

## **ANNI Conference Presentation - September 6, 2011, Bangkok**

### *Implementation Status of ACJ Reference on Sexual Orientation and Gender Identity by National Human Rights Institutions of the Asia Pacific Forum*

*By Grace Poore*

In January 2011, the International Gay and Lesbian Human Rights Commission began networking with LGBT groups in the Asia Pacific Forum countries to see how we could collectively use the report of the Advisory Council of Jurists as an entry point for constructively engaging with National Human Rights Institutions (NHRIs) on the rights of lesbian, gay, bisexual and transgender people (LGBT) people.

The ACJ's findings showed marked inconsistencies between international human rights law and the laws of APF countries. For instance,

- Seven of these countries have laws criminalizing same sex relationships.
- Eleven of these countries do not recognize changed gender identity.
- Fifteen of these countries do not have any laws that explicitly prohibit discrimination against LGBT people.

Prior to the ACJ report on sexual orientation and gender identity, released in December 2010, most of the NHRIs in the APF did not advocate for LGBT rights. Many of those NHRIs that did do some advocacy prior to the report, have lost some of the Commissioners or staff with whom LGBT activists had a good relationship with and had come to trust. These previous Commissioners have been replaced in some instances by new Commissioners who have little interest and limited or no contact with the LGBT community. And the few who have shown interest in LGBT rights need more experience and expertise on these issues.

As of last night, of the eleven NHRIs that had submitted their annual reports to the Asia Pacific Forum, six make no mention of sexual orientation and gender identity or the ACJ recommendations. The five that do talk about sexual orientation and gender identity are in Australia, New Zealand, the Philippines, Mongolia and Malaysia. None of them go quite far enough. I understand that that the ACJ did recognize the need for a staged approach to the recommendations but IGLHRC wonders how many of the NHRIS who have not reported on their work on LGBT rights will actually fulfill their responsibilities or come close to fulfilling them – even if they are given until 2013 to address LGBT human rights violations.

IGLHRC has received reports from several LGBT activists who have been engaging with their NHRIs on LGBT human rights issues. The reports show a pattern.

1. Most of the seventeen governments whose NHRIs are expected to implement the ACJ recommendations are prioritizing a religious framework over a human rights framework, with key state institutions interpreting and implementing laws, including secular laws according to conservative religious beliefs that LGBT people have no rights.
2. NHRIS have not tried and those who have tried have not maintained pressure on police to stop or at least put a moratorium pending further review of using discriminatory laws (such as public order, public nuisance, vagrancy, and morality laws) disproportionately against LGBT people, or in some cases, mis-using and wrongly enforcing laws (such as anti-trafficking and anti-kidnapping laws) to penalize lesbian relationships in response to hostile families trying to break up couples.
3. Even in countries with no sodomy laws or where court rulings have changed on how such laws get applied, NHRIs have been dragging their

feet about acting on the ACJ recommendations – not even at the very least, consulting with LGBT groups for ideas on what to do.

IGLHRC strongly believes that in the absence of strong, sustained, and respectful partnerships with LGBT activists and groups, the recommendations of the ACJ may fall between the cracks when NHRIs deem other human rights issues more important than LGBT rights – which raises the question, if hostile, reluctant or nervous NHRI Commissioners are giving LGBT issues a low priority even at the APF level, wouldn't they give even less attention to these issues at the domestic level?

I speculate that NHRIs may not understand that LGBT people face multiple discrimination, not only because of our sexual orientation and gender identity but also because of other aspects of our identities such as ethnicity, age, religion nationality, disability, social origin. They may not be seeing the intersectional and cross-cutting aspects of violence and discrimination that LGBT people face. Not looking at the full spectrum of human rights means not thinking about LGBT people when NHRIs are working on other human rights issues – such as torture, the death penalty, disability.

As activists working on the ground will tell you, LGBT people experience poverty, homelessness, wage discrimination, workplace harassment, family violence, police abuse, forced migration, civil war, ethnic cleansing, and many other human rights abuses. These barriers to our human rights cannot be siloed and compartmentalized as if they are unrelated to the interlocking system of injustice that many of us are fighting to change.

In this context, I wish to reiterate that we all have a sexual orientation and a gender identity like we all have racial or ethnic identities. So when the ANNI conference program says that this session will focus on SOGI and SOGI rights, it reinforces the idea that only LGBT people have a sexual orientation and gender identity, which plays into the arguments that government officials and even some NGOs use to claim that sexual orientation and gender identity are not their issues because it goes against their culture or religion.

Going beyond the API region to the United Nations. In 2011, for the first time in the history of the Human Rights Council, which is the highest body of the United Nations, a resolution was passed, condemning human rights violations on the basis of sexual orientation and gender identity. The Resolution did not

only condemn violence but significantly also discrimination. It did not only call for an end to these violations but it also stipulated action – the Office of the High Commissioner will be undertaking a study of discriminatory laws, practices and violence against people on the basis of their sexual orientation and gender identity, and ways that international law can be used to stop such violence.

The UN Secretary General, Ban Ki Moon and the UN Human Rights Commissioner, Navi Pillay also have come out with strong statements denouncing human rights violations against LGBT people.

At the CEDAW session in New York this July, several CEDAW Committee members raised many questions on sexual orientation with governments of South Korea, Singapore, Nepal and Costa Rica. One of them surprised me because, previously, she had been adamantly opposed to the inclusion of lesbian issues under the CEDAW Convention. But since the UN Secretary General and the UN General Assembly had come out in support of LGBT rights, she felt that the CEDAW Committee was now obligated to comply – i.e., she was obligated to comply.

I use this example to show that the UN level support for LGBT people's rights could have a positive influence on NHRIs in their role as human rights monitors and protectors. And given that NHRIs have been asked by the Human Rights Council to play a bigger role in reporting on human rights situations in their countries, NHRIs must include LGBT rights violations and make the situation for LGBT people visible.

## CONCLUSION

I'll end by saying that we cannot let the window of possibility for including protections for LGBT people close. Once the Asia Pacific Forum moves on to its next focus, there may be even less political will within NHRIs to attend to the issues facing LGBT people, particularly if they have not committed to doing so already.

I feel that LGBT groups on the ground and international human rights organizations like IGLHRC are a valuable resource for technical assistance to NHRI Commissioners and staff. We can

1. Help NHRIs develop language for talking about sexual orientation and gender identity to government officials and community leaders.
2. Help NHRIs support the implementation of the Yogyakarta Principles.
3. Help NHRIs with their investigation, documentation and reporting on violations against LGBT people for the Universal Periodic Review process.
4. Help NHRIs understand the intersecting nature of discrimination experienced by LGBT people and ask them to look at the full spectrum of human rights violations when they advocate with their governments.

I urge members of ANNI to leverage your contacts within NHRIs and help us with our LGBT rights advocacy. Having the broader human rights community collaborate with us strengthens our advocacy efforts. Incorporating LGBT rights into your own advocacy work strengthens your monitoring of NHRIs' performance on the ACJ recommendations.

I am eager to hear what the NHRIs will say tomorrow (Sept 7) when they give their verbal reports on what actions they have taken and not taken to carry forward the ACJ recommendations. Later this afternoon, IGLHRC is convening



several LGBT activists who have come for the APF Meeting so we can work on developing a collective outcome statement for delivery to the APF tomorrow. Please feel free to talk with us and thank you for the opportunity to speak at this conference.

**NOTE (for reference only):**

In 2008, a UN Joint Statement expressed concern about violence committed against people because of their sexual orientation and gender identity:

- 21 member states voted in favor: none from the APF
- 13 governments voted against: from the APF they were Indonesia, Malaysia, Jordan, Qatar
- 13 governments abstained: India, Philippines and South Korea, all with NHRIs in the APF.

In 2010, the UN General Assembly passed a Resolution, condemning killings of minority groups on the basis of their race, nationality, ethnicity, religion, language, sexual orientation and gender identity. After much debate and struggle

- 93 member states voted in favor of including sexual orientation and gender identity as legitimate grounds – meaning governments had to acknowledge that hate crimes resulting in the deaths of LGBT people was a crime, that the killings had to receive state attention, and perpetrators had to be prosecuted: Australia, India, Nepal, New Zealand, South Korea and Timor Leste are the APF countries that voted in favor.

- 55 voted against this resolution: Of these Afghanistan, Indonesia, Jordan, Malaysia, South Korea are APF countries.
- 27 abstained: Philippines, Mongolia, Sri Lanka and Thailand.

## Q&A TALKING POINTS FOR COUNTRY SPECIFIC SITUATIONS

Inconsistencies between national laws and international human rights standards profoundly impact the lives of LGBT people -- there is no equal protection under the law for LGBT people, discriminatory laws are used disproportionately against LGBT people, good laws are unevenly applied or simply ignored when it comes to remedying violations experienced by LGBT people, and constitutional protections do not explicitly include LGBT people and often unenforceable, especially when there is opposition from hostile religious groups and politicians.

### **PHILIPPINES:**

- While there may not be explicit legal prohibitions on homosexuality, some laws are used disproportionately against LGBT people. For instance, police routinely use vagrancy laws and public nuisance laws to round up gay men and transgender people in public spaces – where in many instances, these arrests involve police extortion, as well as physical abuse, and in some cases, hours of detention without food or water.

- The anti-kidnapping law is used against lesbians and male to female transgender individuals when disapproving families want to break up couples and “rescue” their daughters from their lesbian lovers. Lesbians who adopt children without going through formal adoption procedures are also charged with trafficking.
- Many state institutions from schools to hospitals to police to judiciaries interpret and implement secular laws in keeping with conservative Catholic pronouncements on sexuality and gender non-conformity that promote prejudice against LGBT people.
- The Philippines Constitution offers equal protection for all Filipinos but to actualize constitutional protections, the Philippines Congress must pass laws that specifically protect members of a marginalized group. Efforts to pass an anti-discrimination law have stalled in Congress for the last 15 years and to date there is no explicit legal prohibition of discrimination against LGBT people.

The Philippines National Human Rights Commission reports that it has

conducted human rights trainings and seminars that include information on LGBT people; it submitted an amicus curae to the Supreme Court in support of the LGBT party Ang Ladlad's right to run for national elections. But the Commission has been less effective in pushing for legislation that explicitly prohibits discrimination on grounds of sexual orientation and gender identity. It has not challenged the democratic state institutions that make discriminatory decisions about LGBT people's lives on a daily basis – from hospital policies to school regulations to police procedures. The Commission has indicated that in 2012 it will launch a campaign on sexual orientation, gender identity and human rights.

## **MALAYSIA:**

The National Human Rights Commission, Suhakam, was asked by the ACJ to repeal or amend (as appropriate) Article 377A, 377B and 377D of the Malaysia Penal Code to remove criminal sanctions for same sex sexual conduct, which carries a prison sentence of up to 20 years, as well as advocate for the interpretation and application of religious and customary laws and practices in accordance with the international human rights and freedoms,

and in particular, prohibitions on torture and cruel, inhuman or degrading treatment or punishment.

The Penal Code provisions clearly violate international human rights law. So do many of the religious laws regarding sexuality and gender variance.

Pre-marital sexual behavior, and even (non-sexual) proximity is criminalized for Muslims as *khalwat* under Syariah Criminal Offences Enactments. Also criminal for Muslims under these enactments is sex between men and sex between women, cross dressing and any behavior that is considered impersonation of the opposite sex.

Human rights advocates and scholars in Malaysia report that

- Substantial state resources go into enforcing sexual morality – specifically to pay for religious officers, religious court proceedings, and to cover the cost of conducting raids on private premises as well as saunas, where non-heterosexual individuals are the target of these raids.
- Transsexual individuals are harassed, often by police who take

advantage of the laws and their positions of authority to extort money and sexual favors.

- At the state level, some state education departments have ordered that effeminate boys from ages 12 to 17 be rounded up and sent to “boot camps” for forced re-education “to toughen” them.
- Effeminate men are singled out and prohibited from teaching or training to be teachers.

While Suhakam did publicly reprimand the media in 2010 for using derogatory language about effeminate men and masculine women, it failed in 2011 to denounce death threats against a Malay gay man who released a short video on YouTube, saying “I’m gay, I’m okay” to empower gay youth struggling with their sexual identity. The Commission also failed to condemn the Malay media that publicized and sensationalized the death threats and refused to investigate the threats until a police report is made– despite being aware of the laws in the country regarding homosexuality, the hostile climate against LGBT people, and the particular dangers faced by the individual who was under attack.



## INDONESIA:

- In 2010, a closed-door human rights training for waria (transgender people) being conducted by the National Commission on Human Rights, Komnas HAM was attacked by a group of the local Islamic Defenders Front (FPI). The attack happened on the second day of the training and police did not intervene to protect the participants. These kinds of attacks are part of a growing trend against gatherings of LGBT people in Indonesia. Four other attacks happened in different cities in the same year (2010), each time, the gatherings were dispersed, police failed to provide protection, in some instances, withdrew permits after they were given so that they did not have to get involved in protecting LGBT people from religious opponents.
- 18 LGBT groups from around Indonesia gathered in May 2010 and came out with a statement condemning the label “enemies of national morality” imposed by the religious extremists and also to complain about police inaction. This complaint was sent to Komnas HAM which

promised to take it up with authorities but nothing has been heard so far.

- From 24 September – 20 October 2010, the Q-munity group held the ninth annual Q! Film Festival. While there were threats against the festival in previous years, in 2010 the threats were followed by actual violent attacks. On the fourth day of the festival, FPI demonstrators joined by some Muslim student organizations descended on all the venues screening Q! Film Festival films in Jakarta. They threatened the festival organizers and venue managers. Smaller venues then decided to stop screenings and cancel the rest. The only venues that could continue showing the festival films were French, German and Dutch cultural centers because they received sufficient police protection. However, despite police cooperation, festival organizers and film goers had to endure loudly heard threats and disturbances from demonstrations that continued for several days till the festival ended. Many films were taken off the program. Government responses to the demonstrations wavered. A spokesperson for the Ministry of Communication and Information first said he “did not mind having the festival take place” but later denied given any permission and then referred the matter to the Board of Censorship.

- Komnas HAM wrote a strong letter to all police stations in subsequent Film Festival jurisdictions and recommended that police offer protection. This letter had no effect on police in Yogyakarta who openly colluded with Council of Ulemas (MUI) and did not offer protection. Consequently, the festival had to stop several days early. Police in Bali said they had objections but they were not clear. In only two cities did police agree to provide protection – Surabaya and Makassar, where screenings went smoothly.
- Komnas HAM has agreed to promote the Yogyakarta Principles to policymakers and law enforcement but has no funds to translate the Principles into English. It has begun training the police on the Principles.
- Investigation and resolution of human rights violations cases against individual LGBT people are often delayed considerably because there are too few lawyers and paralegals to assist.
- While individual Commissioners in Komnas HAM are supportive and publicly vocal about the rights of LGBT people, the Commission as a whole is considered sluggish and slow to move the process forward – from case investigation to police followup to government negotiations.

## **THAILAND**

**Refer to situationer.**

## **MONGOLIA**

**Refer to situationer**

## **INDIA**

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## **PHILIPPINES**

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