

HUMAN RIGHTS AND SEXUAL ORIENTATION INTERNATIONAL AND REGIONAL STANDARDS

Background material for workshops presented by the

INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION



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1 HUMAN RIGHTS AND SEXUAL ORIENTATION: KEY INTERNATIONAL PRECEDENTS

Many precedents within the United Nations system establish that sexual orientation is a human rights issue. These are grounded in the Universal Declaration of Human Rights (UDHR)(1948), which proclaims that "All persons are born free and equal in dignity and rights" (Article 1), and are sustained by the UDHR principle that human rights are indivisible. The universality of human rights is fulfilled by addressing the most concealed abuses and by protecting the most vulnerable groups. The following precedents demonstrate that the United Nations already recognizes that sexual orientation is a human rights issue:

- The **United Nations Human Rights Committee** ruled in *Toonen v. Australia* (1994) that laws prohibiting sexual contact between consenting adults were a violation of the fundamental human rights to privacy (Article 17) and non-discrimination (icle 2) enshrined in the International Covenant on Civil and Political Rights (ICCPR). It ruled that the protected category of "sex" in 2 of the ICCPR "is to be taken as including sexual orientation."

- The **United Nations Special Rapporteurs** on Extrajudicial, Summary or Arbitrary Executions (Ms. Asma Jahangir), Violence Against Women (Ms. Radhika Coomaraswamy), and the Special Representative of the Secretary General on Human Rights Defenders (Ms. Hina Jilani) have reported on human rights violations on the ground of sexual orientation related to their specific mandates. In a historic move earlier this year, the Special Rapporteurs on Torture (Sir Nigel Rodley), the Independence of Judges and Lawyers (Mr. Param Cumaraswamy), and Freedom of Opinion and Expression (Mr. Abid Hussein) joined these offices in directly calling for more information about human rights violations based on sexual orientation and gender identity.

- The **United Nations Committee on Economic, Social and Cultural Rights** has held through the General Comment 14 (2000) on the right to the highest attainable standard of mental and physical health in the International Covenant on Economic, Social and Cultural Rights, that sexual orientation is a prohibited basis of discrimination, and has an impact on health status.

- Other treaty bodies such as the **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)** and the **Convention on the Rights of the Child (CRC)** have asked questions related to their mandates to reporting governments which demonstrate that sexual orientation is a human rights issue for which governments are accountable.



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BENCHMARKS FOR ASSESSING HUMAN RIGHTS ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY

A. LAWS, POLICIES AND PRACTICES USED BY GOVERNMENTS TO CONTROL OR REGULATE SEXUALITY

- Sodomy laws
- Age of consent laws
- Laws against vagrancy/litering
- Laws on prostitution (a range of forms: criminalizing the act itself, criminalizing keeping of brothels or quarters for "immoral purposes," criminalizing solicitation, criminalizing pimping, criminalizing Johns)
- Laws prohibiting acts which "offend public morals" or "cause public scandal"
- Laws penalizing those wearing clothing of opposite sex
- Laws criminalizing STD/HIV transmission
- Dress codes (particularly for women)
- Restrictive laws on registration of NGOs
- Restrictive laws on freedoms of association or assembly
- Obscenity/pornography laws, other laws restricting freedom of expression
- Internet regulation codes
- Badly written rape/sexual violence laws (failing to penalize marital rape, defining rape in strictly heterosexual terms)
- Badly written laws on domestic violence
- Marriage laws (denial of marriage to sameosex partners, denial of marriage to trans people, divorce laws, laws on marriage for people living with HIV and AIDS [PLWHA])
- Criminalization of adultery/ fornication
- Laws on parenting/adoption

B. FOCUS ON ANTI-DISCRIMINATION LAWS

Types of provisions providing protections against anti-discrimination:

1. A general statement about the right to equality and respect for the dignity and worth of each individual. This represents a positive recognition of the right to equality, rather than an active protection against discrimination.
2. A prohibition of discrimination on specified grounds, such as sex, disability, religion, or race. These provisions involve an enumerated, closed list of grounds of protection; if sexual orientation or gender identity is not specifically named, then these categories are not protected.

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3. A general prohibition of discrimination, with an 'open' list of some of the types of discrimination that are prohibited. Some grounds of discrimination that are not explicitly listed are covered by the law.

B. FOCUS ON 'SODOMY' LAWS

Many countries around the world—not to mention 13 states within the US—have laws regulating sexual activity between adults of the same sex. Some, most often called 'sodomy' laws, regulate specific sexual acts like anal sex. Other so-called "morality" laws have prohibitions couched in such terms as "unnatural" and "indecent" sexual acts, "anti-social" or "obscene" behavior, or "causing a public scandal". Both categories are used by the police to harass, intimidate, and arrest gay men, lesbians, bisexuals, and transgender persons.

In a landmark decision for the lesbian, gay, bisexual, and transgender human rights movement, the United Nations Human Rights Committee in 1994 ruled that the existence of a sodomy law violates the rights to privacy and non-discrimination enshrined in international law.

Countries that maintain these so-called 'sodomy' laws violate this international standard. Many of these throughout the world are legacies of the British colonial period, when colonizers introduced penal codes mimicking those in England. Today, countries around the world must face the lingering impact of these laws. The original laws, which speak of "unnatural sexual acts against the order of nature", unquestionably find their moorings in Christian strands of morality. Ironically, contemporary Hindu, Muslim, and Christian conservative political forces throughout the world can be almost compulsive in their willingness to latch onto these notions of "natural" and "unnatural", while scapegoating homosexuality as a Western scourge..



3. REGIONAL OVERVIEW: HUMAN RIGHTS LEGAL CONDITIONS IN ASIA AND THE PACIFIC

A. OVERVIEW OF 'SODOMY' LAWS

1. Countries with laws criminalizing homosexual acts:

ASIA	PACIFIC
Bangladesh	Cook Islands
Bhutan	Fiji
Brunei	Kiribati
India	Tuvalu
Myanmar (Burma)	Western Samoa
Malaysia	
Nepal	
Pakistan	
Singapore	
Sri Lanka	

2. Countries with campaigns to repeal 'sodomy' laws:

Fiji
India
Sri Lanka

Focus on India: Late last year, Naz Foundation India, an HIV/AIDS organization in Delhi, and Lawyer's Collective-HIV/AIDS Unit, a legal advocacy partner, jointly filed a legal suit against the Indian government. It argued that Section 377 in the Indian Penal Code, which penalizes 'unnatural sex' with prison terms of up to 10 years, violates the fundamental rights to life and liberty in the Constitution. A groundswell of recent activism among the now more than 60 sexuality minority groups in India--focusing on such issues as psychiatric abuse, police harassment of gays and transgender persons, and arrests and detention of on-duty HIV/AIDS workers working with men who have sex with men—has no doubt put pressure on the High Court of Delhi to consider this case, despite tremendous lojgians the Indian legal system. The hearing date is scheduled for August 26, 2002.

In another attempt to overturn Section 377, the Delhi-based women's organization Sakshi asked the Law Commission of India (LCI), a branch of the government making recommendations for legal reform, to examine a cluster laws regarding sexual intercourse and rape in March 2000. Following Sakshi's advice, the LCI issued a recommendation to strike Section 377 while revising and strengthening rape laws. Despite this advance, it is up to Parliament to act (or sit) on these recommendations, and garnering the support of Members of Parliament throughout India will prove a hefty

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challenge.

3. Countries that have repealed 'sodomy' laws:

Hong Kong (1991)
Burma* (by Government-in-Exile, 2001)

Focus on Burma: Burma, under the oppressive yoke of the military State Law and Order Council (SLORC) since 1988, maintains a British colonial-era law punishing "unnatural offenses." Last year in April, one of the largest organizations of Burmese democracy activists who fled Burma in the wake of SLORC's repression, voted to decriminalize same-sex sexual relations between consenting adults. The All Burma Students' Democratic Front (ABDSF) functions as a parallel democratic government-in-exile with its own defense, welfare, and legal systems. It represents Burmese students, seen as the leading force fighting the military regime, in their struggle to achieve democracy and human rights—and it's decisions project a vision of democracy for a new Burma. Last year's annual meeting saw the repeal of the ABDSF's law punishing anyone, male or female, taking part in same-sex sexual acts with one year imprisonment and dismissal from the organization.

ABDSF's decision, no doubt, was greatly influenced by the work of the Committee for Lesbian Rights in Burma (CLRB), an organization of exiles and others committed to supporting lesbian, gay, and bisexual rights and their place within the liberation struggle for Burma. The democracy movement, it believes, can only be furthered by respect for the human rights of all groups. Gay activist and group founder Aung Myo Min has worked tirelessly within the Burmese democracy movement for 14 years, and was recognized for his work as winner of the Felipa Award from the International Gay and Lesbian Human Rights Commission. For more information about CLRB, please see the website <http://www.clrp.org>, or e-mail them at: myomin@cscoms.com

B. OVERVIEW OF ANTI-DISCRIMINATION LAWS

1. Anti-discrimination at the Constitutional Level

Fiji stands out as one of only three countries in the world—the others being South Africa and Ecuador—with explicit protections on the basis of sexual orientation in the national Constitution. The 1998 Fiji Constitution contains in its Bill of Rights prohibitions on discrimination on the basis of both actual and supposed sexual orientation. Interestingly enough, it remains a mystery to many LGBT activists and citizens' groups who helped forge the new Constitution how these protections actually made their way into the document. It is likely that South Africa's groundbreaking Constitution and New Zealand's human rights laws, among others, served as models.

These landmark protections have withstood at least two waves of attacks from right-wing Christian forces. In 1999 they introduced, and a year later re-introduced, two proposed amendments: one calling for the removal of sexual orientation from this section of the Constitution, and the other defining marriage as the union of one man and one woman "to the exclusion of all others." The Sexual Minorities Project of Women's Action for



Change, the only gay rights advocacy group in Fiji, fought valiantly against these amendments, working with IGLHRC and other international groups on an international letter-writing campaign.

The protections also survived a political coup when gang members led by George Speight held elected leaders hostage in Parliament, seizing control of government in 2000. Speight and co. declared martial law and passed these proposed anti-gay amendments, foregoing any democratic process. When the government was restored, the 1998 Constitution was restored in full—and the protections found their reinstatement. Fiji remains the only country in Asia or the Pacific with national-level anti-discrimination protection.

2. Anti-discrimination at the Metropolitan Level

In November 2000, the city of Tokyo, Japan set an important precedent when it included sexual orientation as a category protected from discrimination in its new human rights guidelines, making it the first city or country in Asia to provide these measures. This significant advance was the fruit of years of tireless advocacy from the Japan Association for the Lesbian and Gay Movement (OCCUR).

3. Campaigns for Anti-Discrimination Protections at the National Level

Active campaigns for anti-discrimination laws flourish in the Special Autonomous Region of Hong Kong, China as well as the Philippines. For several years, a coalition of Tongzhi (a term, literally meaning 'comrade' in Chinese, referring to the diverse communities of lesbian, gay, bisexual, and transgender persons of Chinese descent worldwide) organizations have lobbied the Legislative Council of Hong Kong to add sexual orientation to its equal protection law; among its adversaries are a right-wing Christian group. In the Philippines, a vibrant coalition of 12 community organizations called the Lesbian and Gay Legislative Advocacy Network (LAGABLAB) worked with the progressive political party Akbayan! to draft and introduce in the House and Senate a comprehensive anti-discrimination bill after a series of innovative dialogues. In December 2001, the House Committee on Human Rights unanimously endorsed the bill and strongly urged its passage. Advocates are now pushing for a reading in the Senate. LAGABLAB, in cooperation with Amnesty International-Pilipinas, has also initiated a multi-year "Stop discrimination now!" campaign to educate the general public as well as garner support within the lesbian, gay, bisexual, and transgender communities.

In Thailand, in 2001, a Commissioner of the National Human Rights Commission commented that the general equality clause of the 1997 Thai Constitution protected lesbians and gays from discrimination.

