6 , para. 8.

constitutional supremacy must determine if the criminalization of homosexuality violates their Constitution. In other cases, national courts can rely on the human rights protections in domestic legislation, such as a Bill of Rights, and international legal obligations. In this area of law, the decisions of other countries' high courts as well as international tribunals can be very persuasive. Noteworthy cases include: the United States (2003),[162] Hong Kong, China (2006),[163] Nepal (2008),[164] and India (2009).[165] India is an excellent example of the interplay between interpretation of one's own Constitution with the persuasive growing body of international jurisprudence, as well as pressure from civil society.

The International Commission of Jurists, in their submission to the Supreme Court of Nepal, gave examples of States that have extended human rights protection to transgender people either through legislation or the courts. Recent cases include the following: in 2001, the Constitutional Court of South Africa interpreted the constitutional prohibition of discrimination based on "sexual orientation" to include "transsexuals"; in 2001, the Family Court of Australia held that a transsexual's sex reassignment would be recognized for the purposes of marriage; and in 2004, the Court of Appeals (6th Circuit) in the United States found that "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex".[166]

Countries with legislation protecting the rights of transgender people or allowing them to change their identification documents to reflect their new genders include: Australia, Canada, China (2003), Germany (1981), Italy (1982), Japan (2004), Netherlands (1985), New Zealand (1995), Panama (1975), Romania (1996), Singapore (1996), South Africa (2003), Spain (2006), Sweden (1972), Turkey (1988), the United Kingdom (2004), and the United States.

The first successful international cases concerning sexual orientation were heard by the European Court of Human Rights (ECHR), which is a judicial body that oversees the *European Convention on Human Rights*. Examples include the cases listed below.

- In *Dudgeon v. The United Kingdom* (1981)[167], the ECHR held that the criminalization of homosexual conduct in Northern Ireland violated Mr. Dudgeon's right to privacy (which includes his sexual life) under Article 8 of the European Convention on Human Rights.
- In *Norris v. Republic of Ireland* (1988)[168] and *Modinos v. Cyprus* (1993)[169] the ECHR repeated their ruling from Dudgeon. The ECHR also said that even a consistent policy to not prosecute sodomy was no substitute for full repeal.
- In *Lustig-Prean v. United Kingdom* (1999),[170] the ECHR ruled that the Ministry of Defence's ban on homosexuals from the military was discriminatory and offended the *European Convention on Human Rights*.

162 Lawrence v. Texas, 539 U.S. 588, 26 June 2003.
163 Leung TC William Roy v Secretary for Justice, CACV 317/2005 (20 September 2006).
164 Sunil Babu Pant v Nepal, Supreme Court of Nepal, Order Writ No 917 of 2064 (2007AD) 21 December 2008.
165 *Naz Foundation v National Capital Territory of Delhi*, WP(C) 7455/2001, 2 July 2009.
166 International Commission of Jurists. 2008. "Submission to the Supreme Court of the State of Nepal, Providing the Basis in International Human Rights Law for the Prohibition of Discrimination Based on Sexual Orientation and Gender Identity and Other Connected Matters", 9 January 2008, pp. 14-19.
167 *Dudgeon v. The United Kingdom*, 4 Eur. H.R. Rep. 149 (1981).
168 *Norris v. Republic of Ireland*, 13 Eur. H.R. Rep. 186 (1989).
169 *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993).
170 *Lustig-Prean v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999).

- In Karner v. Austria (2003),[171] the ECHR ruled in favour of equal spousal benefits for heterosexual and homosexual partners.

The human rights bodies for the Organization of American States are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. They are responsible for protecting and enforcing the human rights provisions in the *American Declaration of the Rights and Duties of Man* (1948). *Marta Alvarez v. Colombia* was the first case concerning sexual orientation heard by the Inter-American Commission on Human Rights in 1998.[172] Marta Alvarez contested the fact that she was denied conjugal visits from her same-sex partner while heterosexual couples within the same prison were granted this right. The Commission decided that the case was admissible, meaning it gave an unpublished report of its findings and recommendations to the State, giving the State time to comply. If they State fails to comply, the Commission can submit the case to the Inter-American Court of Human Rights for a binding decision.

At the UN treaty monitoring level, one of the most important developments in international human rights for sexual minorities was the UN Human Rights Committee's decision in *Toonen v. Australia* (1994).[173] Australia, by that time, had decriminalized homosexual acts in every state except Tasmania. Mr. Toonen was a gay activist living in Tasmania, and risked imprisonment for his sexual orientation. He argued that his right to privacy under the ICCPR was violated. Tasmania argued that the criminalization of homosexual activity was part of their HIV prevention strategy. In a landmark decision for the rights of sexual minorities, the UN Human Rights Committee decided that discrimination based on "sexual orientation" is included under the term "sex". After *Toonen*, legal scholars reflecting on the developments of international human rights law protecting sexual minorities noted that, "as a matter of international law, sexual orientation discrimination is a form of sex discrimination. Indeed, the former is not possible without reference to the sex of the individual".[174] The UN Human Rights Committee's decision acts as a very persuasive judicial interpretation of the ICCPR. As such, many domestic courts and other human rights tribunals refer to the decision in *Toonen* to help interpret their international obligations under the ICCPR as well as those under other human rights treaties.

Another celebrated case heard by the UN Human Rights Committee was *Young v. Australia* (2000).[175] In this case, Australia had denied Mr. Young from receiving the veteran's pension benefits from his late same-sex partner. The Committee decided in favour of Mr. Young and said:

> *The State party provides no arguments on how this distinction between same-sex partners, who are excluded from pension benefits under law, and unmarried heterosexual partners, who are granted such benefits, is reasonable and objective, and no evidence which would point to the existence of factors justifying such a distinction has been advanced. In this context, the Committee finds that the*

171 *Karner v. Austria*, 38 Eur. H.R. Rep. 24 (2003).
172 Colombia: Report Nº 71/99 *Marta Lucía Álvarez Giraldo*, Admissibility, Case 11.656, 4 May 1999.
173 *Toonen v. Australia*, Communication No. 488/1992, UN Doc CCPR/C/50/D/488/1992 (1994).
174 International Commission of Jurists, op. cit., p. 5.
175 *Young v. Australia*, Communication No. 941/2000, UN Doc CCPR/C/78/D/941/2000 (2003).

State party has violated article 26 of the Covenant by denying the author a pension on the basis of his sex or sexual orientation. [176]

3.3 International organizations

International organizations (IO), sometimes called intergovernmental organizations, are different from other types of international groups, such as transnational corporations, international associations, or international non-governmental organizations (NGOs). They are created through treaties that explicitly give them legal personality. Membership is limited based on the provisions of the treaty establishing the IO. This creates international legal rights and obligations between the Member States and the IO.

3.3.1 The United Nations

Regarding the responsibilities of membership in the UN, members take on the obligation to advance the purposes and principles of the UN.

Chapter 1 – Purposes and Principles

Article 1

3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.

To further these ends, the Charter of the UN establishes organs responsible for various issues. One organ, the General Assembly, is authorized to, among other things, initiate studies and make recommendations for the purposes of "assisting in the realization of human rights and fundamental freedoms for all without distinction of race, sex, language or religion". [177]

The Economic and Social Council (ECOSOC) is another principal organ of the UN. Its functions include:

1. [making] recommendations for the purposes of promoting respect for, and observance of, human rights and fundamental freedoms for all.
2. [preparing] draft conventions for submission to the General Assembly, with respect to matters falling within its competence.[178]

To assist in its work, ECOSOC allows for NGOs to be accredited and given "consultative status", enabling them to participate in meetings. In 1993, the ILGA was granted consultative status, but this was suspended the following year after one of ILGA's 350 members was

176 *Ibid*, para. 10.4.
177 *United Nations. 1945. Charter of the United Nation. Entered into force 24 October 1945*, article 13(1).
178 *Ibid*, articles 62(2)-(3).

discovered to be a controversial US organization which supported "man-boy love". In response, ILGA rewrote its constitution, making human rights a key component of its work. In 2002, ILGA regained its consultative status. By 2006, other LGBTI groups were accredited, and other NGOs such as Amnesty International, the International Commission of Jurists, and the International Service for Human Rights, began taking up LGBTI rights issues.[179]

In 1993, the UN held the World Conference on Human Rights in Vienna. This was the first UN event that invited LGBTI NGOs to participate. At the World Conference, Australia, Austria, Canada, Germany and the Netherlands were the only five States that made positive references to LGBTI issues. Singapore was the only State to make a negative comment. In negotiations over the final conference statement, Canada proposed adding "sexual orientation" to the listed grounds prohibiting discrimination, but it was decided to not include any list.[180] Instead, the Vienna Declaration and Programme of Action states that "all human rights are universal, indivisible, and interdependent and interrelated".[181]

In 1995, during the Fourth World Conference on Women, held in Beijing, there was another attempt to include a reference to "sexual orientation" in the final statement. After an hour debate on the issue, it was decided to omit any such references.[182]

The 2001 General Assembly Special Session on HIV/AIDS was another opportunity to incorporate sexual orientation into a major international document. Specific reference to MSM and sex in the context of sex work were included in an early draft, but they were later watered down to "those who are at risk due to sexual practice" (i.e. MSM) and "those vulnerable to infection due to livelihood" (i.e. sex workers).[183]

The UN has set up various agencies,[184] which implement UN programmes, and has appointed special rapporteurs[185] who monitor and recommend solutions for specific human rights problems. Over the past decade, these agencies and special rapporteurs have been growing increasingly concerned about human rights violations against sexual minorities. For example, "The Special Representative of the Secretary-General on the situation of human rights defenders has been assiduous in condemning the intimidations of and attacks on lesbian, gay, bisexual, transgender and intersex activists".[186]

179 Sanders, D. 2007. "Sexual Orientation in International Law: What role has international law played in the LGBT movement?" 16 May 2007. http://www.ilga.org/news_results.asp?FileCategory=7&ZoneID=7& FileID=1078 (Accessed 2009).

180 *Ibid.*

181 United Nations. 1993. *Vienna Declaration and Programme of Action*. UN Doc A/CONF.157/23, 12 July 1993, paragraph 5.

182 Douglas Sanders, op. cit.

183 *Ibid.*

184 While the mandates of most United Nations agencies encompass elements of human rights, the following agencies specialize in human rights: United Nations High Commission on Human Rights, the United Nations High Commission for Refugees and the United Nations Human Rights Council. The United Nations Development Programme (UNDP) supports human rights for development and is the convening agency in the UNAIDS Division of Labour to "Remove punitive laws, policies, practices, stigma and discrimination that block effective responses to AIDS."

185 While human rights for sexual minorities would fall under the mandates of many special rapporteurs, the following have made particular reference to sexual orientation and gender identity: Special Rapporteur on extrajudicial, summary or arbitrary executions, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Special Representative of the Secretary-General on the situation of human rights defenders, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, and Special Rapporteur on violence against women, its causes and consequences.

186 O'Flaherty, M. and Fisher, J. 2008. "Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles", Human Rights Law Review, Vol. 8, No. 2, p. 222.

3.3.2 The 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity

On 18 December 2008, Argentina, on behalf of 65 other Member States, delivered the Joint Statement on Human Rights, Sexual Orientation and Gender Identity at the UN General Assembly. This historic statement reaffirms that the principle of universality of human rights applies to every human being regardless of sexual orientation or gender identity. The Statement also calls on States to decriminalize homosexual acts.

In the same meeting, however, Syria delivered an opposing statement on behalf of 53 other like-minded States. The Opposing Statement sent mixed messages; on one hand, it "strongly [deplores] all forms of stereotyping, exclusion, stigmatization, prejudice, intolerance, discrimination and violence directed against peoples, communities and individuals or any groups whatsoever, wherever they occur".[187] but on the other hand, it rejects the idea of expanding existing human rights documents to include "new rights", especially for "certain persons on the grounds of their sexual interests and behaviors".[188] The Opposing Statement also argues that "attempting to give priority to the rights of certain individuals [i.e. sexual minorities]... could result in a positive discrimination [at] the expenses of others' rights and thus run in contradiction with the principles of non-discrimination and equality".[189] This suggests that protecting sexual minority rights will detract from the fight against all other forms of discrimination. In fact, those persecuted on the basis of their sexual orientation are often also discriminated against due to their gender, race, colour or religion. We have been living for decades in a world with concurrent anti-discrimination provisions, for example race and sex, without any problems. Adding protection for sexual minorities should not detract from the prohibition of discrimination on other enumerated grounds – rather, it should enhance it.

As Navanethem Pillay, High Commissioner of Human Rights, said at the UN General Assembly, "Those who are lesbian, gay, or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such".[190]

In March 2011, 85 nations signed a statement entitled Ending Acts of Violence and Related Human Rights Violations Based on Sexual Orientation and Gender Identity issued at the Human Rights Council. The statement noted concerned and called on States to take steps to end acts of violence, criminal sanctions and related human rights violations committed against individuals because of their sexual orientation or gender identity.

In June 2011, the United Nations Human Rights Council passed a historic resolution on human rights violations based on sexual orientation and gender identity. It passed by 34 votes in favour, 19 votes against and 3 abstentions. The resolution (A/HRC/17/L.9/Rev.1)

187 United Nations. 2008b. "Response to the Joint Statement on Human Rights, Sexual Orientation and Gender Identity", 18 December 2008, United Nations General Assembly.

188 Ibid.

189 Ibid.

190 United Nations Office of the High Commissioner for Human Rights (OHCHR). 2008. "Statement by Navanethem Pillay, High Commissioner of Human Rights, to the United Nations General Assembly", 18 December 2008.

calls on the office of the United Nations High Commissioner for Human Rights to review discriminatory laws, practices and acts of violence on the basis of individuals' sexual orientation and gender identity. The results will be presented during the 19th session of the Human Rights Council, and appropriate follow-up will be identified.

3.3.3 Regional international organizations

Other than economic, environmental or other issue-specific organizations, there are at least five main regional IOs around the world. These include the European Union (EU), the Organization of American States (OAS), the African Union (AU), the Organization of the Islamic Conference (OIC) and the Association of Southeast Asian Nations (ASEAN).

- The EU has a rich history of protecting the rights of sexual minorities. The Treaty of Amsterdam (1999) gave the European Parliament the power to combat discrimination against sexual orientation. It is the first international treaty to explicitly mention and protect sexual orientation. According to the Treaty, "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".[191]
- The OAS also has a long history of supporting sexual diversity. It recently passed three resolutions on Human Rights, Sexual Orientation and Gender Identity. It noted with concern that "acts of violence and related human rights violations [are] perpetrated against individuals because of their sexual orientation and gender identity".[192] Currently, the OAS is drafting the *Inter American Convention against Racism and all Forms of Discrimination and Intolerance*. If the OAS adopts the recommendations from the International Commission of Jurists, it will include explicit reference to sexual orientation and gender identity.
- The OIC does not have any protection for sexual minorities. On the contrary, the OIC resists all international attempts to recognize sexual orientation and gender identity as basic human rights. In 1990, the OIC adopted the *Cairo Declaration of Human Rights in Islam*. The Declaration has received criticism from the international community because of Article 24, which states that, "All the rights and freedoms stipulated in this Declaration are subject to the Islamic Shari'ah".[193] The Declaration could therefore never be used to protect the rights of sexual minorities from discrimination as Sharia law explicitly condemns homosexuality. On 18 December 2008, the OIC Member States at the UN signed the Opposing Statement on human rights, sexual orientation and gender identity.
- The AU has been silent on sexual orientation and gender identity. Homosexual behaviour is criminalized in most parts of Africa. Some legal scholars believe that the

191 European Union (EU), *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*. Official Journal C 340, 10 November 1997. Entered into force 1 May 1999, article 5(2)(7). http://eur-lex.europa.eu/en/treaties/dat/11997D/htm/11997D.html (Accessed 5 December 2010).

192 Organization of American States (OAS), *Human Rights, Sexual Orientation and Gender Identity*, Adopted at the fourth plenary session, held on 4 June 2009, AG/RES. 2600 (XL-O/10). This text ratifies what was established in previous years by the resolutions AG/RES.2435 (XXXVIII-O/08) and AG/RES. 2504 (XXXIXO/09).

193 Organization of Islamic Conference (OIC). 1990. *Cairo Declaration of Human Rights in Islam*. Resolution 217 A (III) adopted on 5 August 1990.

equality provisions in Article 2 of the *African Charter on Human and Peoples' Rights* could follow the same interpretation as *Toonen v. Australia*.[194]

- In November 2007, the ASEAN Member States adopted a Charter transforming it into an international organization. Article 1(7) of the Charter makes "promoting and protecting human rights" a purpose of ASEAN. Article 14 mandates ASEAN to develop a human rights body, similar to the European Court of Human Rights or the Inter-American Court of Human Rights. After months of negotiating, on 20 July 2009, the Summit of ASEAN Foreign Ministers, in Phuket, Thailand, agreed to adopt the Terms of Reference for establishing the ASEAN Intergovernmental Commission on Human Rights (AICHR). ASEAN officially launched AICHR in October 2009. AICHR meets regularly and, as of November 2010, is preparing a draft Human Rights Declaration and related conventions. When signed, these conventions will be binding on the Member States. While AICHR is an excellent first step, ASEAN needs to also develop a judicial body that can monitor its implementation, and can hear cases and give binding decisions.

Terms of Reference of AICHR [195]

Purposes

1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.

Principles

2.1 e) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

f) upholding the Charter of the United Nations and international law, including international humanitarian law, subscribed to by ASEAN Members states

2.2 Respect for international human rights principles, including universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms, as well as impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicisation.

Mandate and Functions

4.2 To develop an ASEAN Human Rights Declaration with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights;

4.6 To promote the full implementation of ASEAN instruments related to human rights;

4.10 To obtain information from ASEAN Member States on the promotion and protection of human rights;

4.12 To prepare studies on thematic issues of human rights in ASEAN.

194 Huamusse, L. E. F. op. cit., p. 19.

195 Association of Southeast Asian Nations (ASEAN). 2009. *Terms of Reference of ASEAN Intergovernmental Commission on Human Rights*, adopted 20 July 2009.

3.4 The Yogyakarta Principles

In 2003, Brazil attempted to pass a resolution in the UN Commission on Human Rights (now the UN Human Rights Council) supporting sexual minority rights. The OIC and African States blocked the resolution from ever being voted on, and therefore, human rights activists feared that a substantive resolution in a political body would be unlikely. A new strategy was established, which involved organizing a high-level conference of leading human rights experts and judges from around the world and, ideally, finding consensus. Louise Arbour, the UN High Commissioner for Human Rights at the time, gave the support of her office to organizing the event. As Professor Sanders, the previously mentioned expert in human rights and sexual minorities, explained, "The idea of a high-level conclave fits with a particular pattern in international law. One of the recognized sources of international law lies in the work of prominent scholars and judges".[196]

This culminated in an international panel of experts in international human rights law and on sexual orientation and gender identity, which was held in Yogyakarta, Indonesia, from 6 to 9 November 2006. The 29 member panel came from 25 countries, representing all geographic regions, and included one former UN High Commissioner for Human Rights (May Robinson), 13 current or former UN human rights special rapporteurs or treaty body members, two sitting judges of domestic courts, as well as legal academics and activists.

The resulting document, the Yogyakarta Principles, reached by consensus, is a set of 29 principles that state what current international human rights law says in relation to sexual minorities. The Yogyakarta Principles is therefore not an aspirational document, nor does it attempt to create "new" rights and obligations, it simply interprets existing international human rights instruments and jurisprudence, and rephrases it in a language that is clear and precise regarding sexual minorities. "Each [principle] comprises a statement of international human rights law, its application to a given situation and an indication of the nature of the State's duty to implement the legal obligation".[197]

196 Sanders, D. 2008. "The Role of the Yogyakarta Principles", http://sxpolitics.org/wp-content/uploads/2009/03/yogyakarta-principles-2-douglas-sanders.pdf (Accessed 8 February 2009).
197 O'Flaherty, M. and Fisher, J. op. cit., p. 234.

The Yogyakarta Principles[198]

Principle 1. The right to the universal enjoyment of human rights

Principle 2. The right to equality and non-discrimination

Principle 3. The right to recognition before the law

Principle 4. The right to life

Principle 5. The right to security of the person

Principle 6. The right to privacy

Principle 7. The right to freedom from arbitrary deprivation of liberty

Principle 8. The right to a fair trial

Principle 9. The right to treatment with humanity while in detention

Principle 10. The right to freedom from torture and cruel, inhuman or degrading treatment or punishment

Principle 11. The right to protection from all forms of exploitation, sale and trafficking of human beings

Principle 12. The right to work

Principle 13. The right to social security and to other social protection measures

Principle 14. The right to an adequate standard of living

Principle 15. The right to adequate housing

Principle 16. The right to education

Principle 17. The right to the highest attainable standard of health

Principle 18. Protection from medical abuses

Principle 19. The right to freedom of opinion and expression

Principle 20. The right to freedom of peaceful assembly and association

Principle 21. The right to freedom of thought, conscience and religion

Principle 22. The right to freedom of movement

Principle 23. The right to seek asylum

Principle 24. The right to found a family

Principle 25. The right to participate in public life

Principle 26. The right to participate in cultural life

Principle 27. The right to promote human rights

Principle 28. The right to effective remedies and redress

Principle 29. Accountability

198 For a complete and detailed description of each principle, please go to: http://www.yogyakartaprinciples.org, For a detailed analysis of the jurisprudence and related international legal sources that support the Yogyakarta Principles, please see: Williams, G. 2007. "Jurisprudential Annotations to the Yogyakarta Principles". http://www.yogyakartaprinciples.org/yogyakarta-principles-jurisprudential-annotations.pdf (Accessed 5 December 2010).

In 2007, Louise Arbour delivered a Statement regarding the Yogyakarta Principles to the Third Committee of the UN General Assembly, as follows:

Human rights principles, by definition, apply to all of us, simply by virtue of having been born human. Just as it would be unthinkable to exclude some from their protection on the basis of race, religion, or social status, so too must we reject any attempt to do so on the basis of sexual orientation or gender identity.

The Yogyakarta Principles are a timely reminder of these basic tenets. Excluding lesbian, gay, bisexual, transgender and intersex persons from equal protection violates international human rights law as well as the common standards of humanity that define us all.

And, in my view, respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental right to life, security and privacy by criminalizing harmless private relations between consenting adults.

As such, I wish to reiterate the firm commitment of my Office to promote and protect the human rights of all people regardless of their sexual orientation or gender identity.[199]

199 United Nations Office of the High Commissioner for Human Rights (OHCHR). 2007. "Statement by Louise Arbour, High Commissioner of Human Rights, to the Third Committee of the General Assembly", New York, 7 November 2007.

PART 4

Part 4 - Insular Southeast Asia's international obligations

Having examined the existing domestic legislation and practices in the six countries in insular Southeast Asia, as well as the evolution of international human rights law relating to the protection of sexual minority rights, this section will review the current international legal obligations of Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Timor-Leste.

The table below shows the ratification status of the major international human rights treaties with regard to the six countries. As shown in the table, all six countries have signed the CEDAW and CRC treaties, but the six countries differ with regard to the other treaties and the Optional Protocols.

Table 4: Ratification status of the major international human rights treaties

TREATY	Brunei	Indonesia	Malaysia	Philippines	Singapore	Timor-Leste
ICESCR		02/23/06		01/03/76		07/16/03
ICCPR		02/23/06		01/23/87		12/18/03
ICCPR-OP1				11/22/89		
ICCPR-OP2-DP						
CERD		07/25/99		01/04/69		05/16/03
CEDAW	05/24/06	10/13/84	08/04/95	09/04/81	11/04/95	05/16/03
CEDAW-OP		02/28/00		02/12/04		07/16/03
CAT		11/27/98		06/26/87		05/16/03
CRC	01/26/96	10/05/90	03/19/95	09/20/90	11/04/95	05/16/03
CRC-OP-AC		09/24/01		09/26/03	09/07/00	
CRC-OP-SC		09/24/01		06/28/02		05/16/03

CCPR-OP1 – the Optional Protocol to the ICCPR
CCPR-OP2-DP – the Second Optional Protocol to the ICCRP, aimed at the abolition of the death penalty
CEDAW-OP – the Optional Protocol to the CEDAW
CRC-OP-AC – the Optional Protocol to the CRC on the involvement of children in armed conflict
CRC-OP-SC – the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography

The adoption of international law into domestic law differs between civil law and common law jurisdictions:

- Civil law jurisdictions often consider treaty law and customary international law as part of their domestic legal system without having to pass any legislation. If domestic law conflicts with international law, however, then the domestic law will prevail.
- Common law jurisdictions usually require legislation to transform treaties into domestic law.

Customary international law, on the other hand, is deemed to automatically form part of the common law unless there is legislation that explicitly deviates from it. In both cases, judges often follow the principle of statutory interpretation that national statutes must be construed so as not to conflict with international law.

4.1 Brunei Darussalam

Summary:

- Member of UN, ASEAN, Commonwealth and OIC, among others
- Signatory to CRC and CEDAW
- Opposed the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity
- consistently voted against any developments in Customary international law protecting sexual minorities

With regard to international organizations, Brunei Darussalam is a member of the UN, ASEAN, the Commonwealth,[200] and the OIC. ASEAN, having transformed from an association into an international organization with legal status, will have an increasingly important role in the region in terms of international law. Once the AICHR is up and running, Brunei's legislation will likely come under greater scrutiny.[201]

Of the international human rights treaties, Brunei has only signed and ratified the CRC and the CEDAW. However, Brunei has made reservations[202] to parts of these conventions, claiming certain provisions "may be contrary to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam".[203] As such, Brunei could argue that it does not have the same treaty obligations as other States regarding discrimination based on sexual orientation and gender identity, as, according to Sharia law, homosexuality is contrary to the beliefs and principles of Islam.

200 The Commonwealth is an international organization made up of the United Kingdom and former British colonies.

201 Article 2(2) of the Charter of the Association of Southeast Asian Nations states "ASEAN and its Member States shall act in accordance with the following principles: respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice". As such, human rights will become a cornerstone of the new ASEAN International Organization.

202 A reservation is like an "opt-out" clause. A State can become a party to an international treaty and make a reservation, thereby declaring itself not bound to specific provisions. A reservation with the aim or effect of defeating the purpose of the treaty is not valid.

203 Rule of Law in Armed Conflict. no date. "Brunei Darussalam: International Treaties Adherence". http://www.adh-geneva.ch/RULAC/international_treaties.php?id_state=35 (Accessed 5 December 2010).

As a mixed common law and Islamic law country, customary international law presumably forms part of Brunei's domestic law. But, as a member of the OIC, which has consistently voiced opposition to the recognition of sexual orientation human rights, and by signing the Opposing Statement on Human Rights, Sexual Orientation and Gender Identity, Brunei has persistently objected to the emerging customary law protecting sexual minorities.

4.2 Indonesia

Summary:

- Signatory to ICCPR, ICESCR, CERD, CEDAW, CEDAW-OP, CAT, CRC, CRC-OP-AC, CRC-OP-SC
- Impressive domestic legislation giving effect to the signed treaties
- Opposed the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity
- Member of UN, ASEAN and OIC, among others

Indonesia has established an impressive legal mechanism to protect human rights and provide avenues of justice for victims of human rights violations, as described in Article 7 of UU No. 39/1999.

UU No. 39/1999 Concerning Human Rights

Article 7

1. Everyone has the right to use all effective national legal means and international forums against all violations of human rights guaranteed under Indonesian law, and under international law concerning human rights which has been ratified by Indonesia.

2. Provisions set forth in international law concerning human rights ratified by the Republic of Indonesia, are recognized under this Act as legally binding in Indonesia.

Given that Indonesia has ratified the six major human rights treaties and three of the Optional Protocols, this legislation (Article 7 of UU No. 39/1999) should, in theory, provide considerable protection for sexual minorities. For instance, when interpreting ratified international human rights instruments, a court in Indonesia would likely follow the decision in *Toonen v. Australia,* as well as the general comments from the various treaty monitoring bodies.

Indonesia has a made a reservation to the CRC, claiming that the Indonesian Constitution guarantees the fundamental rights of children irrespective of their sex, ethnicity or race, and that they will not accept "any obligation to introduce any rights that go beyond those prescribed under the Constitution".[204] International jurisprudence indicates that

204 International Committee of the Red Cross (ICRC). no date. "Convention on the Rights of the Child: Indonesia". http://www.icrc.org/ihl.nsf/NORM/C685421D8CF00D85C1256402003FCA18?OpenDocument (Accessed 5 December 2010).

sexual orientation is included under sex, but this reservation may prevent Indonesia from interpreting the CRC in line with general comments of the Committee on the Rights of the Child.

Indonesia supported the Opposing Statement on Human Rights, Sexual Orientation and Gender Identity, but Indonesia is not a "persistent objector", as Indonesia's behaviour on this matter has not been consistent.

Indonesia is a member of the UN, OIC and ASEAN, among other international organizations. Once the AICHR is operational, the recently passed anti-pornography law and Sharia by-law in the city of Palembang may fall under the scrutiny of the Commission.

4.3 Malaysia

Summary:

- Signatory to CEDAW and CRC
- Opposed the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity
- Voted against numerous recent resolutions to develop customary international law protecting sexual minorities
- Member of UN, ASEAN, OIC and the Commonwealth, among others

Of the international human rights treaties, Malaysia has only signed and ratified the CEDAW and the CRC. Malaysia has made reservations to these to the effect that the treaties apply in so far as they are in conformity with its constitution, national laws and national policies. The wording is such that it could be interpreted to exclude sexual orientation and gender identity from protection since Malaysian policies are unsupportive of sexual minority rights.

After ratifying the CEDAW, Malaysia came under heavy scrutiny and criticism by the Committee on the Elimination of Discrimination Against Women. In their concluding comments, the Committee urged Malaysia to criminalize marital rape and reduce the discrepancies between Malaysian civil law and Sharia law.[205] If Malaysia ratifies the ICCPR and ICESCR, the committees responsible for monitoring their compliance will likely scrutinize the lack of rights and State-sponsored discrimination against sexual minorities in Malaysia.

The tradition in a common law country is to consider customary international law as a part of the body of common law. Although Malaysia has not ratified all international human rights treaties, legal scholars believe much of the Universal Declaration of Human Rights has reached customary international law status, and therefore Malaysia is theoretically bound to uphold these rights. But Malaysia has voted against recent resolutions to recognize sexual orientation and gender identity rights. For example, in 2003, Malaysia, along with

205 Committee on the Elimination of Discrimination Against Women (CEDAW). 2006. "Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Malaysia", CEDAW/C/MYS/CO/2, 35th Session. 15 May – 21 June 2006, p.3 & p.5.

Egypt, Libya, Pakistan and Saudi Arabia voted against a landmark UN proposal to promote and protect the rights of all person, regardless of sexual orientation[206]. In 2008, Malaysia supported the Opposing Statement on Human Rights, Sexual Orientation and Gender Identity. Most recently, Malaysia voted on 19 July 2010 against the US-led resolution to grant the International Gay and Lesbian Human Rights Commission (IGLHRC) consultative status at ECOSOC. As such, Malaysia would consider itself not bound by international customary law.

Malaysia is a member of the UN, ASEAN, OIC and the Commonwealth, among many other IOs. The AICHR is likely to examine Malaysia's laws criminalizing homosexuality.

4.4 Philippines

Summary:

- Signatory to ICCPR, ICESCR, CERD, CEDAW, CEDAW-OP, CAT, CRC, CRC-OP-SC
- Criticized for not fully ratifying the international treaties
- Member of UN and ASEAN, among others
- Abstained from the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity

The Philippines is a mixed civil law and common law country and, as such, has chosen to incorporate international law in a mixed fashion. According to Article 2, Section 2 of the 1987 Constitution, "the generally accepted principles of international law are part of the law of the land". This incorporates international customary law directly into Philippines law without the need of any legislative act. Article 7, Section 21, declares, however, that, "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the Members of the Senate". This follows the dualist idea that treaty law must be transformed into domestic law by some legislative act. Although the Philippines is a signatory to nearly all the human right treaties,[207] human rights activists claim that the Philippines has not passed any domestic legislation to give effect to these treaties.[208]

The Philippines is a member of many international organizations, including the UN and ASEAN. In their bid for a seat on the UN Human Rights Council, the Philippines Government publicly and repeatedly demonstrated their national, regional and international commitment to advancing human rights.

206 See ECOSOC. Dreft Resolution: Human Rights and Sexual Orientation. E/CN.4/2003/L.92

207 The Philippines have signed the main human rights treaties, including the optional protocol to the ICCPR (the only insular State in insular Southeast Asia to have done so), giving the UN Human Rights Committee authority to hear complaints from Filipino nationals (once all local remedies to their complaints have been exhausted).

208 The Committee Against Torture's concluding observations noted that the Philippines has ratified the ICCPR but has not passed any laws criminalizing torture (CAT/C/PHL/CO2). The Special Rapporteur for extrajudicial killings, Philip Alston, has noted that death-squads operate with complete impunity is a clear manifestation of the State's inability to respect or protect human rights (A/HRC/11/2/Add.8). The Committee on Economic, Social, and Cultural Rights has also recommended that the Philippines take all appropriate measures to ensure the direct applicability of the ICESCR in domestic courts (E/C.12/PHL/CO/4).

The influence of the Catholic Church may have been responsible for the Philippines' decision to abstain from the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity.

4.5 Singapore

Summary:

- Signatory to CEDAW and CRC
- Member of UN and ASEAN, among others
- Abstained from the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity

Singapore has only ratified two of the international human rights treaties, the CEDAW and the CRC. Like the Philippines, Singapore follows the dualist approach for translating treaties into domestic law: a treaty only has effect in Singapore if parliament has passed legislation transforming it into domestic law. Thus, at present, the developments in international human rights law accompanying the ICCPR and ICESCR do not apply in Singapore.

With regard to customary international law, Singapore follows the common law practice, which considers customary international law as a part of the body of common law. Some scholars argue that many provisions in the ICCPR and ICESCR have become customary international law, and thus would be applicable within Singapore. But in cases were customary international law conflicts with domestic law (e.g. statutes), domestic law takes precedence. In an attempt to bring about a change in Singapore's position on the rights of sexual minorities, the IGLHRC wrote to the Prime Minister of Singapore arguing that, "only by repealing both art. 377 and art. 377A will Singapore comply with the principle that all citizens should be equal before the law, as stipulated in both national and international law".[209]

Singapore is a member of the UN, the Commonwealth and ASEAN. Singapore abstained from the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity. This is not surprising, as Singapore had recently undergone a revision of their Penal Code and had decided to retain the criminalization of homosexuality while not actively enforcing it. Abstaining would be in line with their national policies.

209 IGLHRC, 2007b. "Letter to the Prime Minster of Singapore Regarding the Repeal of Article 377A", 18 October 2007.

4.6 Timor-Leste

Summary:

- Signatory to ICCPR, ICCPR-OP1, ICESCR, CERD, CEDAW, CEDAW-OP, CAT, CRC, CRC-OP-AC, CRC-OP-SC
- Member of the UN
- Supported the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity

In 1999, while Timor-Leste was under the administration of UNTAET, regulation No. 1999/1 was passed, requiring Timor-Leste to observe internationally recognized human rights, in particular UNDHR, ICCPR, and ICESCR. In 2003, Timor-Leste acceded to many international human rights treaties, making Timor-Leste and the Philippines the only two countries in insular Southeast Asia to be party to the ICCPR and ICESCR.

With regard to international organizations, Timor-Leste is a member of the UN, but it is not yet a member of ASEAN, though it has expressed a desire to join. Timor-Leste was the only Southeast Asian country to support the 2008 UN Statement on Human Rights, Sexual Orientation and Gender Identity.

PART 5

Part 5 - Conclusions and recommendations

The worst-case scenario projection for the AIDS epidemic in Asia, presented in the Commission on AIDS in Asia's 2008 report, can be avoided if HIV prevention programming is directed towards those groups who are at most risk of infection. The Commission urges governments in the Asian region to mobilize the political will to implement evidence-based intervention programmes targeting those engaged in high risk behaviours: unprotected male-to-male sex, sharing of needles, and unsafe sex in the context of sex work.

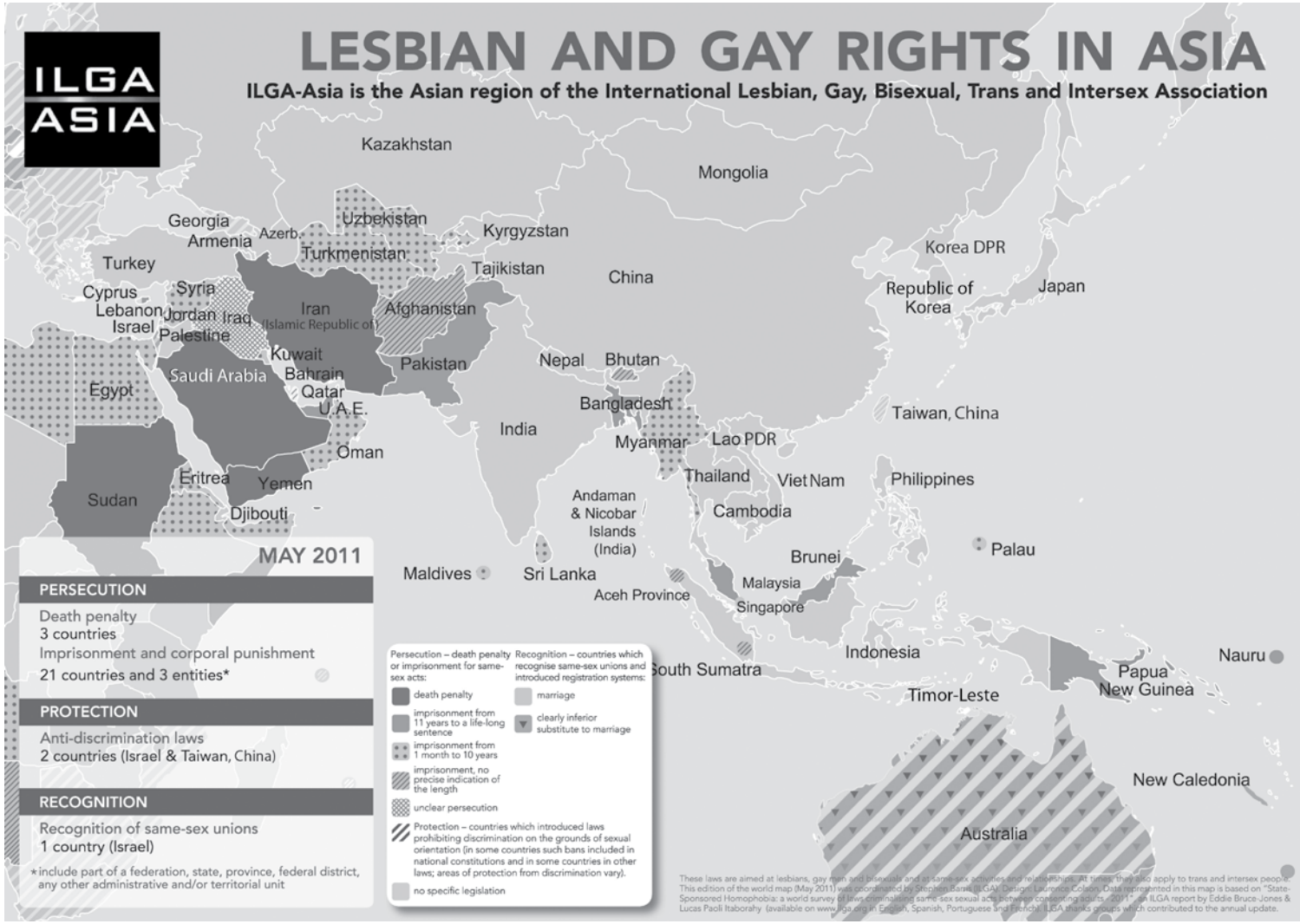
The question was "how do we change current practices to best practices"? The answer came in 2001, when the UN General Assembly adopted the Declaration of Commitment on AIDS, "recognizing that the full realization of all human rights and fundamental freedoms for all is an essential element in the global response to the HIV/AIDS pandemic".[210] It is clear that by improving human rights for sexual minorities, we can begin to implement effective HIV prevention in Southeast Asia. Decriminalization of homosexual behaviour, eradication of stigmas on sexual minorities, and protecting everyone's universal, indivisible, interdependent and interrelated human rights, will create a safe environment for HIV prevention programmes targeting MSM and transgender people.

To make HIV prevention programmes more accessible and responsive to the needs of MSM and transgender people throughout insular Southeast Asia, the following actions are recommended:

1. Decriminalize homosexuality. This will reduce the censorship, harassment and stigmatization that MSM face and will enable health workers to implement HIV prevention programmes targeting MSM.
2. Permit post-operative transgender people the right to change the sex recorded on their identification documents, so that they can function as full citizens.
3. Improve anti-discrimination protection for sexual minorities either through court challenges, legislation, or both.
4. Ratify all the international human rights treaties, especially the ICCPR and the ICESCR.
5. Strengthen the mandates of national human rights bodies, allowing them to use international human rights instruments.
6. Develop a robust and inclusive ASEAN Declaration of Human Rights, and commit to establishing an ASEAN Court of Human Rights to enforce the Declaration.
7. Adhere to the nature of a State's duty to implement its international legal obligations as expressed in the Yogyakarta Principles.

210 UN. 2001. Declaration of Commitment on HIV/AIDS, UN General Assembly, A/Res/S-26/2, 2 August 2001, paragraph 16.

Figure 3: Map indicating locations of persecution, protection and recognition of lesbian and gay rights



Source: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)

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United Nations
Educational, Scientific and
Cultural Organization

UNESCO Bangkok
Asia and Pacific Regional Bureau for Education

Mom Luang Pin Malakul Centenary Building
920 Sukhumvit Road, Prakanong, Klongtoey
Bangkok 10110, Thailand
E-mail: ikm.bgk@unesco.org
Website: www.unesco.org/bangkok
Tel: +66-2-3910577 Fax: +66-2-3910866