

11

Sex and Gender Diversity

Hostility and discrimination against homosexuals, bisexuals, and transgender individuals are commonly explained as religious in origin.

11.1 Overview

There is an old anti-homosexual tradition linking Christianity and Islam back to Judaism. Buddhists in Southeast Asia know of an old belief that being transgender or homosexual reflects misdeeds in a past life. The contemporary strength of these religious beliefs is often unclear. Christianity dropped many Jewish rules, including circumcision and food laws. In our time, mainstream Protestant denominations have come to support equality and non-discrimination. Pope Francis surprised many by refusing to judge a homosexual “who has good will and looks for God,” while also saying that the Church should apologize “to a gay person whom it offended.” Outside of the Islamic heartland in the Middle East, there are some lesbian, gay, bisexual, transgender, and intersexual (LGBTI) friendly Muslim congregations, and certain prominent gay Imams. There is acknowledgement that some gay men have been ordained as Buddhist monks in Thailand. All major religious traditions now have internal divisions or debates on the extension of human rights principles to LGBTI.

Even apart from religion, social attitudes are often difficult. In response, individuals hid their same-sex attractions, even from close family members, and strove to hide gender variance. Staying hidden—or ‘in the closet’—was a stressful, but rational, defensive strategy. It is probably still the most common strategy almost everywhere for gays and lesbians. In broad terms, LGBTI found society to be hostile to their existence, but usually blind to their presence. This combination of responses is odd (or distinctive) when we compare the experience of sexual minorities with that of women and racial minorities (two other equality seeking groups).

The history of anti-homosexual, anti-transgender social views is uneven, with periods of quite open acceptance of certain patterns (best documented for Greece, China, Japan, and Korea). Newer Western thinking, treating homosexuality as an illness or pathology (a secular analysis), spread around the world in the late 19th century. In the most recent half-century, hostile laws have been dropped in the West and Latin America, and sometimes in other places. Generally, social patterns of discomfort or hostility have continued into our time. It has fallen to current human rights thinking to challenge older discriminatory thinking. In this task, there has been support from modern medicine (which holds that no illness or pathology is involved) and biology (which tells us how common these variations are among humans and in the animal world). This rethinking is aided in modern societies by: (a) the mobility of individuals and their independence from their birth families; and (b) the individual rights orientation of modern human rights principles.

This chapter begins by looking at changing responses to sexuality issues and then considers terms and categories, a surprisingly complicated task. It will look at the history of criminal laws and their present reality in Southeast Asia, before turning to the extent of public activism and visibility that is possible in Southeast Asia these days. Finally, issues relating to combating discrimination, the recognition of relationships, transgendered individuals, and intersexuals are considered.

11.1.2 Post-War Change

There have been dramatic changes on sexuality issues around the world in the years since the Universal Declaration of Human Rights. In 1948, half the world had criminal laws against male-male sexual acts, reflecting the impact of British colonialism. Governments and private businesses would not knowingly hire homosexuals. Psychiatrists, psychologists, and lay people regarded homosexuality as some kind of

illness. In 1948, no state extended any legal recognition to same-sex couples. Lesbians could lose custody or access to their biological children if their sexual orientation became known. The major religious traditions were seen as hostile or silent on LGBTI issues. Exceptionally, spirit mediums in various traditions were often transgender or homosexual (with many examples in Southeast Asia).

Today there is a striking international divide on issues of sexual orientation and gender identity. In the West and Latin America (a) Criminal laws are gone, almost completely, (b) anti-discrimination laws now usually cover 'sexual orientation' and sometimes 'gender identity,' 'gender expression' or 'intersex status,' and (c) some or all of the rights and obligations of marriage now apply to same-sex couples. Marriage was opened to any two individuals in the Netherlands in 2001, a lead that has now been followed in over twenty countries, including all of the European colonial powers that once held colonies in Southeast Asia: France, the Netherlands, Portugal, Spain, the United Kingdom, and the United States.

In contrast, there has been clear regression in much of Sub-Saharan Africa, Russia and its immediate neighbours. Colonial-era criminal prohibitions have been strengthened in some African states, and national leaders often vocally condemn homosexuality. Vigilante actions against suspected homosexuals or homosexual gatherings have occurred in a number of African states. LGBTI human rights defenders have been assaulted. Some have been killed. Russia and its neighbours have introduced new laws against 'propaganda' in favour of homosexuality to broadly try to push gays and lesbians back into the closet, end visibility, ban public activism, and block the work of civil society organizations. The goal of such laws, it is said, is to protect children from exposure to propaganda in favour of homosexuality. Opposition to LGBTI rights continues in the MENA region (Middle East and North Africa) and in member states of the Organization of Islamic Cooperation (which includes Indonesia, Malaysia, and Brunei).

11.1.3 Changes in Southeast Asia

What of Asia and Southeast Asia? Criminal prohibitions survive from colonial times in former British colonies (with the single exception of Hong Kong, which decriminalized male-male sexual acts before reversion to China). No country in South or Southeast Asia actively enforces such laws. Police harassment and arrests on vagrancy or public nuisance charges occur at some times in some places. Vigilante actions against gay or transgender events occur occasionally in Java, where police fail to curb actions of the Islamic Defenders Front and similar vigilante groups. In April 2016, two gay rights activists were murdered in Bangladesh, the first such incident in Asia (but part of a series of religiously based extra-judicial killings in the country aimed at atheists and non-Sunni Muslims). Laws protecting LGBTI from discrimination in employment are just beginning to appear in the region. Transsexuals can get recognition of post-operative sex through changes in personal documents in only three Southeast Asian states (Indonesia, Singapore, and Vietnam). Lack of acceptance by families is widely reported as a major problem for LGBTI, with States and religion giving little or no support. Bullying in schools is a regional problem.

Policy statements by heads of government and other national political figures vary. Prime Minister Lee, in Singapore in 2007, referred to homosexuals as part of society, and part of many Singaporean families. His government does not discriminate against LGBT in employment. Yet he supported the retention of a colonial-era criminal prohibition of male-male sexual acts (while promising no 'proactive enforcement'). Two prime ministers in Malaysia, including the present incumbent, Najib Razak, have

frequently spoken out condemning homosexuality. The Sultan of Brunei has proposed new religious laws against homosexual acts, on top of a colonial-era prohibition. In Myanmar, which also inherited a prohibition, no leading politicians seem to have addressed the issue of enforcement, retention, or repeal. In Indonesia, starting in January 2016, a number of cabinet ministers, leading politicians, educators, and clerics condemned homosexuality, some calling for a criminal prohibition or compulsory treatment. This broke general patterns of silence by political and other leaders on issues of sexual and gender diversity in the country, and ended the sense that Indonesia was fairly tolerant of such diversity. A criminal prohibition is being considered in constitutional litigation and in the ongoing project of enacting a new national penal code. Exceptionally, in Cambodia, the President and government have called for acceptance and criticized stereotypical depictions in media reports.

11.1.4 Change at the UN

In the UN system, issues of sexual orientation and gender identity were taken up by treaty bodies and special rapporteurs (the ‘expert’ parts of the UN system), starting with the 1993 decision of the Human Rights Committee in *Toonen v Australia* (described in the ‘Criminal Laws’ section).

FOCUS ON

The Yogyakarta Principles

In 2006, in a period in which progress in the ‘political’ bodies of the UN seemed to be blocked, a group of human rights experts met on the campus of Gadjah Mada University in Yogyakarta, a historic sultanate in central Java. They formulated the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*. A major goal was to make it clear that SOGI rights were not ‘new’ rights, as opponents argued, but were simply the application of existing human rights principles to LGBTI individuals. Many of the experts had worked in the UN system as members of treaty bodies or as special rapporteurs. Others were academics, or judges, or from leading human rights NGOs. One co-chair was Professor Vitit Muntarbhorn from Chulalongkorn University in Bangkok, long active as an expert in the UN human rights system. Former UN High Commissioner for Human Rights, Mary Robinson, participated. Twenty five countries were represented in the gathering. The 29 principles are well drafted, and have been referred to often at the UN and in various legal contexts. The document is one of many similar documents, prepared by groupings of international law experts on various issues, the best known of which would probably be the *Paris Principles on National Institutions for the Promotion and Protection of Human Rights*.



The UN Human Rights Council (the key ‘political’ body in the UN human rights system), for the first time, supported LGBTI human rights with resolutions in 2011 and 2014. The Office of the UN High Commissioner for Human Rights completed two studies and launched an active campaign, ‘Born Free and Equal’ with publications and videos. UN Secretary General, Ban Ki-moon, and the UN High Commissioner for Human Rights, frequently spoke in its support. In 2016, the Human Rights Council took the further step of establishing an on-going mechanism, an independent expert to address “violence and discrimination based on sexual orientation and gender identity.” This

key resolution was put forward by seven Latin American states, including Argentina, Brazil, Colombia, and Mexico. Asian states supporting the resolution were South Korea and Vietnam. Asian opposition came from Bangladesh, China, Indonesia, Kyrgyzstan, Maldives, and Qatar. India and the Philippines abstained. There was bitter opposition and prolonged debates on each of the three Human Rights Council resolutions. The preamble to the 2016 resolution was amended to refer to some of the arguments used against LGBTI equality rights (respect for individual state sovereignty, religious values, local cultural particularities), without limiting the substantive sections of the resolution.

In Asia, the UN Development Programme has been particularly active, with an ongoing 'Being LGBTI in Asia' program, funded by the United States and Sweden. The UNDP has published Country Reports on LGBTI issues in Cambodia, China, Indonesia, Mongolia, Nepal, Philippines, Thailand, and Vietnam.

In 2015, the UN Security Council, the most powerful body in the UN system (charged with issues of international peace and security), held an information session on the killing of homosexuals by Islamic State (ISIS or ISIL) in the parts of Syria and Iraq that it controlled. On 13 June 2016, the UN Security Council condemned the terrorist killing of 49 individuals at a gay night club in Orlando, Florida, one day after it occurred. The statement specifically denounced violence targeting people on the basis of their "sexual orientation," the first time the Security Council had used the phrase in a statement. The Orlando massacre was condemned by a dozen or more world leaders, including Vladimir Putin of Russia, Xi Jinping of China, heads of government in France, Germany, the United Kingdom and the United States, King Bhumibol Adulyadej of Thailand, and Pope Francis.

11.1.5 ASEAN

In ASEAN, there were campaigns to include sexual orientation and gender identity rights in the ASEAN Declaration on Human Rights. No express inclusion was possible. On the formal signing of the Declaration at the 21st ASEAN summit in Kuala Lumpur in 2012, Malaysian Prime Minister, Najib Razak, specifically said that Malaysia rejected lesbian, gay, bisexual, and transgender rights, adding that other ASEAN leaders knew the position of Malaysia and had accepted Malaysia's stance. To date, the work of the ASEAN Intergovernmental Commission on Human Rights has not addressed LGBTI issues.

11.2 Terms and Categories

SEX and GENDER

'Sex' is often used to mean 'gender' – and 'gender' is often used to mean 'sex.' Part of the reason for these usages is the fact that the word 'sex' in English has two meanings. It can mean one's physical sex or it can refer to sexual acts.

SEX

Properly used, 'sex' refers to one's physical or biological sex. There are three broad categories: female, male, and intersexual.

GENDER

Properly used, 'gender' refers to 'socially constructed' patterns of roles, behaviour, and self-presentation that are 'feminine,' 'masculine,' or 'androgynous.'

GENDER EXPRESSION

Refers to how individuals express themselves (in terms of patterns of masculinity or femininity).

GENDER IDENTITY

Refers to an individual's sense of being a man, a woman, or an androgynous, or non-binary individual (neither masculine nor feminine). Gender identity may or may not conform to the individual's physical sex.

SEXUAL ORIENTATION

Sexual orientation refers to the sexual attraction felt by an individual to other individuals on the basis of the other individual's physical sex. Individuals can be sexually attracted to men, women, or both. There is no necessary relationship between gender expression/gender identity, and sexual orientation. Not all effeminate men are homosexual, and not all homosexual men are effeminate. There is some apparent overlapping of categories.

TRANSGENDER

Transgender is an umbrella term that refers to individuals who depart, in whole or in part, from the gendered patterns of dress and behaviour associated with their physical sex. It includes masculinity in women, effeminacy in men, androgyny, transvestism (cross-dressing), and transsexualism.

TRANSSEXUALS

'Transsexuals' (note the double 'ss') are individuals whose 'gender identity' is with the 'other' sex. Individuals will usually 'cross-dress.' Individuals may seek some extent of bodily modification to better conform to their personal sense of 'gender identity.' They may (or may not) seek sex reassignment surgery (sometimes now called gender confirmation surgery). A male-to-female transsexual is now often referred to as a 'transwoman,' while a female-to-male transsexual is a 'transman.'

TRANSGENDER IDENTITIES

Various transgender 'identities' exist in parts of South and Southeast Asia. For example, male bodied individuals living as women, may be identified as Hijra, Metis, Open, Kathoey, Mak Nyah, Waria, or Bakla (in India, Nepal, Myanmar, Thailand, Malaysia, Indonesia, and the Philippines, respectively). As well, there are female bodied individuals who are identified as Toms or Butches. These categories are different from 'transwomen' and 'transmen,' who typically seek recognition as women or men, and who do not adopt the particular transgender identities referred to here.

INTERSEXUAL

Intersexuality refers to various conditions in which the body at birth is neither completely male nor completely female.

LGBTI/SOGI/QUEER

What were initially 'gay rights' organizations gradually expanded to cover a range of sexuality identities that shared the problem of hostility (or at least discomfort) on the part of the larger society to the existence of sex and gender diversity. This led to the acronym, LGBTI, bringing together as allies lesbians, gay men, bisexuals, transgenders, and intersexuals. Sometimes Q (queer or questioning) is added. Some activists prefer to avoid the 'identity categories' listed in LGBTI, in favour of conceptual categories. This resulted in SOGI, standing for sexual orientation and gender identity, sometimes

adding an 'E' for gender expression, and sometimes a second 'I' for intersexuality. Queer is now an umbrella term used by many activists and academics, but it is not used legally or in UN work.



DISCUSSION AND DEBATE

Separate colours or a rainbow spectrum?

Discussions of sex and gender diversity use a number of distinct terms or categories. The rainbow flag is now an international symbol of sex/gender diversity. It has separate bands of colours. But in nature, a rainbow is a spectrum or a continuum. We now have some celebrities identifying as sexually 'fluid.'

Questions

- Do most people (or all people) have elements of masculinity and femininity in their physical bodies, and in their actions and orientations?
- If sex and gender are on a continuum (or scale) why do most people live exclusively as one type?

11.3 Criminal Laws

11.3.1 The origins of colonial era criminal Laws

Passages in the book of Leviticus (18:22 and 20:13) impose the death penalty for a man who "lies with a male as with a woman ...". This Jewish prohibition, one of hundreds of rules in early Judaism, continued in Christianity and Islam (supplemented by a particular interpretation of the story of Lot/Lut and the destruction of Sodom). Through Christianity, the prohibition became part of Roman law, then part of Roman Catholic religious law, and was enforced throughout Europe. With the Protestant Reformation, church courts were abolished in half of Europe, and the offence moved from religious law to regular secular criminal law. In Britain, it took the form of the 'buggery' act of 1533, prohibiting anal intercourse. The wording of the law clearly marked its religious origins (the act was called "abominable," as in Leviticus). These criminal laws were faithful to Leviticus: (a) in only dealing with males, and (b) by imposing the death penalty (which continued in British law to 1861).

The *Napoleonic Penal Code of 1810* was a major reform of criminal law in France, setting out all criminal offences in one comprehensive, well-organized code. Without explanation or any public debate, the prohibition of homosexual acts was dropped. This 'decriminalization' spread to half of Europe as a result of French conquests, and also by governments voluntarily adopting or copying the French code. Major colonial powers—the Netherlands, France, Spain, and Portugal—had no prohibition. As a result, there was no prohibition in the criminal laws of their colonies: Cambodia, Indonesia, Laos, the Philippines, or Vietnam. Thailand, never directly colonized, copied a prohibition, but later repealed it after a history of non-enforcement.

In 1860, Britain enacted a penal code for India. It included a reformulation of the British 'buggery' law, but now without the religious language and the death penalty.

The famous Art 377 reads:

377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

It is important to note that Art 377 shifted the basis for the prohibition away from morality or religion ('vice' and 'abominable' are gone). In place of moral/religious language, the acts involved are described as "against the order of nature," a secular, biological assertion. It became common to describe homosexuality as some kind of illness, disorder, or pathology. Often people would express a fear that this pathology would spread (and so argued that it must be kept under control, to avoid contagion).

Post-World War II studies established that:

- (a) Homosexual acts were much more common than had been popularly assumed;
- (b) Psychological testing could not establish any patterns of maladjustment among homosexuals; and
- (c) Homosexual activity was recorded among hundreds of animal species, countering rather dramatically, the argument that homosexual acts are 'unnatural.'

As a result of these studies, homosexuality was removed from the listing of pathological conditions by medical associations in the United States and the United Kingdom in 1973, and by the World Health Organization in 1983. Most countries have followed this change, including China in 2001. The American Psychiatric Association now condemns as unscientific and harmful any treatments designed to change or 'cure' homosexuals. A court in China in 2014 ruled against a 'conversion' therapy clinic as practicing consumer fraud.

The wording of Art 377 continues in the legal systems of former British colonies or protectorates in most of Asia. In Southeast Asia today, it is part of the law in Brunei, Malaysia, and Myanmar. It continues to be in force in Bangladesh, India, Pakistan, and Sri Lanka (and former British colonies in Oceania, the Caribbean, and Africa). Decriminalization occurred in Hong Kong before reversion to China. In Singapore, Art 377 was dropped in 2007, but the country retained a separate colonial-era criminal provision condemning acts of 'gross indecency' between males. Prohibitions in Central Asia date back to the period of the Soviet Union, when a Western European influenced criminal prohibition was retained for the Central Asian region. The criminal prohibitions have been extended to apply to two women in both Malaysia and Sri Lanka.



CASE STUDY

Criminal Laws in Southeast Asia

Prohibition of “carnal intercourse against the order of nature”: Brunei, Malaysia, Myanmar.

Prohibition of “acts of gross indecency between males”: Singapore.

Prohibition of “acts of gross indecency” between any two people: Malaysia.

Prohibition of male-male sexual acts, with a punishment of 100 public lashes: Province of Aceh, Indonesia, the only local government empowered to enact Sharia criminal law.

Minor laws penalizing vagrancy, public nuisance and disorderly conduct, exist throughout the region and may be used against homosexuals or transgender individuals. The Philippines has a “grave scandal law” for actions “offending decency and good customs.”

Sharia laws, usually applicable only to Muslims, regulate many aspects of family law including inheritance. They apply in the individual states in Malaysia. They cover cross-dressing. Many local laws in Indonesia are said to be Sharia based, and regulate alcohol, women’s clothing, and sometimes have provisions on prostitution or homosexuality. While those are matters that should be dealt with only in national criminal law, Indonesia’s Home Affairs Minister Tjahjo Kumolo said in June, 2016 that the national government would not interfere with such regulations.

11.3.2 The Movement for Decriminalization

History’s first homosexual rights organization, led by elite gay males (doctors and lawyers), began in late 19th century in Europe in the context of a campaign for decriminalization. The movement was centred at an institute in Berlin and was led by Dr Magnus Hirschfeld, who travelled on speaking tours in Europe, America, and Asia. Branches and affiliates sprang up in various parts of Europe. The institute in Berlin was destroyed by the Nazis in 1933, and the books and documents in its research library were publicly burned. With minor exceptions, no gay rights organizations survived that setback. New ones began in Europe and North America after World War II. They faced the fact that half the world had criminal laws prohibiting male-male sexual acts, in each case linked back to the religiously-based laws of Europe. The primary goal was decriminalization.

Post-World War II reforms began slowly with decriminalization in Illinois in 1960, Britain and Wales in 1967, and Canada in 1969. The criminal prohibition in Northern Ireland was held to violate the European Convention of Human Rights in the famous case of *Dudgeon v United Kingdom* (1981), relying on arguments of personal privacy. Similar decisions were made for criminal laws in Cyprus and Ireland. Criminal prohibition in Tasmania was held to be in breach of the International Covenant on Civil and Political Rights in *Toonen v Australia* (1994) on grounds of privacy and equality. The *Toonen* decision was a key breakthrough in the UN human rights system. The United States Supreme Court found such laws unconstitutional in 2003. The laws are now gone in the West, but survive as colonial era prohibitions in most former British colonies.

In 2009, the Delhi High Court ruled against Art 377 on grounds of equality and privacy, adding that the prohibition of discrimination on the basis of 'sex' in the Indian constitution, included a prohibition of discrimination on the basis of 'sexual orientation.' The Indian Supreme Court reversed that decision in 2013, but in January 2016, ordered a rehearing of the issue by a panel of five judges. Over the ongoing life of the Indian litigation: (a) the Congress Party came out in favour of decriminalization; (b) one or more cultural celebrities were publicly identified as gay; (c) decriminalization gained support in liberal public opinion; and (d) annual colourful pride parades flourished in perhaps a half dozen cities. The flip-flops and delays in the judicial challenge have proven very useful in the process of gaining visibility for LGBTI issues.

In 2014, the Court of Appeal in Singapore upheld its prohibition of "acts of gross indecency between males," saying that the government was free to define any particular offence on grounds of morality or social order, and prohibit the activity in question (*Lim Meng Suang v Attorney-General* [2015] 1 S.L.R. 26). The decision failed to cite any of the examples of decriminalization in other jurisdictions. The decision was paradoxical, for in 2007, the government said it would retain the prohibition, but that there would be no 'proactive enforcement,' a kind of de facto repeal. The government retains the section: (a) to appease an active evangelical Christian minority, and (b) to block any divisive debates over allowing same sex marriage. No court challenges have been mounted in Malaysia or Brunei.

11.3.3 Criminal laws in Southeast Asia

In Southeast Asia, the four former British colonies, Brunei, Malaysia, Myanmar, and Singapore, each retain colonial-era prohibitions. Such laws do not reflect local decisions or arise out of domestic, religious, or social considerations. Catholic majority Philippines has no prohibition, though the Church condemns homosexual acts. Buddhist majority Myanmar has a prohibition. Buddhist majority Thailand has no prohibition. Muslim majority Malaysia has a prohibition. The national criminal law in Muslim majority Indonesia has no prohibition. Singapore has a prohibition. China does not. No country in Asia with such a law tries actively to enforce it. The few cases reported in Brunei media of prosecutions all involve acts with underage males. Other prosecutions do not seem to occur.

In March, 2015, the leading body of Islamic leaders in Indonesia, the Council of Indonesian Ulama (MUI) issued a Fatwa, or religious ruling, calling for the criminalization of homosexual acts. In 2016 the Indonesian Constitutional Court gave serious attention to a case urging criminalization. As well, the on-going project of drafting a new comprehensive criminal code could result in criminalization. No state in Asia since the ending of the colonial period has criminalized homosexual acts (though Sri Lanka extended its prohibition to include acts between women). Only in Africa have two countries that had no prohibition, former French colonies, enacted criminal prohibitions in the years since independence.

CASE STUDY

The Two Prosecutions of Anwar Ibrahim in Malaysia

From 1993 to 1998, Anwar Ibrahim was the deputy and obvious successor to long-serving Prime Minister, Mahathir Mohammad of Malaysia. The two politicians had a falling out over policies responding to the Asian financial crisis of 1998. Mahathir fired Anwar, who was charged with corruption and sodomy (under Art 377 of the Penal Code). It was alleged that Anwar had had sexual relations with his wife's driver. While the suggestion was that Anwar was exploiting his position in relation to a junior employee, there was no violence or physical coercion. The sexual activity, if it occurred, was consensual. Anwar said the charges were a fabrication and that the prosecution was politically motivated. He was convicted of corruption (for using his position in an attempt to deflect prosecution) and sodomy, and served six years in jail. A final appeal to the Federal Court resulted in a reversal of the sodomy conviction on technical grounds.



Anwar was released (at a point in time when Mahathir had retired and Abdullah Badawi, somewhat of a reformer, was Prime Minister). Anwar then founded a new political party and was successful in building an alliance with two other opposition parties. In the 2008 general election, this opposition alliance made significant gains against the national coalition which had ruled Malaysia since independence. Four months later, Anwar was again charged with sodomy. Again, it was said to involve an aide, again without violence or physical coercion. Anwar again said the charges were fabricated for political reasons. He was acquitted at trial. Current Prime Minister, Najib Razak, authorized an appeal. The ruling was reversed and a five-year sentence imposed. The decision was upheld by the Federal Court in February 2015. There was extensive national and international coverage of the two prosecutions, with Amnesty International and others condemning the outcome. There is almost no history of prosecutions under Art 377 in Malaysia, except for the two charges against Anwar Ibrahim. In October 2015, the United Nations Working Group on Arbitrary Detention held that Anwar was being arbitrarily detained and demanded his release and the reinstatement of his political rights. This was on the basis that the law used to convict him discriminated on grounds of sexual orientation, in violation of international human rights standards.

Police may lay charges for public nuisance, soliciting, vagrancy, or other similar minor offences. It is easy to get convictions for such charges, or even just to use the threat of prosecution to intimidate or harass individuals, move them away from visible public areas, or extort bribes.

CASE STUDY

Police Actions in Mandalay

On the evening of 6 July 2013, a group of 12 male-bodied individuals, dressed as women, were gathered along the south eastern area of the moat surrounding the old royal palace grounds in Mandalay. Police arrested them under a colonial-era vagrancy law that applied to individuals, in disguise, in a public place at night, without a proper reason. They were detained for several hours at the Mandalay Division police station. They were stripped of their clothing and “verbally, physically, and sexually abused and assaulted by up to 10 police officers,” according to a report. They were eventually released without charge.

For the first time, there was an organized campaign around such police actions. The LGBT Rights Network held a press conference and released statements. Several national and international news sources reported on the story. Three individuals filed complaints with the Myanmar National Human Rights Commission, the Ministry of Home Affairs, the Head of the Police, and two committees of the national legislature. Videos of interviews with victims and activists were posted on YouTube. The UN Special Rapporteur on Human Rights in Myanmar met with the victims and included information on the incident in a report to the UN General Assembly. A law suit against the police was dismissed by the courts. The Human Rights Commission asked the Home Ministry to respond to the allegations. The request was ignored. At the time, the Commission had no authority to compel the Ministry to respond. The incident became a significant national and international story. The publicity and controversy may deter police from further abuse.



11.3.4 Sharia laws

CASE STUDY

Sharia Criminal Laws on Sexuality in Southeast Asia (and Islamic State Areas)

Indonesia

In 2009, the legislature in Aceh, an autonomous province at the northern tip of the island of Sumatra in Indonesia, enacted a local criminal law which decreed death by stoning for adultery, and 100 lashes for homosexual acts. These offences were part of what are referred to as Islamic Sharia (Shariah, Syariah) laws, that Aceh (uniquely in Indonesia) was authorized to impose. The Governor did not sign the new Sharia law and it never came into force. In 2014, the legislature in Aceh enacted a new law against homosexual acts both between men and between women. The penalty was caning, up to 100 lashes, or a payment in gold, or imprisonment. The law applied to both Muslims and non-Muslims, the only Sharia law in Southeast Asia to apply to non-Muslims. Showing affection in public between the sexes was also forbidden. The law came into effect in September 2015. There are no accounts of prosecutions.

Malaysia

The State of Kelantan in north-eastern Malaysia, governed by the Parti Islam se Malaysia (PAS), enacted Sharia laws in 1993 and 2015 with punishments of stoning to death for adultery, crucifixion for armed robbery when accompanied by a killing,



amputation of the right hand for theft, and death for apostasy (converting away from Islam). The State of Terengganu, when it had a one-term PAS government, enacted an equivalent law in 2002. The imposition of these penalties by State governments is blocked by national legislation. In 2015, Kelantan, not for the first time, sought a reform in national legislation to allow it to impose “enhanced punishment” for Sharia offences. In May 2016, the national government submitted a bill in parliament on behalf of the PAS Party, which sits in the opposition ranks. The bill added caning to the punishments that Kelantan could impose for particular moral offences committed by Muslims. Debate on the bill was deferred. Media accounts have not been clear whether homosexual acts are covered in these initiatives.

Brunei

In 2013, the Sultan of Brunei introduced what was to be the first of three stages to implement a comprehensive code of Sharia law, with stoning to death for homosexual acts to be introduced in phase three. There were internal and international protests. As of September, 2016, phase two continued to be delayed, though the Sultan has confirmed his intention to proceed with the additional stages.

Islamic State (ISIS, ISIL)

The so-called ‘Islamic State,’ which in 2015 and 2016 controlled significant parts of Syria and Iraq, has executed probably over 25 males, alleged to be homosexual, by throwing them from the roofs of buildings. Large crowds witnessed these events, often stoning the body after its fall. The campaigns of Islamic State against minority Christians and homosexuals have been discussed in separate special sessions of the UN Security Council in 2015. Individuals from Southeast Asia have travelled to the Middle East to join Islamic State, and some will return to their home countries.

11.4 Violence

A major study of violence against lesbians, bisexual women and trans people, published in 2014 by OutRight International, described situations in five Asian countries, including Malaysia and the Philippines. The report concluded that the family “was the primary perpetrator of violence”, carrying out emotional, verbal, physical and sexual violence against LBT people. LBT Issues were avoided in reports and programs on violence against women, and LGBT reports regularly focused on state perpetrators of violence, not family members, intimate partners and employers. When there was attention to LGBTI, it was typically on gay men and transwomen, and did not deal with violence in the private realm. OutRight International also documented the deaths of over a dozen Thai lesbians in a detailed letter to top government officials in March, 2012. Most seem to have been ‘tomboys’, and the killings were not by police or security officials.

11.5 LGBTI Visibility and Activism

11.5.1 Legal Status for Civil Society Organizations

Many of the first publicly active LGBTI civil society organizations in Southeast Asia were focused on health and concerned themselves with education and HIV/AIDS prevention programs. They were run or staffed by gay males. The health focus made it possible to legally organize and be publicly active. Even this was not possible in Myanmar before 2011, and overseas funders opened HIV/AIDS clinics and programs in their own names – notably Population Services International with US money, and the Burnet Institute from Australia. Pioneering HIV/AIDS organizations in Southeast Asia were PT Foundation in Malaysia, and FACT in Thailand. Typically, these organizations received some overseas funding and developed good relations with government health programs. The only visible organization in Brunei is the Brunei AIDS Council, which gets some project funding from the government. Like Action for AIDS in Singapore, it receives no outside funding.

People Like Us (PLU) was established in Singapore as an LGBTI rights organization. It applied for registration. Registration is legally required for organizations or associations in Singapore. It is an offence to be active in an unregistered organization. PLU was refused registration three times (once when it tried to incorporate as a business, twice as a non-profit society). It continued to be active, cautiously. It was included in particular meetings and consultations with government officials, leading Russell Heng to describe himself and fellow PLU activists as “criminals at the table.” It seems that even today no LGBTI rights advocacy groups are registered as such in Singapore.

Some health and advocacy organizations exist now in major Southeast Asian countries. Gaya Nusantara can claim to be the oldest gay rights organization in Asia, founded in 1983. The lesbian organization, Anjaree, was the first organization in Thailand, founded in 1989. Most are unregistered. Those that are registered tend to use muted names, often using the rainbow symbolism that is now quite universal, for example, Rainbow Sky Association of Thailand, Rainbow Stream (Arus Pelangi) in Indonesia, and Colors Rainbow in Myanmar. Two main organizations in Vietnam are registered and active, but their names give no indication of any LGBTI focus. Vietnam seems to have the only Southeast Asian branch of PFLAG (Parents and Friends of Lesbians and Gays).

11.5.2 Public Actions, Public Advocacy

What of rights to assemble, associate, and conduct peaceful demonstrations? Demonstrations, parades, and other public actions and advocacy are strictly controlled in parts of Southeast Asia. The first public ‘pride parade’ was held in the Philippines in 1994. Annual pride parades, with people and floats moving on public roads, now occur annually in Cambodia, the Philippines, and Thailand (and Hong Kong, Japan, Taiwan, South Korea, and India). Pride events, held indoors, often in the cultural facilities of foreign embassies, have occurred in Indonesia, Laos, and Vietnam. An annual bicycle rally (with flags, balloons, and special t-shirts) is now held annually in Hanoi (no permit required). A public ‘rainbow walk’ has been held in conjunction with indoor activities in Ho Chi Minh City, again with flags, balloons, and matching t-shirts (no permit required to walk on sidewalks). Occasionally, activists in Thailand have held public walks, carrying matching rainbow umbrellas (no permit required). Celebrations of the International Day against Homophobia and Transphobia in Myanmar have, so far, been indoor events. The most famous example of the public ‘non-parades’ is Pink Dot in Singapore.



CASE STUDY

Pink Dot in Singapore

The government of Singapore, which tightly limits public political events, decided to authorize a ‘speakers’ corner’ in a public park, away from the central business district. It was to be the one place in Singapore where people could exercise a public right of free speech (though the sensitive topics of race and religion were forbidden). Activists began holding an annual picnic in the park, with speakers and everyone else dressed in pink. The government eased the rules and began to allow entertainment. Pink Dot, as the annual event is now called, sees thousands of Singaporeans gather each year for a few hours with speakers and popular entertainment. At dusk, the people bring out candles, light up cell phone screens, and brandish flashlights (pink if possible), forming a huge illuminated pink dot. The cover of the book, *Mobilizing Gay Singapore*, by National University of Singapore law professor, Lynette Chua, has an iconic photograph, taken from the top of a nearby hotel, of the huge illuminated pink dot, with the lights of the central business district and Singapore’s giant Ferris wheel in the distance. The name Pink Dot is a playful reference to the description of Singapore as simply a little red dot on maps.

In 2015, 28,000 Singaporeans participated. In 2016, it even had 18 corporate sponsors, including Google, Barclays, JP Morgan, Goldman Sachs, Bloomberg, BP, Facebook, Apple, General Electric, and Visa. The government issued a statement:

The Government’s general position has always been that foreign entities should not interfere in our domestic issues, especially political issues or controversial social issues with political overtones. These are political, social or moral choices for Singaporeans to decide for ourselves. LGBT issues are one such example. This is why under the rules governing the use of the Speakers’ Corner, for events like Pink Dot, foreigners are not allowed to organize or speak at the events, or participate in demonstrations.

The same rationale lay behind Singapore banning the author of this chapter from a public talk in 2007 on the history of colonial-era anti-homosexual criminal laws.



CASE STUDY

Seksualiti Merdeka in Malaysia

On Merdeka Day, 31 August 2008 (a day celebrating the independence of Malaysia from colonial rule), a loose coalition of artists, activists, academics, and NGOs organized a program of concerts, theatre, workshops, films, and talks under the title, Seksualiti Merdeka (sexual freedom, or sexual independence). It became an annual event, celebrating sex and gender diversity. The venue was a commercial art gallery located in the well-known arts and crafts centre, Central Market, located in a vintage area of Kuala Lumpur. The annual festival began when Abdullah Badawi was prime minister. Badawi, unlike his predecessor, Mahathir Mohammad, and successor, Najib Razak, never seems to have publicly denounced homosexuality. He was seen as a reformer, willing to take on the police and fight corruption. Seksualiti Merdeka gained support from the Malaysian Bar Council, Suaram (a well-established human rights NGO), Amnesty International, the UN Theme Group on HIV, and various musicians

and artists. It carefully avoided staging any public protests or actions, and received favourable coverage in the press. Controversy erupted in the autumn of 2010 when a YouTube video, part of the international, 'It Gets Better Project', showed a young Malaysian Muslim man saying he hoped one day that gay Malaysians could say "Saya gay, gaya okey" ("I'm gay, I'm okay"). There was harsh condemnation in the Malay language press. In the face of death threats aimed at the young man, Seksualiti Merdeka withdrew the video. Controversy continued in 2011. In November, when after the beginning of the annual program, the police banned the organization on grounds that Seksualiti Merdeka events were likely to "excite a disturbance of the peace." The reformist, Badawi, was no longer the Prime Minister. The ruling political coalition had done badly in the 2008 election, although it held onto power. The organizers of Seksualiti Merdeka went to court seeking judicial review of the police banning order. The courts refused to question the ban. No judicial review was allowed. Seksualiti Merdeka was over.

To facilitate the political participation of marginalized groups, the Philippines introduced a system of special party-list parties, which would represent dispersed economic or social groupings that were unrepresented in the legislative branch as a result of the constituency system. An LGBTI political party applied to be so recognized, but was denied on moral grounds. In 2010, the Supreme Court upheld the registration of Ang Ladlad as a party-list party, based on the rights of LGBT people to political participation, freedom of expression, and equal treatment. Ang Ladlad ran in two national elections, but failed to win seats.

11.6 Public Media and Government Censorship

What of freedom of expression (which for LGBTI is usually the struggle to gain legitimate visibility within society)? The government of Singapore explicitly bans positive images of homosexuals. The gay Christian singers, Jason and DiMarco, were banned. In 2008, a cable television channel was fined when a home decorating program featured a nursery in the home of a lesbian couple who had adopted a baby. The Media Development Authority said the program "normalizes and promotes a gay lifestyle." In February 2009, Singapore censored the annual Academy Awards broadcast from Los Angeles, cutting parts of speeches about the film on the gay politician, Harvey Milk. A quick same-sex kiss was cut from the stage production of *Les Miserables* in June 2016. A similar blockage of 'positive images' occurs in Malaysia, Brunei, and Laos. Foreign gay magazines are not available in these countries, and wire service stories on LGBTI topics worldwide do not get reprinted.

Thailand has a reputation as the most relaxed jurisdiction in Asia on sexuality issues, and has a very visible gay scene. Two magazines appear regularly on newsstands. One is the first overseas edition of the British gay magazine, *Attitude*, with local Thai content and translations of articles from the British edition. The second, *@ Tom Actz*, a Thai lesbian magazine has been in print for five or six years. These two print magazines may be unique in Southeast Asia. In Singapore and the Philippines, there are online magazines, which, of course, have less public visibility.

Thailand has released a surprising number of gay movies, though most are low-budget comedies with mocking depictions of gay men and transgender women. But there are a few stand-out productions: *Iron Ladies*, *Beautiful Boxer*, *Love of Siam*,

Bangkok Love Story, *Yes or No*, *Yes or No 2*, and the charming 2015 film, *Winning at Checkers (Every Time)*. The last was submitted as the country's foreign language entry to the Oscars. These Thai films show in regular cineplexes throughout the country. Similarly, there have been numerous gay and lesbian films in the Philippines. Other parts of Southeast Asia can claim one or two titles: *Lost in Paradise* in Vietnam, *Arisan*, *Arisan 2* and *Beautiful Man* in Indonesia, *In a Bottle* in Malaysia, and some comedies in Myanmar. There are LGBTI film festivals in Indonesia, Thailand and Myanmar, and showings in other places.

11.7 Discrimination

Most national constitutions in Southeast Asia promise equal rights and prohibit discrimination. Typically, they have a list of prohibited grounds of discrimination. For example, the constitution of Cambodia states in Art 31 that citizens are equal before the law, regardless of "race, colour, sex, language, religious belief, political tendency, birth origin, social status, wealth or other status." No constitution in Southeast Asia expressly includes in such lists 'sexual orientation,' 'gender expression' or 'intersex status.' These grounds may come within 'other status,' but no court in Southeast Asia has yet so ruled. Constitutional provisions usually apply to government actions and laws – and not to employment, accommodation, or services provided by private businesses. Specific non-discrimination laws are required to counter such discrimination.

Express discrimination exists in some countries in the context of military service. The Philippines bars gay males from service in the armed forces. Same-sex sexual acts are not against the law in South Korea, except if the individual is a member of the armed forces. Conscripts in Singapore who are known to be gay are given some kind of alternative service. Thailand has never been concerned with sexual orientation. It exempts transgender individuals from military service on the basis of the medical classification of 'gender identity disorder.'

Activists in the Philippines have lobbied for a decade for a national anti-discrimination law covering employment. Quezon City, home to the main campus of the University of the Philippines, enacted the first such law. As of the beginning of 2016, local ordinances protecting LGBT from discrimination were in place in the Philippines in two provinces, nine cities, one municipality, and three barangays (neighbourhoods within Quezon City). Taiwan enacted a national law against sexual orientation discrimination in employment in 2002, and in education in 2004.

CASE STUDY

The Thai Gender Equality Act

The 1997 Thai Constitution prohibited discrimination on grounds of 'phet,' a Thai word usually translated as 'sex' or 'gender.' Like some other languages, Thai has not drawn a distinction between the two English language terms. In 2007, a constitutional drafting convention debated whether to add words to include what Thai's often call 'sexual diversity.' No wording was added, but a formal statement of the drafter's decision was issued, saying that 'phet' already included "sexual identity or gender or sexual diversity, which may be different from the phet in which the person was



born.” This interpretation was accepted by the Thai Administrative Court in two cases in which the Province of Chiang Mai had excluded transgender kathoey from equal participation in government sponsored public festivals. In 2015, the slow process of drafting legislation to implement the constitutional non-discrimination provision finally resulted in the *Gender Equality Act*, passed by a military appointed legislature. The *Gender Equality Act* clearly covers discrimination against women, and also against transgender kathoeyes and toms, whose self-presentation is different from the sex assigned at birth. It is understood that the legislation would also prohibit discrimination on the basis of sexual orientation, separately from gender identity or gender expression. A committee has been established to facilitate the implementation of the new provisions.

To what extent should individuals be able to claim an exemption from anti-discrimination laws on the basis of personally held religious views or personal conscience? For example, laws opening legal marriage to same-sex couples have an exemption. They do not require religious authorities to perform same-sex marriages (allowing them to discriminate against same-sex couples). Equally, they are allowed to discriminate on the basis of sex (for they often have male-only clergy). Disputes arose in France, the United States, and Canada as to whether civil servants involved in issuing marriage licenses or actually performing marriages could refuse same-sex couples on the basis of their personal beliefs. Such exemptions for government employees were usually rejected, though controversy continues. In *Ladele, McFarlane v UK* (2013), the European Court of Human Rights upheld the firing of a government clerk who refused, on grounds of personal belief, to register a same-sex partnership. Additional disputes developed as to whether private businesses could refuse services, such as wedding planning or the provision of wedding cakes or flowers for same-sex events. Some individual states in the US have enacted ‘religious liberty’ laws allowing such personal exemptions. Their constitutional validity has not yet been tested. In *Boy Scouts v Dale* (2000), the US Supreme Court allowed the Boy Scouts organization to exclude homosexuals from its programs, holding that the organization had a right of free association. After years of controversy, the organization finally dropped the ban. The same sequence of events occurred with the banning of gay and lesbian organizations from St Patrick’s Day parades (big public non-religious events associated with Irish heritage). The US Supreme Court upheld the discrimination in the name of freedom of expression, but after long controversy, the discrimination was ended by the parade organizers themselves.

11.8 Recognition of Same-Sex Relationships

Legal recognition of relationships is needed to give couples security in relation to children, property, and finances so when a husband or wife dies, the partner can take over ownership of their house, access bank accounts, and maintain guardianship of children. These securities are not regularly available to gay and lesbian couples. A surviving partner may be evicted from their house or lose access to their finances, which will then be transferred to the dead partner’s family.

The only examples we have in Asia of the legal recognition of same-sex relationships are in relation to: (a) immigration residency rights, and (b) domestic violence legislation.

Immigration authorities in Hong Kong, Singapore, Thailand (and probably other jurisdictions as well) will grant residency rights for the same-sex partners of individuals who are taking up positions in their jurisdictions, perhaps as embassy staff, academics, or employees of multinational corporations. For example, the same-sex husbands of the current US ambassador to Vietnam and the current UK ambassador to Thailand have residency rights. The relevant immigration laws make no specific reference to same-sex partners, but in practice they do not block such accommodation. In *Taddeucci and McCall v Italy* (2016), the European Court of Human Rights ruled that residency rights must be granted to a partner in a same-sex relationship if such rights are extended to heterosexual partners. In 2016, a judicial challenge in Hong Kong sought the right of the same-sex partner to work, which would have been given to a heterosexual married partner.

It is now common to have special laws on domestic violence. Such laws typically apply not simply to legally married couples, but also partners who are cohabiting. In Hong Kong and the Philippines, these laws apply to same-sex partners. A 2016 law in China is also worded in a gender neutral fashion, and should apply to same-sex partners.

In 2013, the government of Vietnam proposed the legal recognition of unmarried couples, heterosexual or homosexual, for purposes of resolving disputes over child custody or the division of property. There was significant national debate on the set of reforms, but it was the legislature, in the end, that rejected the recognition of same-sex couples. An unusual law which prohibited holding an event and calling it a same-sex wedding was dropped (which led to many news stories saying, incorrectly, that Vietnam now recognized same-sex marriage).

A committee of the Thai parliament held five seminars or hearings in different parts of the country (the last in April 2013) to consider establishing a registration system for same-sex couples that would provide various legal rights and obligations. Separately, a number of activists worked with the Law Reform Commission of Thailand to produce an alternative registration law that would be available to all couples and which would be more comprehensive in dealing with issues of property, social programs, and children. One prominent activist held out for the opening of marriage, rejecting the idea of a separate registration system. No political parties or prominent politicians publicly endorsed any of these alternatives. Drafting was not complete at the time of the military coup in May 2014, and none of the three proposals has been pursued since that time.

What of international law? In *Joslin v. New Zealand* (2002), the UN Human Rights Committee rejected a claim by same-sex couples for equal access to legal marriage, but on the basis of the specifically gendered language in Art 23(2) of the *International Covenant on Civil and Political Rights*. The Committee in *Young v. Australia* (2003) found that the denial of a spousal pension to a surviving same-sex partner violated equality rights. That ruling was confirmed in 2007 in *X v. Colombia*.

The European Court of Human Rights in *Schalk and Kopf v. Austria* (2010) held that a new registration law remedied many of the inequalities in Austrian law between heterosexual couples and same-sex couples (rejecting a claim for full marriage). In *Oliari v. Italy* (2015), the court ruled that Italy was required to have some system of recognition of same-sex couples, either by way of registration or marriage. The court noted that the movement towards legal recognition of same-sex couples had continued to develop rapidly in Europe and other parts of the world (citing the decision of the US Supreme Court earlier in the year opening marriage). Italy subsequently enacted

a registration law (which had been blocked by opposition in the Senate). Italy was the last jurisdiction in Western Europe to introduce either marriage or a registration system.

In 2001, the Netherlands opened marriage to same-sex couples, followed by Argentina, Belgium, Brazil, Canada, Finland, France, Iceland, Ireland, Luxembourg, Mexico, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, the United Kingdom, the United States, and Uruguay. The new president in Taiwan, elected in early 2016, supports the opening of marriage.

In a new Asian development in 2015, a small number of local governments, first in Japan, then in Taiwan, allowed same-sex couples to register their relationships. The benefits of registration were largely linked to: (a) medical situations, where a partner sought hospital visitation rights or the ability to authorize medical procedures in emergency cases; and (b) in relation to the joint rental of apartments. Suddenly, there was a procedure that involved some official recognition, though with very limited consequences.

11.9 Transgender

‘Transgender’ is an umbrella term that came into use in the 1990s to describe individuals who reject the gendered patterns of dress and behaviour associated with their physical sex. The stereotypical association of transgender with homosexuality is still a problem. The two categories are different. Most cross-dressers are heterosexual. Most transsexuals, after body change, seek heterosexual relationships.

11.9.1 Transsexuals

An individual with a female body may have a male ‘gender identity.’ An individual with a male body may have a female ‘gender identity.’ This is a reality that goes beyond most forms of female masculinity and male femininity, and can lead the individual to: (a) full time presentation of his or her self in the non-biological sex; (b) hormonal medication; (c) surgery reducing or enlarging breasts; and perhaps (d) genital surgery.

Genital surgery became widely available only in the 1960s, first in the West. A set of medical rules developed:

- (1) A diagnosis by psychologists or psychiatrists that the individual has ‘gender dysphoria,’ ‘transsexualism’ or an older phrase ‘gender identity disorder;’
- (2) A transitional period, usually two years, in which the individual receives counselling, hormonal therapy, perhaps minor surgery, and lives on a day-to-day basis in the desired sex; and
- (3) A decision by the individual and the doctor on appropriate treatment, which may or may not include genital surgery.

Since human bodies first develop in the womb as potentially either male or female, the bodies of men and women are sufficiently similar that it is possible to reconstruct the genital organs by surgery. Such surgery is easier for the transition from male to female. It remains difficult to construct a successful penis for a female to male transsexual. In either case, XX or XY chromosomes will not change.

For transsexuals, the right to health found in Art 12 of the *International Covenant on Economic, Social and Cultural Rights*, would include a proper diagnosis and appropriate treatment. The European Court of Human Rights in *L v Lithuania* (2007) held that the state medical system could not refuse surgery in a case where the individual had been diagnosed as a transsexual and a course of treatment had begun. The *Diagnostic and Statistic Manual of Mental Disorders, DSM-IV* of the American Psychiatric Association and the *ICD-10* of the World Health Organization represent an international consensus on diagnosis and treatment.

Individuals in Indonesia, Singapore, and Vietnam, on completing genital surgery can get their personal documents, such as national identity cards, driver's licenses and passports, altered to reflect their post-operative 'gender identity.' Document change is also possible in China, Japan, South Korea, Hong Kong, and Taiwan. With document change, the individual can marry in the newly recognized sex. A male to female transsexual will be able to legally marry a male. In 2007, the Supreme Court in the Philippines rejected document change beginning its judgment with a quotation from the book of Genesis in the Bible. Thailand, as well, does not alter personal documents, though it is the regional centre for sex reassignment surgery.

Requirements for document change have been rapidly changing in the West. Change started with the United Kingdom's *Gender Recognition Act* of 2004, which provided that genital surgery was not a requirement for a transsexual seeking document change. Reforms have taken place in a number of countries, including Argentina, Denmark, Ireland, Italy, Malta, Netherlands, Norway, and Sweden. Even the British reform of 2004 is now recognized by the UK government as seriously out of date. The new rules mean that a person committed to living as the 'other sex' can gain document change without the requirement of: (a) a medical diagnosis, (b) genital surgery, (c) sterility, (d) hormonal treatment, or (e) a divorce ending any existing marriage. These new reforms are described as respecting the 'self-determination' of the individual. The European Court of Human Rights in *YY v Turkey* (2015) ruled that it was a violation of rights of privacy and family life to require, for document change, that the individual have undergone genital surgery which would have made them sterile. The first jurisdiction in Asia to respond to this newer thinking has been Taiwan. In December 2013, the Ministry of Health and Welfare authorized document change without any psychiatric evaluation or surgery.

A 2015 report to the Council of Europe said the state should ensure "that the change of name and gender on official documents can be obtained through quick, transparent and accessible procedures that effectively guarantee full legal recognition in all areas of life." Denmark, Malta, Ireland, and Norway have led in making the procedure for changing documents a simple administrative matter.

The old requirements—diagnosis, waiting periods, divorce, genital surgery, sterility—now seem simply to reflect neurotic fears of any loosening of the sex/gender system (even for a small minority of individuals). International media first reported on a 'pregnant men' a decade ago – the sensational story of an individual in Oregon who had given birth to a child after document change identified him as male. Media do not bother to report new examples. The story is no longer news.

In a 2016 report, the UN Special Rapporteur on Torture noted that the refusal of transgender people's legal recognition in their appropriate gender "leads to grave consequences for the enjoyment of their human rights, including obstacles to accessing education, employment, health care and other essential services." The report noted

that “in states that permit the modification of gender markers on identity documents abusive requirements can be imposed, such as forced or otherwise involuntary gender reassignment surgery, sterilization or other coercive medical procedures.” It is now frequently asserted that the requirement of genital surgery and sterility for legal recognition of gender identity is a form of torture.

In recent years, the strong transsexual identification of some pre-puberty children has come to be recognized and respected. Medical treatment may involve the blocking of puberty, delaying that bodily change until it is clear what decision the individual wants to make.

11.9.2 Discrimination Based on Transsexuality

In *P v S and Cornwall County Council* (1996), the European Court of Justice held that discrimination on the basis of sex reassignment was discrimination on the basis of ‘sex’ and, for that reason, contrary to European Union law. Recent decisions in the US also recognize that discrimination against transsexuals is discrimination on the basis of ‘sex.’ Antidiscrimination laws that cover gender identity are mandatory in the EU, and increasingly common in other parts of the West. The 2009 constitution of Bolivia was the first constitution to ban discrimination on grounds of gender identity, as well as sex and sexual orientation.

A recurring issue relates to sexually segregated toilets. In October 2006, the New York Metropolitan Transportation Authority resolved a long-standing dispute by ruling that individuals throughout their extensive subway and railroad system could access whichever restroom was “consistent with their gender expression.” In 2016, some individual states in the US enacted laws requiring individuals to use toilets in accordance with the ‘sex’ indicated on their birth certificates, a challenge to the federal government which makes grants to schools dependent upon toilet access based on gender expression or gender identity. A coalition of state governments has sued the national government over the issue. The issue could be heard by the Supreme Court in 2017.

CASE STUDY

Transgender in Malaysia

One of the few available studies on discrimination against transgender women was published by Human Rights Watch in 2014, under the title, *I’m Scared to be a Woman: Human Rights Abuses against Transgender People in Malaysia*.

Three transgender women in Negeri Sembilan, who had been arrested and prosecuted for wearing women’s clothing under a state-level Sharia law, challenged the law as in conflict with human rights provisions in the Malaysian Constitution. State level governments have authority to legislate on matters related to Islam, and all 13 states prohibit Muslim men from dressing as women. Three states also criminalize women “posing as men.” Cases are heard in Sharia courts. In a carefully prepared challenge, backed by the NGO, Justice for Sisters, a trial court heard evidence about the classification of Gender Identity Disorder in the *DSM-IV* of the American Psychiatric Association. The three individuals had been diagnosed as having GID and evidence established that the condition was neither a matter of personal choice nor amenable to treatment. A sociologist gave evidence describing the Mak Nyah community in



the country (a long recognized transgender grouping). A religious authority testified that cross-dressing was forbidden in Islam. After losing at trial, the petitioners were successful on appeal. In 2014, the Court of Appeal ruled that the state-level Sharia law was in conflict with the constitutional rights to life and personal liberty, equality, freedom from gender discrimination, freedom of movement, and freedom of speech, assembly, and association. The judgment cited a decision of the Supreme Court in India which held that the prohibition of discrimination on grounds of 'sex' covered 'gender identity' as well. It quoted from a Malaysian government report to the UN General Assembly Special Session on HIV/AIDS in 2010 which said that the social shunning of transsexuals in the country resulted in the majority of Mak Nyah being "unable to obtain employment and thus end up doing sex work." The judgment criticized the trial court judgment, which equated transgender with homosexuals, saying the case had "absolutely nothing to do with homosexuality." The implications for a challenge to Art 377, however, were very clear. In October, 2015, the Federal Court, the highest court in the Malaysian system, on purely procedural grounds, ruled that the decision could not stand. It said that a constitutional challenge could only proceed with an authorization from the Federal Court. The authorization of a high court judge, which had been obtained, was insufficient. As in the Seksualiti Merdeka case, judicial review was rejected on grounds that avoided any discussion of human rights. The ruling suggests that the Federal Court could block any attempt to revive the challenge.

11.9.3 Distinct Transgender Identities

In the Southeast Asian region, there are 'third sex' transgender groupings, made up of individuals who share some extent of a collective identity. The best known are the Bakla in the Philippines, the Mak Nyah in Malaysia, the Waria in Indonesia, and the Kathoey in Thailand. Internationally, the best known (and largest) of the 'third sex' groupings are the Hijra and related groups in India, Pakistan, and Bangladesh. These groupings have no equivalents in the contemporary West or in Confucian influenced societies in East Asia. Some find a place in entertainment, as in the transvestite cabaret shows in Thailand, or as entertainers at political rallies in Indonesia. Some run small businesses, such as beauty parlours, or work selling cosmetics in department stores. In the Philippines, they are often called 'parloristas.' In South Asia and Southeast Asia, they frequently engage in sex work, being barred from most other jobs.

Two reforms have been taking place. Some government agencies have recognized these groups as socially and economically marginalized. At times, training programs have been extended to them by government social welfare departments in Malaysia and Indonesia. Some governmental recognition of a 'third sex' category has occurred in South Asia, but not in Southeast Asia.

11.10 Intersexuals

Intersexuality refers to various conditions in which the body at birth is neither completely male nor female. Some forms of intersexuality do not become apparent until the onset of puberty. When an intersex child is born, some confusion and embarrassment usually overwhelms the parents. Doctors, at least in the past, routinely recommended 'normalizing' surgery, to bring the child's physical appearance into

line with a male or female standard. The fact of an intersex history was regularly kept from the child, who may come to realize on maturity that critical information has been suppressed.

Intersex activists argue that almost all ‘normalizing’ surgeries are cosmetic in nature. They are not medically necessary. They involve guesswork, for doctors cannot know how the individual will identify on maturity in terms of sex or gender identity. Many intersexuals have rejected the sex assigned at birth, and must face the fact that irreversible genital surgery has taken place. Medical treatment, activists argued, should be deferred until the child (sometime after puberty) is able to give fully informed consent to a course of treatment (or to reject intervention). In other words, it should be up to the individual to determine whether to be male, female, or intersexual.

In response to controversies around intersex issues, a fifty-person panel of experts in paediatric endocrinology from both Europe and North America, together with patient-centred activists, studied the issues involved. The result was the 2006 *Consensus Statement on Management of Intersex Disorders*. The statement supports patient’s rights and the need for informed consent. The 2006 Yogyakarta Principles requires the state to ensure “that no child’s body is irreversibly altered by medical procedures in an attempt to impose a gender identity without the full, free, and informed consent of the child.” The 2013 report of the UN Special Rapporteur on Torture condemned any non-consensual surgical intervention on intersex infants, calling such actions a form of torture. Criticism of ‘normalizing’ surgeries have come, as well, from the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. In the Universal Periodic Review, governments are now criticized for allowing such surgery to continue. In 2015, Malta prohibited such surgeries in its leading legislation on transgender and intersex issues.

Little information exists in Southeast Asia as to whether the new international standards are being followed by doctors and medical institutions. Intersex individuals have been able to get their personal documents corrected, even in countries that will not change documents for post-operative transsexuals. There was considerable publicity about the case of Alter(ina) Hofan in Indonesia, who was classified as female at birth but whose designation was changed to male after surgery. He married a woman, only to be accused by the woman’s mother of not being a man. After sensational coverage in the Indonesian media, Alter was imprisoned for a period of weeks before the charges were finally dropped. In 2008, the Philippine Supreme Court in the Cagandahan case granted an intersex applicant’s petition to be recognized as male. The petitioner was classified as female at birth, but male characteristics developed as the body matured. The judgment reflected on the rigidity of having only two sexual categories, male and female, when the petitioner’s body did not conform to either model. Since the petitioner identified as male, and sought that classification, the court so ordered.

11.11 Conclusion

We are in a period of significant change on LGBTI rights, but only in certain parts of the world. There has been a shift away from near universal condemnation sixty years ago. There are now fairly slim majorities in the UN Human Rights Council supporting change. For young people growing up in Southeast Asia there is some chance of support and recognition for sex and gender diversity.

A. Chapter Summary and Key Points

Introduction

The hostility and discrimination against lesbian, gay, bisexual, transgender, and intersexual (LGBTI) people is commonly explained as religious in origin. Some religions have an anti-homosexual tradition, but their contemporary views may be less clear. All major religious traditions now have internal divisions or debates on the human rights of LGBTI. The history of anti-homosexual, anti-transgender bias is uneven with periods of quite open acceptance, but hostility is the more recent trend. Now, LGBTI people find society hostile to their existence, but blind to their presence.

Post-War Change

There have been dramatic changes on rights about sexuality since the UDHR was adopted in 1948. At that time, half the world had criminal laws against homosexuality and many regarded it as an illness. Today, most criminal laws have been abolished and same-sex marriage is allowed in many countries, but there has been regression in much of Sub-Saharan Africa, Russia, the Middle East, North Africa, and in member states of the Organization of Islamic Cooperation. In Southeast Asia, criminal prohibitions survive from colonial times but no country actively enforces these laws. Police harassment continues while vigilante actions against gay or transgender events still occur in the region. Lack of acceptance by families is widely reported with States and religious organizations giving little or no support. Bullying in schools is a regional problem. Views of heads of government vary.

Change at the UN

In the UN system, issues of sexual orientation and gender identity were taken up by various bodies starting in 1993 with *Toonen v Australia*. The UN Human Rights Council has passed supportive resolutions on LGBTI human rights despite bitter opposition. Other bodies like the UNDP, the UNSC and the UN General Secretary, have also been supportive.

Criminal Laws

The Bible prohibited homosexuality, a provision which became part of Roman and Roman Catholic religious law. The *Napoleonic Penal Code* reformed criminal law in 1810, dropping the prohibition against homosexual acts, and this change spread to half of Europe. Most colonial powers and their colonies had no prohibition against homosexuality. The major exception is Britain, where criminalization was maintained in its colonies. For example, the penal code for India contained the famous Art 377 which still exists in many ex-British colonies, prohibiting acts “against the order of nature,” commonly defined as homosexuality. The movement for homosexual rights and decriminalization began in late 19th century Europe and was centred in Berlin. In most western countries, reforms began after World War II. Cases in the Indian and Singaporean Supreme Courts of Appeal have challenged, but not overturned these laws.

LGBTI Visibility and Activism

The first active LGBTI civil society organizations in Southeast Asia were focused on health and concerned themselves with education and the prevention of HIV/AIDS. Today, the rights to assemble and associate are tested with ‘pride parades’ held in various city centres; governments have tried to prevent these in Malaysia and Singapore. Some governments explicitly ban positive images of homosexuals, while other countries are more relaxed.

Discrimination

Most national constitutions in Southeast Asia promise equal rights and prohibit discrimination although discrimination exists in the context of military service. The Philippines has lobbied for a national anti-discrimination law covering employment. Whether private businesses can refuse services, such as wedding planning, for same-sex events has been disputed.

Recognition of Same-Sex Relationships

Giving relationships legal recognition offers couples security as regards children, property, and finances, especially when one partner dies. These securities are not regularly available to gay and lesbian couples. Immigration authorities may grant residency rights to the same-sex partners of individuals in some countries. Domestic violence laws typically apply to cohabiting partners. In 2015, a small number of local governments in Japan and Taiwan allowed same-sex couples to register their relationships. The benefits of registration were largely linked to medical situations, for example, where a partner seeks hospital visitation rights, or in relation to the joint rental of apartments.

Transgender

‘Transgender’ is an umbrella term to describe individuals who reject the gendered patterns of dress and behaviour associated with their physical sex. In Southeast Asia, there are a number of ‘third sex’ transgender groupings such as the Bakla in the Philippines, the Mak Nyah in Malaysia, the Waria in Indonesia, the Kathoey in Thailand, and the Hijra in India, Pakistan, and Bangladesh. The stereotypical association of transgender with homosexuality is still a problem. Most cross-dressers are heterosexual. Most transsexuals, after body change, seek heterosexual relationships. Genital surgery only became available in the 1960s. Individuals in Indonesia, Singapore, and Vietnam, on completing genital surgery, can have their personal documents altered to reflect their post-operative ‘gender identity.’

Discrimination Based on Transsexuality

Anti-discrimination laws that cover gender identity are increasingly common in the world. Reforms are taking place in South Asia (but not Southeast Asia) in the following areas: services for socially and economically marginalized LGBTI, training programs for social welfare departments, and recognition of a ‘third sex’ category (but only in some governments). A recurring issue is sexually segregated toilets.

Intersexuals

Intersexuality refers to various conditions in which the body at birth is neither completely male nor female. Some forms of intersexuality do not become apparent until the onset of puberty. In recent years, the transsexual identification of some pre-pubescent children has been recognized and respected. Previously, when an intersex child was born, doctors would routinely recommend surgery to bring the child’s physical appearance into line with a male or female standard. Intersex activists argue that almost all these surgeries are cosmetic and not medically necessary. They also involve guesswork, for doctors cannot know how the individual will identify on maturity in terms of sex or gender identity. The preferred practice now is to recognize the patient’s rights and acquire informed consent before surgery.

B. Typical exam or essay questions

- What are the laws, government policies, and general social attitudes in your country on the issues raised in this chapter? What positions has your country taken on sexuality issues at the United Nations?
- Do LGBTI rights advocacy groups function openly and visibly in your country?
- What countries or jurisdictions regularly enforce: (a) criminal laws against same-sex sexual acts between consenting adults; (b) laws against cross-dressing; (c) laws against individuals hanging out at night in places that gays or cross-dressers frequent; (d) laws or policies that prohibit gay or lesbian or transgender bars; or (e) restrictions on media that feature images of LGBTI?
- Why do countries retain anti-homosexual criminal laws when these are not actively enforced?
- Should anti-homosexual criminal laws be held to discriminate on the basis of sex (as was held in *Toonen v Australia* and at trial in *Naz v India*)?
- Is the bullying of students who are perceived to be LGBTI a problem in your country?
- What violations do transgender people face in your country? What has been the response of the government and civil society?
- If someone changes their sex through an operation, should their birth certificate also be changed to reflect the current sex of that person? Why, or why not?

C. Further Reading

Sexuality and Rights

- Lynette Chua
- Peter Jackson
- Julian Lee
- Michele Ford
- Douglas Sanders
- Mergawati Zulfakar

Research Organizations

The UNDP has many useful publications on sexuality in the Asia Pacific. They produce country reports under the “Being LGBT in Asia” program including for Cambodia, Indonesia, Philippines, Thailand, and Vietnam.

The UNDP and the Asia Pacific Forum have produced recent big report: *Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics* (2016).

Other UNDP reports include:

Leave No One Behind: Advancing Social, Cultural and Political Inclusion of LGBTI People in Asia and the Pacific (2015)

Discussion Paper: *Transgender Health and Human Rights* (2013)

Council of Europe, *Protecting Human Rights of Transgender Persons: A Short Guide to Legal Gender Recognition* (2015).

Human Rights Watch and Amnesty International have programs on LGBT rights with advocacy notes and research reports. Some relevant HRW reports include:

I'm Scared to be a Woman: Human Rights Abuses against Transgender People in Malaysia (2014).

'These Political Games Ruin Our Lives': Indonesia's LGBT Community Under Threat, (2016).

The OHCHR has some publications including a *Fact Sheet on Intersex, and Born Free and Equal: SOGI in International Human Rights Law*.

OutRight International is an NGO with research and reports including: "Letter to Thai Officials: Killings of Lesbian Women and Transgender People in Thailand" (March 22, 2012) and *Violence: Through the Lens of Lesbians, Bisexual Women and Trans People in Asia* (2014).

The ICJ has a *SOGI Case Book* of court cases and the *SOGI UN Database* of reports, resolutions, and findings from treaty bodies.

The International Council on Human Rights Policy has a study on *Sexuality and Rights*

Other organizations include ILGA, Sexual Rights Initiative (SRI), and WHO's programs on Sexuality, and Gender and human rights.