‘BORN FREE AND EQUAL’ IN ASEAN

Rights of Sexual Orientation, Gender Identity, Gender Expression and Intersex Status in Southeast Asia

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1. SOUTHEAST ASIA

THE REGION

Southeast Asia (SEA), with over 600 million people, is one of the most diverse regions in the world. Its eleven countries lie well beyond the Han and Hindu heartlands of China and India. On both sides of the land borders with China and South Asia are diverse minority peoples, unrelated to national majorities on either side. Modern border lines always divide distinct peoples. The many SEA languages fall within four separate language families, Austronesian, Austroasiatic, Sino-Tibetan and Tai-Kadai. Major migrant populations add Chinese dialects and Tamil. Half the people in Southeast Asia speak versions of Malay, a language that flourished as the language of regional trade. English is officially the ‘working language’ of ASEAN, a practical decision.

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2 Victor King, The Sociology of Southeast Asia, Nias, 2008, 16.
3 English is the language of instruction in schools in the Philippines and perhaps in Singapore. English seems to continue as the language of the legal systems in former British colonies.
There is an old unifying history, half forgotten, of centuries of 
seaborne trade linking the ports and peoples of the region.⁴ Only Laos is 
landlocked, though major parts of Myanmar and Thailand are far from the 
sea.

Peninsular Southeast Asia is separated from China and India by large 
areas of hills and mountains with highly diverse populations, a region 
sometimes now called Zomia.⁵ This complex, difficult area blocked any 
significant invasions by land (in sharp contrast to the history in South Asia). 
The Mongol Empire, the world’s largest at its height, pierced this divide 
only once, and very briefly, with a raid that reached Bagan in central 
Myanmar. The Mongol raid toppled the first Burmese empire, changing 
local history – and then left. Great empire builders – Alexander, Genghis 
Khan, Tamerlane – swept through China and Central Asia. The Manchus 
took control over China by a military invasion from the North East, 
establishing the Ching dynasty. The Mughals took control in what is now 
India, invading from the North West. Such conquests are not part of the 
history of Southeast Asia. Yet Southeast Asia, itself, does not have a 
peaceful history.

The major pre-modern empire in Southeast Asia, the Hindu-Buddhist 
Majapahit (1294-1478), was based in eastern Java (and preceded by 
centuries the unifying reach of the Dutch East Indies, and then of 
independent Indonesia). The major contests for power in Myanmar were 
primarily between Burmans and Mons. Fighting occurred in the SEA 
mainland between Thai, Burman, Lao and Kymer.

Different peoples, religions, traders and colonizers came into the 
Southeast Asian region mainly by sea, over long periods of time. They came 
as traders, laborers and settlers, not as invaders.

A Chinese diaspora settled over three centuries, as traders, coolies, 
laborers and finally as urban business people. They live in significant

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⁴ A major history of Southeast Asia is titled “The Lands beneath the Winds.” It posits certain 
common patterns among the ten ASEAN states, based on the regional trading patterns made possible by the 
seasonal trade winds. Seaborne trade linked a dozen or so major ports throughout the area, and used a 
common trade language that we now know as Malay. Asian trade patterns moved a rich array of goods – 
porcelain, ceramics, frog drums, silks and cotton fabrics. Trade from South Asia brought Hinduism and 
Buddhism.

⁵ The now classic description of this region is James Scott, The Art of Not Being Governed, Yale, 
numbers in all SEA countries. They constitute the region’s largest and most successful category of immigrants. They have often been resented or attacked for their cultural differences and economic success.

At 74%, Chinese are a strong majority in Singapore, the only ‘settler’ state in Asia. The founding father of Singapore, Sir Stamford Raffles, is neither Malay nor Chinese, but British. After independence, the founding Prime Minister, in office for thirty-one years, was Lee Kuan Yew, a Cambridge educated lawyer, as was his wife. Singapore is a unique and prosperous city state, with less than half the population of Bangkok, Ho Chi Minh City, Jakarta or Manila. Uniquely in Asia, this settler state continued to be a place of substantial immigration, where a section of the population has come to live permanently and acquire citizenship. It has an immigration policy, not simply a migrant labor policy. There has been an influx of Mandarin speaking mainland Chinese, maintaining the ethnic balance in the society. Singapore also, uniquely, has strategies of ethnic integration, in housing, electoral rules and military conscription. Government, state symbols and laws are secular in character. Strict laws prohibit speech or writing that might cause racial or religious offence. Singapore leaders praise its racial harmony (and fear racial disorder).

The major religions of Buddhism, Hinduism, Islam and Christianity came by sea from abroad. Traditional spirit worship and spirit mediums continued in the region, pushed to marginal roles by new religions. Nearly half the people of ASEAN are Muslim, mostly Sunni, including, of course, the great majority in densely populated Java. Buddhist majorities, with

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7 Immigration policies are contentious in Singapore. Active citizen opposition to the government’s plan to see an increase in population to 6.9 million led to a dropping or hedging on the goal. Public opposition to “high immigration … has become a source of great discontent…”: The Singapore Exception, Special Report, The Economist, July 18, 2015, 6. The low fertility rate means that without immigration, population numbers would be declining.
8 Some 80 per cent of people live in government housing, under long term leases. Quotas ensure that government housing units contain proportions of Chinese, Indian and Malay people. Multiple member constituencies require political parties to have minority candidates, guaranteeing minority representation in parliament. Since 1988 most seats in parliament are filled from Group Representation Constituencies of four to six members, where the party slate must include at least one person from a minority. Political parties are not ethnically or religiously based, unlike in Malaysia.
9 The three racial communities are not equally well off: “Malays are poorer, less well educated and account for nearly half of all arrests for drug offences. A 2012 study of the Malay community at Nanyang Technological University noted fears of the emergence of a ‘hardened underclass’.” See The Singapore Exception, Special Report, The Economist, July 18, 2015, 8.
differing numbers, and different traditions, dominate in the mainland SEA areas, but not the lower peninsula or the islands.

The Philippines is the only Christian majority country in Asia, with strong links to Spanish colonial patterns in Latin America. It has sometimes been called the ‘alien in Asia,’ for its Latin, Christian and American associations. Vietnam has a substantial Christian minority from the colonial period.

Hill tribes in upland border areas are often Christians (such as most Kachin and Chin in Myanmar, and many Montanyards in central Vietnam). Local evangelical Christians who are part of majority populations are a much newer factor, and are important politically as opponents of SOGIE rights in Singapore (and Taiwan, Hong Kong and South Korea).

Colonialism divided the area, with Britain, France, the Netherlands, Portugal, Spain and the United States assuming control of particular areas. Within British controlled areas there were significant movements of local peoples. Those movements established large Indian minorities in Malaysia, Myanmar and Singapore. Smaller numbers of Indians were already living in the major port cities as traders and money lenders. Indian migrants worked as civil servants, shop keepers and plantation laborers. Indians in colonial Burma manned the largest share of the colonial bureaucracy. The majority of police and army were Indians. Half the population of Rangoon was Indian. Many Indians fled Burma in the face of the Japanese invasion. The partial expulsion of remaining Indians from Burma after the 1962 military coup led to a small Indian diaspora in Bangkok.

Colonial governments introduced written legal codes based on their home legal systems. As well, foreign codes were copied in independent Siam, as part of efforts to hold off the colonial powers by demonstrating modernity. Anti-homosexual ‘sodomy’ laws were a specialized British export to Asia.

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10 Michiel Baas, Singapore turns 50, IIAS Newsletter No 17, Summer 2015, 18, reviewing Rajesh Rai, Indians in Singapore, Oxford New Delhi, 2014. Some Indians also came as prisoners when Singapore was a penal colony. Many stayed after serving their sentences.
Colonialism was challenged by nationalist movements that were usually leftist or communist.

"...communism had been making inroads into the region since the 1920s as an organizing framework for anti-colonial activism, with communist parties established in Indonesia in 1921, Indochina, Malaya and the Philippines in 1930 and Burma in 1939. Meanwhile, the arming of nationalist forces during the Second World War, whether through Japanese or Allied involvement, meant that when the war ended aspirant nationalists were a force to be taken seriously, and they renewed their anti-colonial challenge."\(^\text{13}\)

The Second World War undermined Western colonialism in Asia. The Japanese invasions showed that Western colonial powers could be defeated. In historical terms, colonialism ended abruptly:

The mid-twentieth century marked one of the greatest watersheds of Asian history. The relatively brief Japanese occupation of Southeast Asia and much of China, and its sudden ending with the atomic bombs of August 1945, telescoped what might have been a long-term transition into a dramatic and violent revolution. In essence, imperial constructs were declared to be nation-states, the sole legitimate model of twentieth century politics, sanctioned in the ‘sovereign equality’ principle of the United Nations charter (1945).\(^\text{14}\)

France and the Netherlands tried to regain control of their colonies but lost those wars. Britain, in hoc to India for troops in WW II, as promised, granted independence to India and Pakistan, and, a bit more slowly, to its other Asian colonies.

Leftists came to power in many newly independent states, but in a broad spectrum from the single party states (Vietnam, Laos, Burma, Cambodia), to British style Fabian socialists (India, Singapore), to populists (Indonesia). In contrast, there were western oriented centrist or conservative governments in Malaysia, the Philippines and Thailand. China reinvented itself, as it had done many times in its long history. It expelled the Japanese colonizers and other foreign powers. The internal civil war ended and

\(^{13}\) Kelly Gerard, 48-49.

\(^{14}\) Anthony Reid, Imperial Alchemy, Cambridge, 2010, 1.
Mao’s communists took power, dedicated to creating a “new China.” Asia entered a new era.

Independent Asian states were courted by the rival sides in the Cold War, and Southeast Asia was divided anew. The non-aligned conference in Bandung, Indonesia, in 1954 tried to forge some collective independence within the new polarized international order. That had limited success. Asian states were unable to escape the polarization of the Cold War years. Thailand, South Korea, Australia and New Zealand supplied troops for the American side in the Vietnam War.\(^\text{15}\) The British fought Communist insurgency in Malaya in the “Emergency” from 1948 to 1960, pioneering the ‘strategic hamlets’ strategy that the Americans would copy in Vietnam. Sukarno ruled in coalition with Communists, but the 1965 alleged communist coup attempt, led to their slaughter in the “year of living dangerously.” Indonesia was suddenly strongly anti-communist.

Communist insurgencies in parts of Southeast Asia continued into the 1980s, with Chinese backing. The Thai government issued an amnesty in 1980 to bring Thai communists back into mainstream society from jungle areas. The communist party of Thailand continued until 1990, gradually loosing cadres.\(^\text{16}\) Chinese backing ended, and insurgencies in the region today are ethnic in character. The insurgent Burmese Communist party became the Wa nationalist army (a dramatic example of the shift). The only Communist parties in ASEAN states today are the ruling parties in Vietnam and Laos, neither of which are exporting insurgencies.\(^\text{17}\)

Instability in the region seemed to justify strong, authoritarian governments. ASEAN was largely a “club of dictators.”\(^\text{18}\) Press freedom was sharply limited. Political opposition was curtailed. Political demonstrations were blocked. NGOs were often excluded. A columnist in the Jakarta Post recently suggested that Indonesia was “practically the only

\(^{15}\) Pro-Communist and anti-Communist factions from Cambodia and Laos supplied troops for the competing sides. The Philippines is not listed as a belligerent, but nine from the Philippines are listed as casualties, perhaps individuals who were integrated in the US forces. Wikipedia, Vietnam War, accessed May 29, 2015.

\(^{16}\) Nanchanok Wongsamuth, Out of the jungle, but left in the wilderness, Bangkok Post Spectrum, Sunday, May 31, 2015,3.

\(^{17}\) Exceptionally, there seem to be a small number of communist insurgents surviving in the Philippines. Seriously leftist parties are rare and small. Akbayan in the Philippines was an exceptional left party, participating in electoral politics and with an excellent record of supporting LGBT rights.

\(^{18}\) Kelly Gerard, 142.
Southeast Asian country that meets democratic standards”, while conceding that consolidating democracy was still a “work in progress” in his country.\textsuperscript{19}

Most Southeast Asian states are relatively small. France failed to create a unified ‘Indochina’ from the areas that are now Cambodia, Laos and Vietnam. Myanmar, once part of British India, was administered separately from 1937, with the central area forming a colony, and peripheral hill areas treated as protectorates, left largely in the hands of local ethnic leaders. Siam retained its independence. It was a buffer zone between French and British controlled areas. It consolidated control over somewhat autonomous areas such as Lanna (Chiang Mai), Nan and other small kingdoms. In size Indonesia is the remarkable SEA exception, a conglomerate of differing islands and peoples. With 250 million people, Indonesia is the world’s fourth largest country. It is comparable to China and India in its regional and religious complexity. It would have been larger had the British not taken over the Malay peninsula from the Dutch. The Philippines, now with a hundred million people, is less complex than Indonesia, but has a large ethnic-religious Muslim population that is dominant in parts of the large southern island of Mindanao (and indigenous peoples in various areas of the country). Vietnam, next in line in population size at 90 million, has large minority populations in the northwest, the central highlands and the Mekong delta (border populations, following the mainland Southeast Asian pattern).

Ethnic differences vary from country to country. Thailand elites have a strong sense of a unifying cultural identity. Both Malaysia and Singapore have had race riots in their post-independence histories. Malaysian politics tries to manage three strongly identified communities, the Malays, Chinese and Indians, with a slight Malay majority. Cleavages between these groups in Malaysia seem to have grown more intense in recent years. The three communities coexist in Singapore, but with an overwhelming Chinese majority. The Singapore government has mandated residential integration through its ubiquitous public housing system, and credits that integration for generally amiable race relations.\textsuperscript{20} Java and the Javanese dominate Indonesia. Some of the outer islands are quite poor. Urban Chinese minorities have often faced discrimination and violence in Indonesia, the Philippines and Vietnam.

\textsuperscript{19} Bawono Kumoro, Jakarta Post, Indonesia can guide Malaysia back onto democratic path, The Nation (Bangkok), September 4, 2015, 11A.
\textsuperscript{20} Fareed Zakaria, The Washington Post, Engineering diversity to hack the racial divide, The Nation (Bangkok), June 30, 2015, 11A.
There are still armed insurgencies in the region. Myanmar continues to have ethnically based insurgencies in the minority areas that form half of the national territory. No other ASEAN state is as fragmented. Resolution of the issues is still a long way off. Ethnic insurgencies, on more limited scales, are current in southern areas of Thailand and the Philippines. In 2015 there was another attempt to construct a workable system of ‘autonomy’ for ‘Bangsamoro’ in a large section of Mindanao, in the hopes of easing or ending ongoing insurgencies. Killings occur on a weekly basis in the far south of Thailand. Indonesia instituted a system of limited ‘autonomy’ for Aceh, at the northern tip of Sumatra, apparently successfully settling a very long insurgency. There is also limited autonomy for Papua, in the far east of the archipelago, where insurgency seems limited. The number of areas with armed clashes is at its lowest level in modern SEA history.

Is there anything special about being LGBTI in Southeast Asia? There seems to be.

It is generally understood that pre-colonial Southeast Asian societies accorded more equal rights to women than occurred in either the Indian or Chinese traditions.

Since Anthony Reid reinforced the argument by George Coedes that women in Southeast Asia were conferred important roles by the culture of the region, the notion of the “traditional” high status of women in Southeast Asia has been foundational to paradigmatic understandings of the region as a distinct geographical and cultural entity separate from the rest of Asia.²¹

Greater equality between men and women tends to produce less social anxiety over sex and gender diversity. Many scholars also suggest old widespread patterns of cross-gender spirit mediums in the region. On this evidence is fragmentary, but intriguing. Such a history may explain the high levels of acceptance of gender diversity that are such a distinctive feature of societies in Southeast Asia today.

This is a region of rapid recent change, primarily in its more developed and urban areas. English, the working language of ASEAN, is the dominant international language of politics and trade. Most of SEA is now prosperous. Poverty has been reduced in ASEAN from 45% in 1990, to about 15% in 2010. A middle class has risen from 15% in 1990 to 37% in 2010, totaling some 144 million people (more than in India, less than in China). If Southeast Asia was a single state, it would be the world’s seventh largest economy.

Uneven growth patterns over the last 60 years have resulted in the movement of millions of migrant workers within the ASEAN region, significantly altering population patterns. Indonesians work in Malaysia. Cambodians, Laotians and varied peoples from Myanmar work in Thailand. Remittances from overseas workers are a backbone of the economy in the Philippines, but hardly unique to it.

According to the World Bank, Asia received a hefty $122 billion in remittances last year [2014]. The Philippines is the largest recipient of remittances in Southeast Asia, with $28 billion, followed by Vietnam with $11 billion. In Indonesia, remittances account for $8.55 billion, or 0.9 percent of the country’s GDP in 2014.

These figures do not cover perhaps 5-6 million ASEAN nationals who are crossing borders irregularly with no formality or documentation. Reforms in China now allow emigration, and China has become the largest source of immigrants to the United States, and, perhaps, to Singapore as well.

The controlled entry of temporary workers, on specific contracts, is well institutionalized in Malaysia and Singapore (and perhaps Brunei as well). After the 2013 ‘riot’ in Little India in Singapore, a number of contract workers were expelled. Numbers have been reduced as well in response to some social resistance to the extent of reliance on migrant workers. Kuala Lumpur announced in June, 2015, that it would bring in 1.5 million workers from Bangladesh in stages over the following three years, particularly for work on plantations. The workers will not be able to change employers, and must return at the end of the contract period (an arrangement used by a number of countries in Asia). At present there are 1.9 million foreign

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workers in Malaysia, with an estimated 1 million additional illegal workers.\textsuperscript{24}

Three member states – Singapore, Brunei and Malaysia – are in the higher-income statistical bracket ($10,000 per capita or more), with per capita incomes in 2013 of $55,000 (Singapore), $39,000 (Brunei) and $10,500 (Malaysia). Average years in school are notably higher in Singapore and Malaysia than other parts of ASEAN, indicating a better trained labor force.\textsuperscript{25} Each of the three leading states, in terms of per capita income, lacks a broad, integrated economy. Prosperous Singapore has few natural resources and limited manufacturing capacity, but thrives as a business and services hub. It imports sand and water. In 2015 Malaysia, the major oil exporter in \textit{ASEAN}, was hit badly by a 48\% drop in oil prices from 2014 levels and was threatened with a possible downgrade in the country’s credit rating.\textsuperscript{26} Brunei lives on oil and gas revenues (and investment income). Different growth rates mean that the development gaps in \textit{ASEAN}, while dramatic, are gradually narrowing.\textsuperscript{27} The Philippines has had robust growth recently, changing its image from that of an economic laggard.

Two changes in economic patterns are having increasing impact. Emerging multinationals based in developing economies, including a number based in \textit{ASEAN}, have been expanding their reach. Secondly foreign direct investment from “developing Asia” rose by 33.9\% between 2012-2014, according to \textit{UNCTAD}.\textsuperscript{28}

In 2013, SEA received US$126 billion in foreign investment, $2 billion more than China. In 2014 the gap in favor of SEA over China was almost $10 billion.\textsuperscript{29} Considerable investment in SEA now comes from China, a major historical change. US foreign investment is higher in SEA

\textsuperscript{24} DPA, KL to bring in 1.5m from Bangladesh, The Nation (Bangkok), June 28, 2015, 4. 
\textsuperscript{25} Haruhiko Kuroda (Governor of the Bank of Japan), Productivity growth is Asia’s path to success, The Nation (Bangkok), July 24, 2015, 11A, crediting Robert Barro, Jong-Wha Lee, Educational Attainment Dataset, data as of 2014. 
\textsuperscript{26} Choong En Han, Elffie Chew, Bloomberg, Malaysia escapes Fitch downgrade, Bangkok Post, July 2, 2015, B7. 
\textsuperscript{27} The projected growth rate for the least development group, the so-called CLMV countries (Cambodia, Laos, Myanmar and Vietnam) is around 8.9\%, while the rate for the other six is in a range of 3.5\% to 6.5\%; Nareerat Wiriyapong, ASEAN’s next decade, Asia Focus, Bangkok Post, April 6, 2015, 1. 
\textsuperscript{28} Michael L. Tan, Going ‘glocal’, Philippine Daily Inquirer, August 5, 2015, A15. 
\textsuperscript{29} Reuters, SE Asia attracts more FDI than China for second year, Bangkok Post, March 17, 2015, B7.
than in the BRIC nations combined (Brazil, Russia, India and China). In 2013, ASEAN overtook China as the single largest recipient of foreign direct investment.

It has been estimated that ASEAN’s GDP will overtake that of Japan by 2025. And by 2030, the ASEAN Community with a large middle-class and rising purchasing power, will be the fourth largest single market after the EU, the US and China.

But in terms of trade, ASEAN-Chinese trade is much higher than that with the US. The US is only in fourth place.

The manufacturing sector is weak, it seems, in most parts of the region. Indonesia’s main exports are coal, tin, rubber and palm oil. The manufacturing sector actually declined as a percentage of GDP between 2005 and 2015. Thailand and Vietnam compete in the export of rice. One or the other is usually the world leader. For manufacturing success the usual example given is the automobile sector in Thailand, the regional leader, much of which is assembly work. Indonesia could match or overtake Thailand in auto production soon, basically for its domestic market. Vietnam’s leading export manufactured product since 2013 has been electronics. Samsung and Intel are major producers in the country. There is electronic production in Thailand, Philippines, Malaysia and Singapore, but SEA is way behind South Korea, Taiwan and China. With wages increasing in China, parts of Southeast Asia are seen as gaining a new low-wage advantage for sectors such as textiles, clothing and footwear.

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30 Curtis China, Jose Collazo, As China slows, opportunities still exist on Asia’s frontiers, The Nation (Bangkok) March 17, 2015, 10A.
31 Lim Cheng Teck, CEO for ASEAN at Standard Chartered Bank, Making the ASEAN economic integration a reality, The Nation (Bangkok) June 1, 2015, 3B.
33 Kent Harrington, Project Syndicate, How China is winning Southeast Asia, Philippine Daily Inquirer, August 10, 2015, A17.
35 Karl Wilson, The next world factory: ASEAN poised to become manufacturing hub for companies seeking low wages and strong growth, China Daily Asia Weekly, September 25-October 1, 2015, 1; Chris Brummitt, Rieka Radadiana, Indonesia policy makers get real with pared back reform goals, Jakarta Post, Business, September 22, 2015, 14; Jennifer Lo, Vietnam steps up its game, China Daily Asia Weekly, September 25-October 1, 2015, 6.
2. ASEAN

2.1 REGIONALISM IN SOUTHEAST ASIA

Regionalism does not come easily to ASEAN. National histories of the member states are a series of unique stories. The three Malay Muslim majority states differ very substantially from each other. The four former British colonies have little in common. A common colonial history belies the animosity between Cambodia and Vietnam.

‘…up until the time of the Japanese occupation the term ‘Southeast Asia’ was rarely used.’ … ‘For the most part … neither the foreigners who worked in Southeast Asia before the Second World War, whether as scholars or otherwise, nor the indigenous inhabitants of the countries in Southeast Asia, thought about the region in general terms.’ Anderson reinforces this point more strongly by stating that the naming of Southeast Asia – for him ‘a meaningful imaginary’ – ‘came from outside, and even today very few among the almost 500 million souls inhabiting it’s roughly 1,750,000 square miles of land (to say nothing of water), ever think of themselves as “Southeast Asians.”’

The region is characterized by long-standing historical animosities. In the 1950s and 1960s the region was ‘derided as a cockpit of war and ‘the Balkans of the East’. …’ Indochina had been a major theatre of Cold War competition, first as the French attempted to retain colonial control, then in the US led coalition that finally had to flee Saigon in 1975.

In addition, founding President Sukarno in Indonesia sought a greater Indonesia, opposing the plans for the creation of Malaysia. Sukarno’s ‘konfrontasi’ involved armed conflict in Sarawak from 1963 to 1965. Between 1964 and 1966 two Singapore infantry battalions were involved in fighting the Indonesians in Johore and Sabah.

On 14 November 1964, an attempt by ten Indonesian marines to sabotage an oil installation was foiled. One landing on the east of

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36 Victor King, The Sociology of Southeast Asia, Nias, 2008, 4 (references omitted).
37 Barry Desker, Asean Integration remains an illusion, The Nation (Bangkok), March 6, 2015, 9A.
Singapore on 1 December and another on 28 December were also stopped when their movements were observed and reported by civilians. Apart from targeting key installations on the island, Indonesian regulars also conducted hit-and-run bombing attacks, including the bombing of MacDonald House [on Orchard Road]. The last major operation was launched on 26 June 1965 when four boats carrying 26 regulars arrived to attack a police station and a power station. The attempt ended in failure with the sinking of all four boats by security forces.38

The bombing of MacDonald House on Orchard Road left three civilians dead and thirty-three others injured. Two Indonesian marines were tried for the bombing, convicted and hung. As well, Indonesia, under Sukarno, forcibly took control of both Timor Leste and West Papua.

Thailand was seen as supporting the ethnic insurgencies in the areas of Myanmar bordering the Kingdom.

Over the past five decades, all previous Myanmar leaders since Gen Ne Win, unwaveringly believed that Thailand supported the insurgent groups, made up of various ethnic minorities along the Thai-Myanmar border, to undermine the central government…39

Thai Prime Minister General Chatichai Choonhavan in 1988 declared a goal of turning Indochina “from a battlefield into a marketplace.”40 It had been a battleground, and the fractious history has not yet been fully overcome. In 2015 former ASEAN Secretary General Surin Pitsuwan referred to a “first world country [Singapore] anchored in a sea of uncertainty, instability and uneven development in every dimension”, a startlingly frank assessment of the ASEAN region.41

A journalistic overview concluded

39 Kavi Chongkittavorn, Implications of Myanmar’s election in Thailand, The Nation (Bangkok), September 7, 2015, 11A.
41 Region loses great statesman, Bangkok Post, March 24, 2015, 1.
the fractious nature of the region extends to almost every facet of life – politics, governance, regulations, infrastructure, education, healthcare, culture and more. The World Bank’s *Ease of Doing Business Index* provides a snapshot of just how different the 10 ASEAN nations are. While Singapore sits in first place, Myanmar is ranked 177 out of 189; Brunei, Cambodia and Laos all fall below the top 100 countries.

The development gap between the ASEAN-6 (Brunei, Indonesia, Malaysia, Singapore, Thailand and the Philippines) and Cambodia, Laos, Myanmar and Vietnam (collectively known as the CLMV countries) is often so vast, the idea of a cohesive ASEAN community seems like a pipe dream.\(^\text{42}\)

*…it takes four days on average to clear goods being imported into Singapore, 14 days for Malaysia, and 23 days for Indonesia.*\(^\text{43}\)

The past is not yet the past, as old resentments continue to surface. In a plenary inter-parliamentary panel at the 2015 *ASEAN Civil Society Conference* a female member of the main opposition party in Cambodia, referred in passing to the “loss” by Cambodia of Kampuchea Krom, the southern Mekong delta area in present-day Vietnam. Mocking her reference to this historical territorial loss as a continuing irritant, senior Thai past-Senator Kraisak Choonhavan referred to Thailand as having ‘lost’ what is now Shan state in Myanmar, plus half of Cambodia. One wonders if old hands in Myanmar or Shan state still resent the ‘loss’ of Lanna, and its capital Chiang Mai. Violence flared over the Preah Vihar temple site on the Thai-Cambodian border three or four years ago, stirred up by anti-government nationalist ‘yellow shirt’ forces within Thailand trying to ‘reclaim’ the area around the temple. These grievances have not yet fully lost their force.

Opposition Senator Hong Sok Hour in Cambodia was indicted on August 16\(^\text{th}\), 2015, for posting materials on the internet challenging a 1979 border agreement between Vietnam and a Vietnamese installed government in Cambodia, in which present Prime Minister Hun Sen was foreign minister. Challenging the agreement, Hun Sen said, “amounts to treason.” The opposition, it seems, was playing on anti-Vietnamese sentiment in

\(^{42}\) Elaine Tan, Unleasing ASEAN’s full potential, China Daily Asia Weekly, May 1-7, 2015, 16.

\(^{43}\) Lim Cheng Teck, CEO for ASEAN at Standard Chartered Bank, Making the Asean economic integration a reality, The Nation (Bangkok) June 1, 2015, 3B.
Cambodia by suggesting that the 1979 agreement had given away territory to Vietnam.

The opposition Cambodia National Rescue Party has been seeking political benefit by accusing Vietnam of encroaching on Cambodia soil – a potentially sensitive topic that has ramped up tensions at the border.\(^\text{44}\)

ASEAN is very conscious of the task of creating some extent of collective consciousness in the region.\(^\text{45}\) It describes itself as “a community that aims to instill a sense of belonging and identity among its citizens…” It seeks to “engender a collective sense of pride in ASEAN heritage and achievement…”\(^\text{46}\) Surakiart Sathirathai has said:

Our citizens do not as yet identify themselves as Asean, unlike the citizens of the European Union who increasingly identify themselves as Europeans first and their national identities second.\(^\text{47}\)

To quote Barry Desker again:

Like other regional groupings, the reality facing Asean is that it is essentially a diplomatic community of policymakers, journalists and academics, which has not sunk deep roots.\(^\text{48}\)

The animosities among ASEAN states continue, but seem less problematic than the historical animosities in South Asia or East Asia. The only successful regional political / economic organization within Asia is the Association of Southeast Asian Nations, ASEAN.\(^\text{49}\) ASEAN is a success, even if fairly weak or limited, and, in its present form, not yet a teenager.

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\(^\text{44}\) AP, Cambodian opposition senator faces 17 years in prison, The Irrawaddy, August 17, 2015.
\(^\text{45}\) This is an ambitious project. See a study of attitudes within ASEAN states by the ASEAN Foundation: [www.aseanfoundation.org/documents/Attitudes%and%Awareness%20Towards%20ASEAN.pdf](http://www.aseanfoundation.org/documents/Attitudes%and%Awareness%20Towards%20ASEAN.pdf)
\(^\text{46}\) These goals come from pages 1 and 2 of the Executive Summary of the ASEAN Communication Master Plan, published October, 2014, available on the ASEAN website.
\(^\text{47}\) Surakiart Sathirathai, Eight Challenges Asean must overcome, Bangkok Post, August 8, 2015, 9. Dr Surakiart Sathirathai is chairman of the Asian Peace and Reconciliation Council and former deputy prime minister and Minister of Foreign Affairs of Thailand.
\(^\text{48}\) Barry Desker, Asean’s new era: Challenges amid growing cooperation, The Nation (Bangkok), August 22, 2015, 8A.
\(^\text{49}\) It is remarkable, given the modern economic integration of East Asia, that there are no regional economic treaties or shared political bodies. Economic relations are very strong, but political and social relations among South Korea, China and Japan are tense and difficult. As well, in South Asia, the
There is hardly any Asean mind-set, except among policymakers, academics and journalists. Most businessmen resist closer economic cooperation if it undermines their existing market dominance but are keen on opening the markets of their neighbours.  

Commentators regularly point to the high diversity within Southeast Asia. Big countries / small countries. Communists / capitalists. Muslims / Buddhists / Christians. Rich countries / poor countries. Weak states / strong states. Perhaps the differences within ASEAN are no more problematic than the differences were in Europe, when the project of gradual European unification began after the Second World War. The EU is the distant model that political actors in ASEAN are very aware of.

Authoritarian states are common. Singapore is not modest about its success in a difficult region. The city-state “likes to celebrate its own success-story as one of the wealthiest, healthiest, safest, cleanest and most competitive nations in the world.” But the ‘men in white,’ the leaders of the governing Peoples’ Action Party, continue tight social control – no demonstrations, a tame local media, no legal LGBTI NGOs, compulsory residential integration, no chewing gum. The leaders fear that the members of the new prosperous middle class may throw off their ‘nanny state’ masters in favor of an untested and incompetent opposition. People actually protested their policy of increasing the population by an additional 1.5 million (not a target, the government now says). Authoritarian governments in both Cambodia and Malaysia saw their support decline in the most recent elections, with Malaysia’s BN coalition actually loosing the

poisonous relations between India and Pakistan mean that the only regional organization, SAARC, is so weak that it hardly seems to exist. The Shanghai Cooperation Organization is another regional organization, focused on security issues. It brings together China, Russia, four Central Asian ‘stans’, and is admitting both Pakistan and India to full membership.

Barry Desker, ibid. There is an ASEAN Business Club consisting of the chief executives of some of the most important business enterprises in the region. It held its third annual forum in Singapore in May, 2015, with the Minister of International Trade and Industry of Malaysia as the keynote speaker. Planners expected over 50 speakers and 300 participants from 13 countries. See ASEAN business leaders to meet, China Daily Asia Weekly, May 8-14, 2015, 4.

Brunei, Cambodia, Laos, Malaysia, Singapore and Vietnam would generally be considered authoritarian, with restrictions on political organizing and controls on media. A military government in Thailand has pledged a return to elections, though the exact date is not clear.


PAP leaders campaign wearing white to symbolize that they are not corrupt. On the protests on the population policy see N Vasu, Yeap Su Yin, Chan Wen Ling, Immigration in Singapore, Amsterdam University Press, 2015.
popular vote, while retaining a majority of seats in the national legislature. Disorder, even race riots, are seen as real possibilities by many politicians.

Human rights organizations had not formed on an ASEAN level. Forum Asia, based in Bangkok, casts a wider net, as do LGBTI and HIV/AIDS organizations. Organizing such bodies on an ASEAN level is new. There are now some examples. 54

2.2 ASEAN – THE ORGANIZATION

ASEAN was formed by five countries in 1967. It had strong anti-communist goals, for it was formed in the period of the Vietnam/American war, and the period when Chinese-backed communist insurgencies were active in Burma, Malaysia and Thailand. In those years China backed the Khmer Rouge in Cambodia. All that changed.

In stages, ASEAN expanded to its present membership. The ASEAN Free Trade Area agreement came in 1992. The fears of the spread of communism were long gone by 1995 when Vietnam became an ASEAN member. ASEAN + 3 (ASEAN plus China, Japan and South Korea) was established as a regular forum in 1997. ASEAN’s goals became largely economic, particularly after the shock of the Asian financial crisis of 1997-8. The ASEAN Charter was signed in 2007, formally strengthening the body. The ASEAN Economic Community is to be substantially completed by the end of 2015, eliminating most internal tariffs and facilitating trade and investment. Included are measures for the mobility of skilled labor and openings on the trade in services. ASEAN has free trade agreements with China, India, South Korea, Australia, New Zealand and Japan. It is seeking to ‘upgrade’ the FTAs with China, Japan and South Korea. 55 We may see a new one with the EU. In contrast, the US backed Trans-Pacific Partnership, includes only four ASEAN countries, Brunei, Malaysia, Singapore and Vietnam.

The Asian financial crisis of 1997-8 derailed economic progress in the region. ASEAN was sidelined, playing essentially no role in the immediate response to the crisis. The International Monetary Fund was the major

54 Discussed later are SEAHRN, the Southeast Asia Human Rights Network, and the Human Rights Resource Centre for ASEAN based at the University of Indonesia.
55 The Star, Asia News Network, Asean to upgrade FTAs with East Asian economies, The Nation (Bangkok), August 25, 2015, 3B.
intergovernmental player, with Malaysia, alone, rejecting IMF solutions in favor of capital controls. The crisis hastened support within ASEAN for the forging of a common market. Annual meetings of finance ministers began in November, 1997, in the midst of the crisis. In 1998 an ASEAN Investment Area Ministerial Council began. 56 ASEAN was reinvented as a political and economic “community”. The ASEAN Charter of 2007 formally marks its reinvention and the beginning of its current roles and aspirations.

2.3 SUCCESSES AND FAILURES

ASEAN’s greatest success has been achieving recognition by outside forces as a regional entity. This has occurred though ASEAN has not been able to take unified positions on major issues such as Chinese territorial claims in the South China Sea, or the US-backed Trans-Pacific Partnership.

ASEAN had great political success in organizing international aid in the face of the massive Nargis hurricane that hit Myanmar. As well there are a number of ASEAN trade agreements, including one with China. Most tariffs have been reduced or eliminated in the build up to the official date for the ASEAN Economic Community, the end of 2015.

ASEAN has proved incapable or responding to the conflicting claims over the South China Sea, which affect the Philippines and Vietnam in particular. China, while very friendly to ASEAN on economic and political issues, is notoriously dogmatic and aggressive on territorial claims. Over and over it simply asserts that its massive claims to the South China Sea are valid, and that the area is within Chinese domestic jurisdiction. In ASEAN meetings Cambodia, Laos and Myanmar have rejected any statements condemning China’s actions in the region, which include turning rock outcroppings into islands, building air strips, lighthouses and exploring for hydrocarbons. The issues have divided ASEAN (resulting, famously, in no communique from the foreign ministers meeting in 2012, and no common position in a communique in August, 2015). The 2015 communique simply “took note of the serious concerns expressed by some Ministers on the land reclamations in the South China Sea, which eroded trust and confidence, increased tensions and may undermine peace, security and stability in the

56 Kelly Gerard, 68.
South China Sea.” The issues have “dominated” discussions in six foreign ministers meetings in a row.  

ASEAN has been irrelevant in the disputes about Rohingya/ Bengali migrants from Myanmar, even in the face of a humanitarian crisis in 2015, with boatloads of individuals and families floundering in the seas between the Myanmar/Bangladesh border area and their goal of reaching Malaysia. The serious regional problem of the annual spread of cross-border haze from the burning of fields in Sumatra has also eluded an effective ASEAN response.

2.4 ALTERNATIVE REGIONALISMS?

There are possible competing ‘regional’ realities that could be alternatives or competitors to the focus on the ASEAN ten. APEC, the Asia Pacific Economic Cooperation forum has faded in importance, making no progress on trade arrangements. A more significant ‘region’ is the Greater Mekong Sub-Region (GMS), which includes parts of China, and has been seen as the most rapidly integrating ‘region’ in Asia. The GMS is seeing massive Chinese investment in infrastructure, involving roads, railways and multiple hydro electric projects on the river systems. Thai political scientist Thitinan Pongsudhirak sees ‘integration’ and ‘connectivity’ proceeding much more clearly in the GMS than in other parts of the wider region. He sees some common history behind the GMS (that contrasts with ASEAN).

…its mainly Buddhist peoples crisscrossed the land for better livelihoods, mixing and enmeshing across ethnic and linguistic lines. Borders were not drawn then, and they matter less now. War and conquest were rife and part of life but trade and commerce were also brisk and prevalent. This mainland sub-region would not be complete without China’s southern Yunnan province, known as the Nanchao kingdom in the distant past, bordering Laos, Myanmar and Vietnam. Yunnan traditionally defined the ethnicity and lineage of many parts of mainland Southeast Asia…

The Greater Mekong Subregion (GMS), a Japan-backed initiative administered by the Asian Development Bank (ADB) since 1992, has

57 Kavi Chongkittavorn, True Meaning of Asean joint communiqués, The Nation (Bangkok), August 10, 2015 11A.
harnessed the potential and promise of the Mekong economies through road and rail infrastructure development straddling the mainland in multiple directions. The GMS also includes Guangxi Zhuang Autonomous Region in China’s deep south, next to Yunnan and north of Vietnam. Guangxi adds a 50-million population and a US $250-billion economy to the GMS market.\textsuperscript{58}

The six Mekong countries will meet in November, 2015, to establish a broader cooperation mechanism than \textit{GMS}, which is limited to infrastructure development.\textsuperscript{59}

An umbrella gay-run AIDS organization, \textit{Purple Sky}, was established for the \textit{GMS}, but currently has no funded programs. One of the largest gay bars in China, with famous cross-dressing cabaret shows, has flourished for a decade or so in Nanning, the capital of Guanxi Zhuang Autonomous Region and part of the \textit{GMS}.

Alternatively, \textit{ASEAN} integration can be seen as in competition with much larger plans or forces:

\begin{quote}
ASEAN is at the center of a battleground of two economic giants vying for influence and markets in the region. ASEAN integration is set amidst ongoing negotiations for larger economic integration in the Asia-Pacific through the China-led Regional Comprehensive Economic Partnership (RCEP) and the US-led Trans-Pacific Partnership Agreement (TPPA). These competing trade agreements are key to the achievement of the Asia-Pacific wide integration envisioned by the members of the Asia-Pacific Economic Cooperation (APEC) through the Free Trade Area of the Asia-Pacific (FTAAP).\textsuperscript{60}
\end{quote}

While the \textit{APEC} proposal is now irrelevant, 2015 saw unprecedented US-China open rivalry on trade and investment, with the competition between their respective regional trade proposals, and over the Chinese initiated \textit{Asia Infrastructure Investment Bank}. US commentators recognized that the blockage in the US Congress of agreements to increase China’s role in the

\begin{flushright}
\textsuperscript{58} Thitinan Pongsudsirak, Real integration action in Mainland SE Asia, Bangkok Post, May 15, 2015, 11.  \\
\textsuperscript{59} Supalak Ganjanakhundee, New Mekong cooperation mechanism, The Nation (Bangkok) October 19, 2015, 6A.  \\
\textsuperscript{60} ASEAN Community 2015: Integration for Whom?, IBON International Policy Brief, April, 2015, 7.
\end{flushright}
World Bank lay behind China’s AIIB initiative. The hostility of the US Congress to any measure seeming to have benefit for China was a political fact of life, limiting any US presidential initiatives. So TPP excluded China, and AIIB excluded the US. President Obama successfully campaigned for Congressional support for the TPP bargaining process, arguing bluntly that if the US did not set the rules on trade, China would. This was a blatant appeal to anti-Chinese members of Congress. All ten ASEAN countries are involved in the negotiations for the China backed 16 country RCEP trade agreement. Only four – Singapore, Brunei, Malaysia and Vietnam – are parties to the TPP.

2.5 WHAT STATES SUPPORT ASEAN?

Singapore seems to have been a steady supporter of the reinvention of ASEAN as an economic and political project. Lee Kwan Yew had seen the island city-state as in need of an economic ‘hinterland’, and had strongly supported the union with Malaya for that reason. ASEAN can be seen as a massive ‘hinterland’ for Singapore and Singaporean investment is strong in the region.

Indonesia, as the largest state and the largest economy in ASEAN, has a history of support for ASEAN. This continued under the ten year incumbency of President Yudhoyono (2004-2014), a period in which Indonesia became a stable democracy and in which ASEAN “remained the primary focus of and platform for Indonesia’s foreign policy.”

...Indonesia became an active player in regional and international affairs ...– under Yudhoyono’s leadership – an acknowledged leader of ASEAN...

...Indonesia championed the inclusion of an article on human rights in the ASEAN Charter in 2007, the establishment of the ASEAN Intergovernmental Commission on Human Rights in 2009 and the ASEAN Human Rights Declaration in 2012...

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61 Evi Fitriani, Yudhoyono’s foreign policy” Is Indonesia a rising power, in Aspinall, Mietzner, Tomsa, 2015, 73 at 78.
63 Fitriani, 81.
2.9 SOCIAL/CULTURAL STRATEGIES IN THE REGION

The Museum of Ethnology in Hanoi celebrates the diversity of cultures in the country. Now there is a second museum, at the same site, celebrating the diversity of cultures within ASEAN. Thailand has opened an ASEAN Cultural Centre. There will be an official launch late in 2015:

“Culture ministers from Asean countries have been invited to join the opening ceremony, which will also feature a discussion on the future of Asean cultural cooperation,” Culture Minister Veera Rojpojanarat told a press conference…64

ASEAN cultural events and film festivals are becoming more common. During the writing of this report a free ASEAN film festival was held in Thailand, with showings in Bangkok, Chiang Mai, Khon Kaen and Surat Thani. Among the eleven films selected for the festival was a gay romance from Vietnam, set in 1990s Ho Chi Minh City.65 There are a few LGBTI film festivals in the region and they like to show entries from various Asian sources.

2.10 THE ASEAN COMMON MARKET

In spite of constant stories in 2015 about the imminent full establishment of the ASEAN common market, it was clear that Indonesia, the region’s largest economy, was committed to some new levels of protectionism. There was, in Yudhoyono’s second term “a substantial regression towards economic nationalism” mostly driven by elements in the bureaucracy.66

Between 2009 and 2014, seven key laws were passed that imposed restrictions on foreign investors, established new tariffs and allowed ministries to set import quotas. … Indonesia began an export ban on unprocessed minerals in January 2014, trying to force large mining companies to build in-country processing facilities. Some mining firms suspended operations as a result, and a compromise was only

64 Phatarawadee Phataranawik, A stage for cultural exchange, The Nation (Bangkok), August 3, 2015, 15B.
65 Phatarawadee Phataranawik, A window on ASEAN, The Nation (Bangkok), August 24, 2015, 14B.
reached at the end of Yudhoyono’s term. … Moreover, the passing of three new protectionist laws in 2014 … indicates that Indonesia’s Government and Parliament have no intention to change course anytime soon. In the 2014 elections, economic nationalism was a key theme, with both candidates trying to outbid each other as the more patriotic manager of the economy. … Jokowi’s team was only slightly less nationalistic. … open market policies … do not win elections in Indonesia…  

[In July, 2015 the Indonesian] Finance Ministry raised import tariffs on a range of consumer goods from food to clothes to cars in a move intended to support the local manufacturing industry. “Cabinet ministers talk openly about pushing back against the implementation of the AEC reforms and reviewing the usefulness of existing trade agreements,” notes the Lowy Institute in its latest report on rising trade protectionism in Indonesia.

1. RELIGIOUS AND SOCIAL ATTITUDES

3.1 RELIGION IN THE REGION

Religious patterns vary dramatically in the ASEAN region. Singapore, rather surprisingly, is said to be the most religious diverse country in Asia. Singapore politicians like to point out to areas with mosques, churches, Hindu temples and Chinese temples in close proximity. Yet Singapore seems quite a secular state. It has a Maintenance of Religious Harmony Act which empowers the state to act against any religious figures who attack other religions or the government. There are strong legal taboos in the city-state against talking divisively about race or religion. There is clearly a fear that the ‘harmony’ in the society could fall apart. The ruling People’s Action Party feared losing the minority

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68 Zubaidah Nazeer, The Straits Times, Asia News Network, Regional giant still ambivalent towards AEC, The Nation (Bangkok) August 28, 2015, 10A.
evangelical Christian vote if it repealed its remaining colonial era sodomy prohibition.

Pushing back against frequent calls to repeal Section 377A are Singapore’s growing evangelical mega-churches. Some of them have formed an alliance called “Love Singapore”, which campaigns against any further relaxation of the law in favour of gay and lesbian rights. Their big congregations are influential in forming mainstream opinion in the city-state.⁷⁰

While Indonesia is often said to practice a ‘moderate’ form of Islam, and presidents like to hold it out as an international model for a democratic Muslim state, there is significant disharmony in practice.

For years, hate speech and repeated attacks against Indonesian Christians and Muslim sects (Ahmadiyya, Shias and more recently some Sufis) by radical groups such as the Front Pembela Islam (FPI, Islamic Defenders Front) and the Forum Umat Islam (FUI, Islamic People’s Forum) have gone largely unanswered. The Setara Institute, which monitors religious freedom in Indonesia, documented 220 cases of violent attacks on religious minorities in 2013, an increase from 91 such cases in 2007. To understand this lingering issue during Susilo Bambang Yudhoyono’s term, observers have often pointed to the President’s indecisiveness and related that to the fact that his fragile governmental alliance included Islamist parties.⁷¹

…Yudhoyono declined to respond to calls to pressure the local administrations in Bekasi and Bogor to abide by Supreme Court and ombudsman rulings that there were no grounds for the compulsory closure … of church sites in those cities. Instead he argued that this was a matter for local governments. In the case of the minority Islamic sect Ahmadiyah, it seems that Yudhoyono initially opposed plans by three of his ministers to issue a joint ministerial decree restricting the activities of the controversial group, but eventually agreed not to intervene.⁷²

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⁷¹ Gwenael Njoto-Feillard, Religious Pluralism and Tolerance in Jokowi’s Indonesia, ISEAS Perspective #10, 2015, 2.
⁷² Stephen Sherlock, A balancing act, in Aspinall, Mietzner, Tomsa, 2015, 93 at 100.
This meant that discrimination against Christians and Ahmadiyah was supported. Yudhoyono’s minister of religious affairs, Suryadharma Aki made inflammatory anti-minority speeches, supporting measures against Ahmadiyah and Christians.

In addition he was a strong and vocal supporter of the FPI [the Islamic Defenders Front], the organization named by the Setana Institute as one of the non-state actors most frequently responsible for acts of violence against religious minorities. Suryadharma … even invited Munarman, the FPI’s vitriolic spokesperson, to run as a legislative candidate for PPP [the United Development Party, a coalition partner in the government].

Not far behind Suryadharma in terms of his ability to make astonishingly inflammatory remarks was Home Affairs Minister Gamawan Fauzi. In response to increasing calls for him to disband the FPI after multiple acts of violence attributed to the group, Fauzi said in October 2013 that it was a ‘national asset’, and that local and national leaders should work with the group.73

And the national governments of Yudhoyono and now Jokowi remain silent on the local ‘sharia’ laws that restrict women and homosexuals.

In August, 2015, President Jokowi in a major speech talked about a problem of rising religious intolerance in Indonesia, and called upon the large important Nahdlatul Ulama organization to promote “moderate Islamic values” as a means to counter often-violent militant Islamists.74

There are Islamic identified political parties in Indonesia and Malaysia. No other countries in ASEAN have religiously identified political parties. In the 2014 presidential election in Indonesia the coalition supporting Prabowo Subianto, who lost the election to Jokowi, included the five Islamic identified parties with seats in parliament. Prabowo could also count “on radical Muslim militias such as the FPI” (the Islamic Defenders Front, which had a history of disrupting LGBTI events). In sharp contrast, Jokowi’s coalition brought together nationalist and secular groupings. His alliance’s

73 Robin Bush, Religious politics and minority rights during the Yudhoyono presidency, in Aspinall, Mietzner, Tomsa, 2015, 239 at 246.
74 More efforts needed to protect religious minorities: HRW, Jakarta Post, August 4, 2015.
...main task in the presidential campaign was to fend off accusations from the Prabowo camp that Jokowi’s election would lead to the marginalization of Islam from the political arena. Among others, Prabowo’s campaign spread rumors that Jokowi was the son of a Singaporean Chinese; that he would appoint a member of the Shi’a minority as Minister of Religion; and that he planned to legalize same-sex marriage. In Jokowi’s view this smear campaign was Prabowo’s most effective political weapon, and it was mainly responsible for Jokowi’s dramatic decline in the polls. From the 39 per cent margin in December 2013, Jokowi’s advantage had shrunk to less than 1 per cent three weeks before the elections. Fittingly, however, it was the non-Muslim constituency’s massive support for Jokowi that helped him over the line. An exit poll showed that 70 per cent of non-Muslim voters had opted for Jokowi, and only 12 per cent for Prabowo (the rest refused to reveal their choice).  

In the non-campaigning week immediately before the vote, Jokowi did a personal mini Hajj to Mecca, bolstering his Muslim credentials.

Polygamy for males, technically polygyny, is allowed in Islam, under specific conditions. Founding president Sukarno publicly practiced polygamy, while his successor, Suharto, actively discouraged the practice. Megawati Sukarnoputri, the first woman president, chose a polygamist, Hamzah Haz as vice president. This angered anti-polygamy activists “trying to counter growing pro-polygamy sentiment.” It became unacceptable for public figures in Indonesia to have multiple wives.

Soeharto and his wife publicly disapproved of both polygamy and divorce, which they juxtaposed against the ideal of a monogamous two-child family, which later became enshrined as the small and prosperous family norm underpinning the state family planning programme.

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76 See Introduction, in Linda Rae Bennett, Sharyn Graham Davies, 2015, 1 at 6.
77 See Nina Nurwila, Linda Rae Bennett, The sexual politics of polygamy in Indonesian marriages, in Bennett, Davies, 2015, 68 at 71-2, which states that polygamy was first legally recognized in Indonesia by the 1974 law on marriage. That law sought to impose strict conditions on polygamy, and cannot be seen as a pro-polygamy reform. The authors note that “technically illegal polygamy is more common than legalized polygamy.”
The state was highly active in promoting a modern nuclear family and family planning.

Three stories on polygamy appeared in the Jakarta Post in August, 2015. The Defense Minister affirmed that civil servants in his ministry were not permitted to have more than one wife. A candidate for the Anti-Corruption Commission was rumored to be polygamous, clearly disqualifying him if it was true. The National Commission on Violence against Women called on the government to ban polygamy, noting that the 1974 Marriage Act only specifies strict conditions to be met before a man takes a second wife.\(^78\)

In ASEAN polygyny is legal, perhaps with conditions, in Brunei, Indonesia and Myanmar. It is legal only for Muslims in Malaysia, Philippines and Singapore. It is not legal in Cambodia, Laos, Thailand or Vietnam.

Marriages are legal in Indonesia if made under the Marriage Act, or if they are conducted “according to one’s religion and faith.”\(^79\) It is common for marriages not to be registered with government authorities (a pattern in other parts of ASEAN as well, for example Myanmar and Thailand). The Indonesian Marriage Act requires that a legal marriage must be conducted in line with the rituals of a religion to which both the bride and groom adhere. Individuals entering a mixed-faith marriage will simply not register the marriage. The barring of legal recognition for inter-faith marriages was upheld by the Constitutional Court in June, 2015.\(^80\) State level shariah laws in Malaysia also attempt to regulate mixed-faith marriages and religious conversion. A series of high profile and very controversial judicial decisions have resulted. In one bitterly fought case Shariah courts ordered the burial of a male as Muslim against the protests of the non-Muslim widow that the deceased was Hindu.

\(^78\) Minister denies supporting polygamy, Jakarta Post, August 13, 2015; Govt urged to ban polygamy, Jakarta Post, August 12, 2015; Team looks into polygamous KPK candidate, Jakarta Post, August 14, 2015.

\(^79\) Love and protection, editorial, Jakarta Post, March 4, 2009. This editorial notes a pattern of “contract marriages” in the mountain area of Puncak in West Java, where local women enter into contract marriages of a few months or a few years with foreigners from the Middle East. Such marriages are identified with Shi’a Muslims, not Sunni followers.

\(^80\) Court upholds status quo in Marriage Law, Jakarta Post, June 19, 2015. All Indonesians are considered to be religious, and to adhere to one of the recognized religions. Religion is specified on the national identity card.
A series of recent news stories in Indonesia focus on combating extremism or fundamentalism in favor of a ‘moderate’ Islam. On June 17th, 2015, President Jokowi said his administration would work closely with moderate Muslim organizations in an effort to prevent radicalization. On August 11th, the Religious Affairs Minister introduced a curriculum promoting Islamic teachings at all levels of schooling that embraced diversity and promoted peace and tolerance. A story on August 24th discussed the ideas of the two largest Muslim organizations, Muhammadiyah and Nahdlatul Ulama which could protect the country from “fundamentalism.” On that date the chairman of the Indonesian Ulema Council, at a national conference, described Islam in Indonesia as a tolerant religion that rejected all forms of radicalism. In September an international conference focused on radicalism and political violence. The last story noted that an estimated 514 Indonesians had gone to Syria and Iraq to fight with the Islamic State insurgency. Around half were Indonesian citizens already residing in nearby countries as students or migrant workers.

The message is strong in Indonesia and Malaysia that individuals should avoid radicalism in the name of Islam, but also that ‘moderation’ does not mean ‘liberalism.’

Religious Affairs Minister Suryadharma Ali warned yesterday of “liberal thinking”, including those demanding that the Marriage Law be changed for the sake of same-sex marriage, infecting the nation’s thoughts. Suryadharma said that a battle between liberal and orderly thoughts was currently occurring in the nation. … Suryadharma warned Indonesian students who studied philosophy in other countries not to forget the “country’s identity,” and that they should stay away from liberal Islam. He seemed to acknowledge that there is a body of thought called ‘liberal Islam’.

In Malaysia UMNO (the United Malay National Organization) is in competition with PAS (Parti Islam Se-Malaysia) for the conservative

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81 Jokowi to work with moderate Muslims, Jakarta Post, June 18, 2015; Minister introduces peaceful Islam curriculum, Jakarta Post, August 12, 2015; Islam Nusantara can protect RI from fundamentalism, Jakarta Post, August 24, 2015; Mui joins the push for a moderate Islam, Jakarta Post, August 25, 2015; Deradicalization efforts lack progress: Expert, Jakarta Post, September 9, 2015.

82 Beware of liberal thoughts: Minister, Jakarta Post, February 23, 2011.
Muslim vote. This has made opposition to SOGIE rights mandatory (effectively for all national political parties). There are

...growing political sensitivities over the role of Islam in Malaysia and growing competition over the Malay vote, which has served to generate ever more conservative Islamic agendas.83

The Malay/Muslim vote is split between UMNO, the United Malay National Organization, and PAS, the conservative Islamic Party. The Chinese vote in the last national election was no longer a bloc vote for the ruling Barisan Nacional coalition that has formed the government since independence. The Chinese vote divided between the Anwar led opposition coalition and the BN. UMNO has become more and more Islamicist to compete with PAS. Prime Minister Najib increasingly speaks against homosexuality. At a youth forum in August, 2015, he denounced both Islamic State and LGBT, lumping them together as “hiding behind the façade of human rights…”

Prime Minister Datuk Seri Najib Abdul Razak said that human rights should be defined according to the context of Islam and syariah in the country. “Even if this is difficult to defend at the international level, we should defend the definition in the country,” he said, noting that lately, there is a rise of extremist and liberal groups which are trying to dominate the majority of the country’s population. “These groups, are hiding behind the façade of human rights to approve their acts which deviate from Islamic teaching. Such groups includes the Islamic State (IS) and Lesbian, Gay, Bisexual and Transgender community (LGBT) are targeting the younger generation to spread their ideologies – and it seems like they have managed to influence them. Najib said he viewed the Wasatiyyah (moderation) approach as the best method to curb such understanding.84

In the Philippines the Catholic Church regularly speaks on legislative issues, and made enactment of the Reproductive Health Act impossible for a decade. To the surprise of many, it has spoken in support of a national non-
discrimination law for LGBTI, while restating its opposition to homosexual acts or same-sex marriage. There is tolerance towards LGBTI because they are a ‘lost flock’ that the Church needs to reach.\(^{85}\)

In the 2015 election in Myanmar the major parties ran no Muslim candidates, reflecting anti-Muslim popular sentiments enflamed by a highly active grouping of Buddhist monks. In 2014 the national parliament passed four ‘race and religion’ laws, aimed against Muslims.

Current religious extremism in the Middle East, most sharply the rise of Islamic State, is seen as a real or potential threat within the region, justifying, for example, the new anti-terrorism law in Malaysia. Official statistics identified 30 Malaysians who had gone to Iraq and Syria and another 30 who had been stopped at the border. Of course, the numbers leaving may be higher.\(^{86}\) At the 26\(^{th}\) ASEAN Summit in Malaysia on 27 April, 2015, the heads of government approved the Langkawi Declaration on the Global Movement of Moderates, an initiative that began in 2011 designed to counter extremism. The declaration refers to “promoting cohesion in the multi-racial, multi-religious and multi-cultural ASEAN Community whose diversity is a source of strength…” It cautions that “extremism should not be associated with any culture, civilization or religion.” It encourages “inter-faith and cross-cultural dialogues” and other efforts to counter the danger of “violent extremism.” With the decline of left wing insurgencies, extremism in ASEAN countries is cultural and religious in character.

In ASEAN there have been no equivalents of the large religiously based protest events in Seoul against the 2015 pride parade, or the religiously based protests in Taipei on the marriage issue in late 2014. Protests such as those in Eastern Europe. Actions by the Islamic Defenders Front in Java have sometimes been violent or at least threatening, but have never involved significant numbers of active protesters. Legal restrictions on public protest are, no doubt, one factor, but an avoidance of confrontation – or a choice to ignore LGBTI issues – or a passive tolerance of diversity


seem involved, as well. Religious groupings may be largely inward looking, with evangelical Christians one of the exceptions.

Both Indonesia and Vietnam list officially approved religions. Vietnam recognizes Buddhism, Catholicism, Protestantism, Islam, Cao Dai and Hoa Hoa (as well as non-belief). All Indonesians have one of the five recognized religions indicated on their national identity cards [was that ended?] Malays are described in the Malaysian Constitution as followers of Islam, an extraordinary legal linking of race and religious belief.

The views of the relatively new evangelical Christians against LGBTI rights are strong. As largely prosperous members of majority populations, they are well organized and engage with public issues. The clearest example in ASEAN is with the evangelicals in Singapore, who campaigned against repeal of a British-era anti-homosexual criminal law in 2007. Lawrence Khong of the Faith Community Baptist Church fervently preached against the repeal of the law.

“We see a looming threat to this basic building block by homosexual activists seeking to repeal Section 377A of the Penal Code,” Khong told his congregation.

“Examples from around the world have shown that the repeal of similar laws have led to negative social changes, especially the breakdown of the family as a basic building block and foundation of the society. It takes away the rights of parents over what their children are taught in schools, especially sex education. It attacks religious freedom and eventually denies free speech to those who, because of their moral convictions, uphold a different view from that championed by increasingly aggressive homosexual activists.”

3.2 RELIGIOUSLY MOTIVATED ATTACKS ON LGBTI EVENTS IN INDONESIA

A number of incidents have occurred in Indonesia in which Islamist groups have threatened or actually attacked events organized for LGBTI individuals. We can list particular examples.

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87 Tom Benner, Gay culture gaining momentum in Singapore, Al Jazeera, June 3, 2013. The arguments are the same as those made by evangelical Christians in the West. Similar anti-LGBTI activism by evangelical Christians has been occurring in Hong Kong, South Korea and Taiwan.
September 9-10, 1999: Members of twenty-one organizations and groups came to Solo in Central Java for the fourth conference of a national network, to be held at the Dana Hotel, with a press conference to follow.

Such a press conference had never taken place before, and it represented a substantial move to claim public recognition in post-Soeharto civil society. By at least September 7, however, several Muslim organizations in Solo had learned of the meeting and ... declared that it should not take place. Moreover, this rejection took the form of threatened violence – specifically, to burn down the Dana Hotel and kill anyone found there. The meeting was cancelled ... but the Muslim organizations soon learned of a backup plan to hold a press conference at the local PRD office. On September 10, a group of youths from these organizations surrounded the office and threatened to burn it down. Death threats were made against Oetomo [a lead activist] and a mobilization took place across the city, based on rumours that the meeting would be moved...88

November 11, 2000: A violent attack occurred on a transgender Waria gathering in Kaliurang, Central Java, held to coincide with government sponsored public ‘health day’ events. Approximately 150 men, who identified as members of the Gerakan Pemuda Ka’bah (Ka’bah Youth Movement) entered the hall where Waria entertainment was underway, shouting “God is great.” The men assaulted people in the hall with knives, machetes and clubs. At least 25 were injured, with three hospitalized. Fifty-seven men were arrested following the event. All were released without charges being filed.89

March, 2010: Islamic Defenders Front (FPI) and Association of Muslim Intellectuals (MUI) activists forced the cancelation of the ILGA Asia LGBTI conference scheduled for March 26-29 in Surabaya, East Java. 150 individuals had gathered for the conference from 14 countries. The front of the hotel was blocked by local police and riot squad police to protect the participants. The Police decided to not provide a permit ...due to strong protests from the local branch of the Indonesian Council of Ulema (MUI). “We will not issue the permit due to

security reasons,” Sri [Setyo Rahayu, head of the Surabaya community policing department] said. “If it allowed to be held, many parties will stage protests. … She said the group concerned had been informed of the decision and that if it chose to proceed, police would not hesitate to take action to prevent it from holding the conference.\textsuperscript{90}

A 150-strong mob attacked the lobby of the hotel [where the conference was to be held] after Friday morning prayers and refused to leave until the police and hotel management would guarantee that the event was cancelled. In the evening, the mob conducted a floor-by-floor sweep of the hotel, going to the rooms of the 150 conference participants from 14 countries to make sure that they had left. An organizer told Gay City News how he was repeatedly punched by one of the agitators in the hotel lobby for refusing to turn over ILGA’s list of conference participants.\textsuperscript{91}

The Surabaya Police in East Java has decided not to issue a permit for a regional conference of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) slated to be held from Wednesday to Friday. Adj. Sr. Comr. Sri Selyo Rahayu told tempoineraktif.com that the provincial police refused to issue a permit for the event and the city police had followed suit. Rahayu said there were also indications the conference could be “vulnerable” should it go ahead. Earlier, the local branches of the Indonesian Ulema Council (MUI), the highest Muslim authority, and the Muhammadiyah, the country’s second-largest Muslim organization, had objected to the conference.\textsuperscript{92}

The Minister of Religious Affairs, Suryadharma Ali, said that the conference organizers could face criminal charges of contempt on religious and decency grounds.\textsuperscript{93}

April, 2010 – \textit{FPI} activists invaded a human rights training program for transgender individuals in Depok, West Java. The program was organized by the \textit{National Commission for Human Rights}.

\textsuperscript{91} Megawati Wijaya, Glad to be gay in Indonesia, Asia Times Online, September 24, 2010.
\textsuperscript{92} Surabaya police ban gay rights group conference, Jakarta Post, March 24, 2010.
\textsuperscript{93} Hartoyo, Longing for Acceptance, Homosexuals in Indonesia Find Hatred and Discrimination, Jakarta Globe, April 16, 2010.
September 24, 2010 – the 9th annual Q! Film Festival was scheduled to open in Jakarta, with plans to screen 120 films in six cities, hold two art exhibitions, public talks and three book launches. Festival organizer John Badalu said he was aware of possible risks, but that the festival was “different in principle” from the IGLA Asia conference which had been blocked. The festival was “more cultural” than political. But he noted, out of caution, he was selective in his use of the media: “We never do a public press conference, for example. And we choose only queer-friendly media.” All the film screenings were to be at cultural venues and foreign embassies.

The festival works closely with a number of foreign governmental or government-linked groups including Goethe Institute (Germany), Central Culture Francaise (France), Japan Foundation and AusAID (Australia) and is mainly funded by the Holland based Hivos (Humanist Institute for Development Cooperation).

September 28, 2010 – more than 100 member of the Islamic Defenders Front launched protests outside three venues for the Q Film Festival, the German, French and Dutch cultural centers. Police flanked the protesters. On September 29th the organizers officially announced that their program would continue. Screenings at some venues were cancelled. The German Goethe Institute, involved with the festival from its beginnings, continued with its programs.

September 28, 2010 – the Indonesian Ulema Council (MUI) called on authorities to ban any films that promoted homosexuality. In fact all the films scheduled to be shown at the Q! Film Festival had been cleared by censors. MUI deputy secretary general Amirsyah Tambunan defended his organization’s position:

“It’s not true that banning this movie will violate human rights because free sex and homosexuality are abnormal sex behaviors, and they betray human nature because in the long run it could eliminate the next generation.”

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94 Indonesia’s 9th Q! Film Festival to run in 6 cities, fridae.com, September 23, 2010.
96 Dessy Sagita, MUI gives thumbs down to Q! Gay Film Festival, Jakarta Globe, September 30, 2010.
May, 2012 – members of the Majelis Mujahideen Indonesia violently disrupted a book launch in Yogyakarta by the lesbian feminist author Ishad Manji. Authorities promptly banned the book tour, taking no actions against the protesters.97

May 27, 2012 – Lady Gaga cancelled her Indonesian concert after the Islamic Defenders Front threatened violence against her fans if she performed.98

September, 2014 – the University of Sanata Dharma decided to cancel a seminar on LGBT issues following threats from the Islamic Defenders Forum (FUI).99

November 20, 2014 – a Transgender Day of Remembrance rally held in Yogyakarta was attacked by unknown assailants, injuring four participants.100

3.3 ASIAN VALUES

In the 1990s, after the end of the Cold War and the break-up of the Soviet Union, we saw

(a) the very visible economic success of Korea, Taiwan, Hong Kong and Singapore, following the export-led development strategy that had put Japan into the first world economic category,

(b) strong growth in Malaysia and Thailand, and growth in Indonesia and other parts of ASEAN,

(c) a drop in foreign aid from the west in favor of promoting liberalized trade through the World Trade Organization and other measures,

(d) a new and aggressive western linking of economic relations with human rights, labor rights and the protection of intellectual property (in the ‘sanctions decade’ in which China and others were lectured, and Myanmar blocked almost completely from western trade and investment),

97 Kathryn Robinson, Masculinity, sexuality and Islam, in Bennett, Davies, 2015, 51 at 62.
11A.
99 Bambang Muryanto, Unidentified group attacks transgender rally, injures 4, Jakarta Post, November 22, 2014.
100 Ibid.
(e) a set of UN world conferences to set new international agendas now that the Cold War was over – conferences on human rights, the environment and other western agenda themes.

There was a reaction to the new western aggressiveness, and it took the form in the region of asserting ‘Asian values’ of social stability, family strength and loyalty to nation, in contrast to the self-centered individualism of the West, whose social disorder, Asian critics said, was sure to cost it its leadership. The two figures most associated with the assertion of ‘Asian values’ were Mahathir Mohammad of Malaysia and Lee Kwan Yew of Singapore. Both were fluent speakers of English and both presided over the opening of their economies to rapid economic development and international trade and investment. Lee Kwan Yew is quoted as saying:

**Too much democracy leads to homosexuality, moral decay, racial intolerance, economic decline and single-parent families.**

Over and over again, Mahathir condemned the west, in particular the United States, for high rates of teenage pregnancies, drugs, homosexuality and casual attitudes to sex. His themes were not so much Islamic teachings as seeing social disorder as a dangerous western pattern, based on individual rights, individual liberty, ignoring duty to family, community, religion and society. For both Lee Kwan Yew (in this period) and Mahathir, homosexuality seemed to mean irresponsible libertarian promiscuity (far from the contemporary western image of same-sex couples photographed with their children). Lust not love. Promiscuity not stability. Individualism not community values. Those were the images being conjured up.

‘Asian values’ challenged the claims of international human rights to universal validity. The debate over the issue went to the 1993 Vienna *World Conference on Human Rights*, with developing states (including China and the ASEAN states) largely on the side of relativism, and the West on the side of universal validity. The result was a qualified victory for universalism. In advance of the world conference Asian states agreed on the following language at a preparatory meeting:

8. **Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process**

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of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

The final Vienna *Declaration and Programme of Action* of 1993 had similar wording:

5. All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Three other developments challenged ‘Asian values’ arguments: (a) an express counter-alliance initiated by South Korea and the Philippines, (b) the Asian financial crisis, and (c) the defection of China.

South Korean leader, Kim Dae Jung, and Philippine President, Corazon Aquino, sought to counter the hegemony of the Asian values discourse when they founded the ‘Forum of Democratic Leaders in the Asia-Pacific’ in 1994. Supported in the 1990s by state representatives from Thailand, Taiwan, Hong Kong and Japan, what this counter-argument did was to encourage and create space for non-state actors to engage and challenge elite interpretations of human rights.102

Secondly, the Asian financial crisis of 1997-98 undercut ideas of Asian exceptionalism, revealing patterns of crony capitalism and corruption. The spectacular growth in parts of Asia had made the argument for distinct Asian values seem credible. The crisis undercut those arguments.

The third development was the defection of China. For economic reasons China wanted membership in the *World Trade Organization*. China shifted to support for ‘human rights’ in order to prevent blockage of *WTO* membership by the US Congress. China signed the *International*
Covenant on Civil and Political Rights, and placed ‘human rights’ in its constitution. It allowed US President Clinton to talk about human rights on national television during a state visit in June, 1998. China dropped its role of supporting the resistance of developing states to western human rights demands. That shift was not easy for China, which had worked hard to be seen as a voice for developing states. China became a WTO member in December, 2001. And China became the great growth story of the ensuing decade.

Appeals to Asian exceptionalism, or ‘Asian values’ have been in retreat, but still have some potency. The ASEAN Human Rights Declaration of 2012 largely repeats the 1993 Vienna compromise in General Principle 7:

All human rights are universal, indivisible, interdependent and interrelated. All human rights and fundamental freedoms in this Declaration must be treated in a fair and equal manner, on the same footing and with the same emphasis. At the same time, the realization of human rights must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.

In August, 2015, Prime Minister Najib in Malaysia said his government would support human rights only as understood in Islam. His governing coalition had been facing declining support from Malay Muslims, attracted to the more conservative PAS Islamic political party.

If there is any distinct ‘Asian value’ that in our times differentiates ASEAN countries from the West, it would be in the strength of loyalty to family. Obligations to parents are crucial not simply in the Confucian influenced areas, but in other parts of Southeast Asia as well. Parents can sue children who fail to assist them in Singapore.103

3.4 SOCIAL ATTITUDES

A 2013 Pew Research Center report about global attitudes towards gays and lesbians found that 93 percent of Indonesians did not believe

103 The Singapore Exception, Special Report, The Economist, July 18, 2015, 8.
that homosexuality should be “accepted by society,” making the
country one of the least tolerant nations surveyed.\textsuperscript{104}

In a 2013 Pew Research Center report about global opinions of the
LGBT community, more than 70 percent of Filipinos said
homosexuality should be “accepted by society,” making the
Philippines the most “tolerant” nation surveyed in the Asia-Pacific
region after Australia.\textsuperscript{105}

3.5 EDUCATIONAL PATTERNS

The Cambodian government

…has shown some willingness to engage with LGBT issues. The
government, for instance, has recently shown support for programs
combating LGBT-based discrimination in schools. This year, it is
backing an initiative spearheaded by UNESCO and CCHR [a LGBTI
NGO] to deliver LGBT sensitivity training to thousands of
Cambodian teachers.\textsuperscript{106}

One-third of Thai students who identify as LGBT have experienced
physical abuse in school according to a 2014 study conducted by Plan
International, UNESCO and Mahidol University. Almost 25 percent
of some 2,000 students surveyed said they had been sexually harassed
because of their sexual orientation or gender identity.\textsuperscript{107}

2. MEDIA

Looking at public media coverage of SOGIE and intersex issues in
\textit{ASEAN} shows, very sharply, the wide differences that exist in the region.

CINEMA AND TELEVISION

\textsuperscript{104} Dominique Mosbergen, “We were treated like animals”, The World Post, October 11, 2015.
\textsuperscript{105} Dominique Mosbergen, The dangers of being LGBT in ‘tolerant’ Philippines, The World Post,
October 12, 2015.
\textsuperscript{106} Dominique Mosbergen, In Cambodia some families still try to cure LGBT sons and daughters,
The World Post, October 14, 2015.
\textsuperscript{107} Dominique Mosbergen, Two-faced Thailand, The World Post, October 20, 2015.
Many films and television dramas with LGBT characters are highly discriminatory, treating transgender individuals as comic figures. In 2015 a number of activists in Vietnam publicly protested the slapstick depiction of an effeminate gay man in a highly popular mainstream film. Such depictions are routine in films in Thailand, though a number of recent films have moved away from such exaggerated stereotypes. The highly controlled media in Brunei, Singapore and Malaysia generally avoid any coverage of LGBTI lives, and never report on progress in acceptance in the region or other parts of the world.

In 2009 the U.S. film Milk won academy awards for best actor and best original screen play. The film was about the pioneering ‘out’ San Francisco gay activist and politician, Harvey Milk, through to his murder in his city hall office by a fellow council member. Those who watched the Academy Awards on the Star satellite television network in Asia saw acceptance speeches from which the words ‘gay’ and ‘lesbian’ had been deleted. Pang Khee Teik, activist and gallery manager in Kuala Lumpur, called on all his social media contacts to protest the censorship, saying it had “sent a message to all Malaysians that gays and lesbians are still shameful things to be censored from the public’s ears.” He said the two moments of silence “rang out like the gun shots that killed Harvey Milk.” Separately, viewers in Singapore who watched the repeat telecast on a free-to-air channel found that entire chunks from the two speeches were cut, including Dustin Lance Black’s references to isolation while growing up, and Sean Penn’s comments on gay marriage. The Star Asian satellite TV network claims to reach more than 300 million viewers in 53 countries. In China CCTV cut the Sean Penn speech, and omitted that of Dustin Lance Black.\footnote{Sylvia Tan, Oscar speeches censored in 53 Asian countries?, fridae.com, February 26, 2009.} Imported visibility had to be kept in check, but omitting the awards for Milk completely from the telecasts was not seen as possible.

Thailand has seen a surprising number of local films focused on gay men, lesbians and almost always kathoeys. These films have mainstream distribution within the country, showing on Cineplex screens in malls in all the provinces. Most famous internationally are three films: \textit{Iron Ladies}, on a kathoey volleyball team (recently remade), \textit{Beautiful Boxer}, on the famous transgender kick boxer, and \textit{Tropical Malady}, a mysterious film that won an award at Cannes. 2007 saw two mainstream Thai movies with oddly similar titles: \textit{Bangkok Love Story}, and \textit{Love of Siam}. The first was a
gangster movie, with a member of the Royal Thai Police falling in love with a hit man. The second was a teenage sexual awakening film. In October, 2015, The Love of Siam was included in the Registry of Films as National Heritage by the Thai Film Archive and the Culture Ministry.

…2007’s “The Love of Siam”, the widely acclaimed, award-winning hit that brought gay romance to the mainstream. It was a breakthrough for young director Chookiat Sakveerakul, as well as the film’s stars, leading man Mario Maurer, actor-musician Witwisit Hiranyawongkul and the August band.109

A thoroughly middle-class film, Metrosexual, was something like the very popular Indonesian gay themed film Arisan. Popular romps were Kung Fu Tootsie and Saving Private Tootsie. Top Thai actors featured in Me…Myself, and The Odd Couple.

2015 has been surprising for the number of Thai LGBT films showing in regular cinemas. They include P’Chai/Winning at Checkers Every Time, Red Wine for the Dark Knight, The Blue Hour, Love Love You, Water Boyy, Hor Taew Taek and Love Next Door. All the films had young male leads, sometimes dressed as school boys (though the gay pair in the first film was an older brother and partner). Two were ghost movies, a very popular Thai genre, with the young gay student lead character being drawn into danger. Poj Anon has made five transgender comedy horror films, the most recent, Hor Taew Taek, showed in cinemas in October, 2015. Otherwise there were no comic kathoeys featured in these films, though an older queeny ‘aunt’ was a major but respected character in the fourth film. The first film was put forward by Thailand as their official Oscar entry for best foreign language film.

Only the Philippines has a comparable number of LGBT films. Over a number of years half a dozen films had some connection to the ‘macho dancers’ who used to perform in a scattering of gay bars in the major cities.110 Many other films have been produced with mainstream distribution. In 2014 Kasal: The Commitment, won the top award at the

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109 Wise Kwai, Cinema as history: Another 25 entries are added to the archive’s historical registry, The Nation (Bangkok), October 16, 2015, 15B.

110 There are still male erotic dancers, but the ‘macho dancer’ style is now passé.
annual Cinemalaya Independent Film Festival, a major festival.\textsuperscript{111} 2015 saw Alimuon, prominently reviewed in the Philippine Star.\textsuperscript{112}

Indonesia had Arisan (and its sequel) and Lovely Man. A 2013 study described and analyzed ‘gay, lesbi and waria’ identities in Indonesian film. It explored why transgendered characters are popular with the Indonesian public and the way they are portrayed on film.\textsuperscript{113}

Malaysia had In a Bottle. Vietnam had Lost in Paradise and in 2015 Big father, small father and other stories. Myanmar had I Want To Eat You, and its sequel. Again these films gained mainstream distribution. None involved nudity. Usually there was at least one kiss.

Alex Au has written about access to LGBT films in Singapore:

Through the 1990s, gay themes gained prominence in Singapore theatre, and the 1992 liberalization of film censorship allowed a number of gay-affirmative films to be screened. Augmented by their novelty factor, films such as The Wedding Banquet (1993, directed by Ang Lee), Philadelphia (1993, directed by Johnathan Demme) and The Sum of Us (1997, directed by Geoff Burton and Kevin Dowling) created a buzz in the nascent gay community. Nor were English-language films the only ones. Farewell My Concubine (1983, directed by Chen Kaige) and Happy Together (1997, directed by Wong Kar Wai) depicted homosexual longing in Chinese contexts, helping to indigenize such feelings among the ethnic Chinese who form the majority of Singaporeans.\textsuperscript{114}

There are limits:

“A happy LGBT character, who has a good job or family support, isn’t allowed on Singaporean television, LGBT activist and corporate attorney Paerin Choa says. “They have to be sad, troubled, or

\begin{footnotes}
\item[112] Alimuon expected to make waves due to ‘hot’ theme, Philippine Star, May 4, 2015.
\item[113] Ben Murtagh, Genders and Sexualities in Indonesian Cinema: Constructing Gay, Lesbi and Waria Identities on Screen, Routledge, 2013, 256 pp.
\item[114] Alex Au, Speaking of Bangkok, in Jackson (ed), Queer Bangkok, HK, 2011, 181 at 186.
\end{footnotes}
suicidal. In Chinese dramas, the gay character is often a serial killer or a comical side-kick.”
The “promotion or glamorization of the homosexual lifestyle” is not allowed on television or in radio broadcasts, according to guidelines established by Singapore’s Media Development Authority.
“Information, themes or subplots on lifestyles such as homosexuality, bisexualism, transsexualism, transvestism, pedophilia and incest should be treated with utmost caution,” the guidelines state. “Their treatment should not in any way promote, justify or glamorize such lifestyles.”

This has echoes in the broad laws in Russia against any “propaganda” favoring homosexuality, which blocks most media coverage.

Malaysia liberalized its rules of films with a ruling in 2010. Gay characters can be depicted, so long as they either die or convert to heterosexuality.

“We are now allowed to show these scenes,” Malaysian Film Producers’ Association president Hamad Puad Onah told Agence France-Presse. “As long as we portray good triumphing over evil and there is a lesson to be learned in the film, such as from a gay who turns into a man. Previously we are not allowed to show these at all.”

LGBTI film festivals are now held in Indonesia, Myanmar, Philippines and Thailand. John Badalu established the annual Q! Film Festival in Indonesia in 2002, and it has continued in each subsequent year. It has always had to deal with the threat of attacks by the Islamic Defenders Front and similar religious hardliners. Security measures and news embargoes are used by festival organizers to deter opponents. Q! has spread to a number of cities, and regularly uses the cultural facilities of foreign embassies as venues for showings. It seems to be the most successful LGBTI film festival in Asia.

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115 Dominique Mosbergen, How one of the world’s richest countries is limiting basic human rights, The World Post, October 13, 2015.
NEWSPAPERS

We lack media surveys in the region on coverage of LGBTI stories. The Bangkok English language newspapers have good coverage of local, regional and international stories. The Bangkok Post has a monthly LGBT page, supplementing regular stories. The last big ‘Nation’ party in Singapore in 2004 got coverage in Bangkok and Hong Kong newspapers and the Far Eastern Economic Review, but went unnoticed in the local Straits Times.

LGBTI MEDIA

The first Japanese gay magazine, Barazoku, was published in 1971, and various magazines have been published continuously in Japan since that time. The first Thai gay magazine, Mithuna, began publication in Bangkok in 1983. Various Thai language gay magazines have been published since that time, varying in style and content. Mainstream Thai language gay magazines, easily available in magazine racks, began in the 2000s. Notable and successful were Tom Act, a Thai lesbian magazine, launched in 2008, and a Thai edition of Attitude, the first foreign language edition of the popular British magazine. A number of mild gay male skin magazines are published, with no full nudity or interaction between models. They are only available at a small number of outlets.

A literature, unique in the region, began with the publication in 1994 of Ladlad, an anthology of Filipino gay writing, edited by two academics from leading Manila universities, J. Neil C. Garcia (University of the Philippines) and Danton Remoto (Ataneo University), followed by Ladlad 2 and Ladlad 3. In 1993 a clinical psychologist, Margarita Go-Singco Holmes

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117 See, for example, Bangkok Post, Life section, July 30, 2015, 4, with a major article reviewing recent news and a second AFP article on gay rights in Korea. AFP seems particularly active in circulating LGBTI stories, though such stories also appear on Reuters and AP.

118 Gay Times reported in December, 2004, 79: “After 33 years, one of the world’s oldest gay magazines has been forced to close through bankruptcy. Barazoku, established in 1971, had been a trailblazing publication in its time, and the first in Asia to be sold in mainstream bookshops. The magazine’s owner/publisher blamed the fall in sales and advertising on the rise of the internet. … Barazoku’s name translates as ‘rose tribe’, which has since entered the language as a synonym for ‘homosexual’.”

119 The British Library funded an ‘endangered archives’ project, in which the early Thai magazines were collected and digitalized.
published “A Different Love”, a collection of her sexual advice columns.\textsuperscript{120} These publications, and subsequent ones, were available in the archipelago-wide chain of National Book stores, where students of all ages congregated to buy school supplies and text books. There was no difficulty in accessing this new LGBTI literature.

There are now online gay magazines: Element in Singapore, Outrage in Philippines, Galaxy in India and probably others.

ACADEMIC PUBLICATIONS

In 1996, the University of the Philippines published Garcia’s Philippine Gay Culture, a massive study, with a cover illustration of a punk St. Sebastian.\textsuperscript{121} It was one of a set of books published by UP to mark the centennial of the founding of the university. Garcia speculated that the 19\textsuperscript{th} century political hero Jose Rizal, unmarried, was likely to have been gay. He introduced the theories of Michael Foucault and Eve Kosofsky-Sedgewick to Filipino readers.


Hong Kong University Press has a “Queer Asia” series, which has published around a dozen titles. They published a revised edition of Philippine Gay Culture, and volumes on Singapore and Bangkok.

Some books get banned. A recent story told of a government religious department in Kuala Lumpur seizing copies of ‘Allah, Liberty and Love’, by lesbian author Irshad Manji. The raid was illegal for it took place one week before the book was banned by the Home Ministry.\textsuperscript{122}

The pornography law in Indonesia prohibits materials showing “deviant sexual intercourse”. The phrase is defined to include “necrophilia,\textsuperscript{120} A twentieth anniversary version of the book was published by Anvil press in 2015.
\textsuperscript{121} A second revised edition was published by the University of the Philippines and Hong Kong University Press in 2008 and 2009, without the St. Sebastian cover illustration.
\textsuperscript{122} DPA, Religious raid on book shop deemed illegal, The Nation (Bangkok) August 26, 2015, 4A.
bestiality, oral sex, anal sex, lesbians and homosexuals.”¹²³ There have been no prosecutions to date involving LGBTI materials.

3. ASEAN, CSOs AND HUMAN RIGHTS AND CIVIL SOCIETY ORGANIZATIONS

We need to understand two inter-related parts of the process of reinventing ASEAN in the decades after the ending of the Cold War. One is the expansion of its concerns to include human rights, and the second is the extent of the inclusion of civil society organizations in the life of the association.

ASEAN is an organization of governments. No other entities or groupings are guaranteed rights of consultation, participation or involvement. Yet the legitimacy of ASEAN (and of its member states) is dependent on some level of support (or tolerance or acquiescence) from civil society.

Southeast Asia has

(a) a short history of independence for nine of the ten states,
(b) a perceived need for ‘nation building’ in all ten,
(c) fears of political and ethnic instability,
(d) a prioritization of economic development,
(e) changing geopolitical realities with the ending of the Cold War and the rise of China and
(f) a history of authoritarian governments.

Most ASEAN states have been guarded in their recognition of human rights and any engagement with civil society organizations. All ASEAN states have seen active international NGO campaigns targeting their human rights records.

4.1 HUMAN RIGHTS

4.1.1 HUMAN RIGHTS CONTESTED

The *ASEAN Charter* of 2007 had provisions on human rights. It was not clear a decade ago that an *ASEAN Charter* would include provisions on human rights, for

- Singapore and Malaysia had led the ‘Asian values’ arguments in the 1990s, challenging the ‘universality’ of international human rights ideas,\(^\text{124}\)
- Singapore, Malaysia, Brunei and Myanmar had signed the minimum number of UN human rights treaties (basically those on women, children, and people with disabilities, and with reservations),
- In 2007 Myanmar and Thailand had military governments,
- Myanmar was widely condemned internationally on human rights grounds, and resentful of the criticisms and of the very severe economic sanctions that had been imposed by Europe, the US and other western states,
- Various *ASEAN* states had ‘authoritarian’ governments, with strict limits on political organizing and tight controls on media,
- Brunei was and is a Malay Muslim Sultanate, without any commitment to democratic elections,
- Criticism of human rights advocacy has not been unusual on the part of political leaders. Occasionally political leaders in Malaysia spoke out against the “abuse of rights” by activists. Prime Minister Najib in August, 2015, denounced LGBT for “hiding behind the façade of human rights…”\(^\text{125}\) General Prayut Chan-o-cha, head of the military government in Thailand, criticized activists who were “exploiting the principle of human rights to cover up their wrongdoing.”\(^\text{126}\) Susilo Bambang Yudhoyono, shortly before his election as president of Indonesia, said that “democracy, human rights, concern for the environment and other concepts being promoted by Western countries

\(^{124}\) The ‘Asian values’ campaign was always paradoxical. It was led by Lee Kuan Yew of Singapore and Mahathir Mohammad of Malaysia, both responsible for opening their countries to international business. Singapore became the most westernized place in Asia and the most prosperous.


\(^{126}\) Prayut vows end to cycle of coups: “Don’t rely on democracy’ for charter, Bangkok Post, October 11, 2015, 1.
are all good, but they cannot become absolute goals because pursuing them as such will not be good for the country."\textsuperscript{127}

Singapore was the sole dissenting voice at the 1993 Vienna \textit{World Conference on Human Rights} when it made its famous statement pointedly titled "The Real World of Human Rights." Singapore described most human rights as "still essentially contested concepts." The statement went on:

\textbf{Singaporeans, and people in many other parts of the world do not agree, for instance, that pornography is an acceptable manifestation of free expression or that homosexual relationships is just a matter of lifestyle choice. Most of us will also maintain that the right to marry is confined to those of the opposite sex.}\textsuperscript{128}

Singapore’s Deputy Prime Minister, S. Jayakumar, in September, 2005, at the UN Summit, repeated the statement that most human rights were still essentially contested concepts, arguing that certain states pushed their own particular ideas, calling them ‘universal norms’.\textsuperscript{129} In a 2008 workshop in Singapore on a possible \textit{ASEAN} human rights mechanism, Singapore’s second minister for foreign affairs, Raymond Lim, in his keynote address, repeated some of this language:

\textbf{The fact is that while universality is an ideal that we must aspire to, the interpretation of most rights is still essentially contested concepts. A few years ago, it would have been difficult to imagine that ASEAN would commit itself to establishing a human rights body of any kind. But we have clearly moved ahead.}\textsuperscript{130}

Still ‘essentially contested’, but now grudgingly accepted.

\textsuperscript{127} Dominic Berger, Human Rights and Yudhoyono’s test of history, in Aspinall, Mietzner, Tomsa, 2015, 217 at 219.
\textsuperscript{128} Copy in possession of author. While this was in an official Singapore statement to the conference, the country did not attempt to challenge the final ‘consensus’ Declaration and Programme of Action. Note that Singapore was opposing same-sex marriage before it was legal in any country in the world (though the registration system in Denmark, enacted in 1989, was often referred to as marriage).
\textsuperscript{129} UFP, UN assembly pressured over new human rights council, Japan Times, Sept. 18, 2005, 5.
\textsuperscript{130} Tan Hsien-Li, 173. It is interesting that a ‘cut and paste’ process has been underway, in which grammar has not been adjusted in the 2008 presentation. One assumes that the 1993 statement is the source of wording for those in 2005 and 2008, though research might show earlier iterations.
A more nuanced critique of human rights was explained by Bilahari Kausikan, Singapore’s Ambassador at Large, and Policy Advisor at the Ministry of Foreign Affairs, speaking in his personal capacity:

[He] argued for a practical approach to human rights and for the recognition “that not all rights are compatible or capable of simultaneous realization.” He then highlighted the important role of the state in maintaining the balance among conflicting belief systems. He observed that the conception of rights that is predominant in the west is one in which rights are held by the individual against an overly powerful state. “But the essential problem in much of the rest of the world, and in my view certainly in Southeast Asia as regards freedom of belief, arises when the state is too weak to hold the balance between competing belief systems or too timid to be willing to resist political pressures to privilege one belief system over another.” Thus, Ambassador Kausikan said that it is a matter of determining the most urgent priority – which will vary according to specific circumstances. “You cannot – or at least only very rarely can – do everything simultaneously particularly when the state is weak.”

Instead of human rights being “essentially contested” propositions (the earlier Singaporean critique), he is saying that the state must manage or balance competing ‘rights.’ He fears, in the case of religion, that the state may privilege one belief system over another.

Perhaps he was thinking of Indonesia, where the state has been hostile to the construction of new Christian churches and has decreed that the heterodox Amadhiya believers must not proselytize, effectively privileging majority Sunni Muslims. But perhaps he was thinking of Singapore’s use of its ubiquitous state housing system to ensure that racial minorities are physically integrated, living in the same complexes and areas as majority ethnic Chinese. Race and religion coincide in Singapore, and in much of Asia. The freedom to choose where you live is constrained in Singapore by

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131 The remarks were at the launch of a report by the Human Rights Resource Centre “Keeping the Faith: A Study of Freedom of Thought, Conscience, and Religion in ASEAN”, hosted by the Centre for Asian Legal Studies at the National University of Singapore, April 30, 2015, accessed May 20, 2015, from the website of the Human Rights Resource Centre, http://hrrca.org. The most credible explanation for the Singapore government’s refusal in 2007 to repeal 377A of the penal code (prohibiting acts of gross indecency between males) is the appeasing of the politically active minority composed of evangelical Christians. ‘Balancing’ was perhaps attained because of the pledge not to ‘proactively enforce’ the section, which in practical terms would mean no enforcement. See below, the section on the 377A campaign.
a state plan to block minority concentrations. Officials and leaders see a high likelihood of inter-communal discord if racial/religious groups form neighborhoods (or ‘ghettos’). So places of residency are controlled or managed by the state, overriding decisions solely based on individual preferences. Similar rules apply for schooling. Classes must be integrated. Compulsory military service also serves to bring the races together.

In Ambassador Kausikan’s view, the Western preoccupation with ‘individual’ rights does not recognize such social management by the state. So it is best to avoid the approach to ‘rights’ found in the ‘west.’

Only Indonesia under Yudhoyono emerged as a consistent defender of ‘human rights’ in ASEAN and internationally (whatever one may think of the domestic record):

…few other leaders in the region appeared as confident as Yudhoyono when addressing human rights issues in international forums. He was the first Indonesian president to actively leverage an apparent commitment to human rights in Indonesia’s international diplomacy. Early on in his first term he began to promote human rights within ASEAN, and in 2008 he established the Bali Democracy Forum, an annual forum for the promotion of democratic values.132

There are three factors that led to the ASEAN Charter’s inclusion of human rights:

(a) a pledge by ASEAN governments in 1993 to consider a ‘regional arrangement’ for the promotion and protection of human rights,
(b) the activism of the Working Group on an ASEAN Human Rights Mechanism and ASEAN ISIS, and
(c) the need to add social content to the security and economic rationales for ASEAN, in order to sell a newly ambitious ASEAN agenda both at home and abroad.

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132 Dominic Berger, Human rights and Yudhoyono’s test of history, in Aspinall, Mietzner, Tomsa, 2015, 217 at 220. In fact Suharto had given some support to human rights to assuage the international condemnation resulting from the Santa Cruz massacre in East Timor. He established a national human rights commission and hosted a UN human rights seminar. Habibie, his successor, also indicated support, signing, for example, some ILO conventions on labor rights.
These factors overcame the resistance of ASEAN governments to adopting a human rights agenda of any kind, and, to a lesser extent, to including CSOs in their deliberations.

4.1.2 THE PLEDGE.

In advance of the United Nation’s World Conference on Human Rights, held in Vienna in June, 1993, ministers and representatives of thirty-four Asia-Pacific states met in Bangkok, pursuant to a UN General Assembly resolution. This was one of a series of regional intergovernmental meetings in preparation for the Vienna world conference. Nine of the present ASEAN member states participated. Only Cambodia was absent.

Were Asian governments going to block consensus at Vienna, in the name of “Asian values”? Would they follow the urging of Mahathir Mohammad, and ask for the reopening of the 1948 Universal Declaration of Human Rights, written when most countries in Asia-Pacific were colonies with no voice in the world body? Would they attack the structure of the UN, where western states dominated in the Security Council?

Generally the Bangkok Declaration that emerged from the preparatory meeting struck a moderate tone, at least in terms of the politics of the time. States reaffirmed their commitment to “principles contained in the Charter of the United Nations and the Universal Declaration on Human Rights.” They regretted a UN bias in favor of civil and political rights, which downplayed or ignored the importance of economic, social and cultural rights. They promoted the ‘right to development’ and criticized aid conditionality. They said ratification of UN human rights treaties “should be further encouraged” (seeming to gently criticize Asian patterns of non-ratification). The establishment of national human rights commissions was supported (Article 24).

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133 Singapore, as already noted, was the only country to make a statement at the Vienna conference challenging the ‘universality’ of human rights, but it did not attempt to block ‘consensus’ on the final statement of the conference.

134 These words are in the fourth preambular paragraph. The paragraph does not refer to ‘the principles’, which would suggest all of them. Nor does it only refer to ‘some of the principles’ which would have made it clear that some were either rejected or problematic. The paragraph says less than it seems to say.

135 The Bangkok and Vienna declarations led quite directly to the establishment of the commission in South Korea, the first in the world to have a legislative mandate specifically including issues of discrimination on the basis of sexual orientation.
‘national and regional particularities’ was stated (and confirmed in the Vienna declaration):

8. Recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds.

For present purposes, the key provision was Article 26:

26. Reiterate the need to explore the possibilities of establishing regional arrangements for the promotion and protection of human rights in Asia.

Where did Article 26 come from? It seems to recognize the worth of the regional human rights bodies in Europe and the Americas. In retrospect it seems to be most relevant to ASEAN, the only notable regional or sub-regional intergovernmental organization in Asia-Pacific.

Article 26 probably came from a UN draft of the Vienna conference final statement. Such drafts set the agenda for the regional and the other preparatory meetings leading up to any world conference. Agreement on wording for most points is to be worked out in this process, not left to the unwieldy final full conference. A closed drafting committee process at the full conference handles remaining disputes. No points should be taken up by an open acrimonious debate on the floor in the final sessions of the conference itself. ‘Consensus’ on the final statement means compromises on wording and no open dissent.

The final Declaration and Programme of Action of the Vienna World Conference on Human Rights, dated 25 June, 1993, supports the establishment of “regional arrangements…”

37. Regional arrangements play a fundamental role in the promotion and protection of human rights. They should reinforce universal human rights standards, as contained in international human rights instruments and their protection. The World Conference on Human Rights endorses efforts underway to strengthen these arrangements and to increase their effectiveness, while at the same time stressing
the importance of cooperation with the United Nations human rights activities. The World Conference reiterates the need to consider the possibility of establishing regional and subregional arrangements for the promotion and protection of human rights where they do not already exist.\textsuperscript{136}

In July, 2003, \textit{ASEAN} foreign ministers said the regional grouping should ‘consider the establishment of an appropriate regional mechanism on human rights’ following the theme in the \textit{Bangkok Declaration} and the \textit{Vienna Declaration}.

The first time ASEAN officially addressed the subject of human rights mechanism was at the 26\textsuperscript{th} ASEAN Ministerial Meeting (AMM) held in Singapore in 1993. The immediate impetus for this lay outside the region. On 25 June 1993 the World Conference on Human Rights in Vienna produced the Vienna Declaration and Programme of Action. In their joint communiqué from the AMM the ASEAN Foreign Ministers rhetorically supported the Vienna Declaration and agreed to consider establishing an appropriate regional human rights mechanism. Support in this instance meaning: (a) paying lip service to – it was some sixteen years later the mechanism was formed (AICHR) – and for much of that time the consideration was, at best, lukewarm; and (b) note regional specifics limiting not so much the universality of human rights but rather their sequencing. That is, the need for economic rights to come before political rights... ASEAN interest in human rights was not therefore internally driven but rather a response, and a negative one, to changing external conditions.\textsuperscript{137}

It was a “negative” response, only in that it put off consideration. It was a response to “changing external conditions” in that human rights had become more highly institutionalized in the UN system (a) with the coming into force of major human rights treaties in the 1970s (the \textit{ICCPR} and the \textit{ICESCR}), (b) shifting foreign policies in Europe and the United States that included human rights, (c) the growth of major international human rights NGOs and (d) with the Vienna Conference itself.

\textsuperscript{136} Paragraph 76 also supports regional arrangements, in seeking greater UN resources to support such initiatives.
\textsuperscript{137} Alan Collins, Building a People-oriented Security Community the ASEAN Way, Routledge, 2013, 81.
The *ASEAN Community Security Plan of Action* of November, 2003, was a major structural statement that spelled out the “three pillars” structure of *ASEAN* (political-security, economic and socio-cultural). Human rights were included in the concerns of the *ASEAN Security Community*, the pillar that was the most advanced at that point in time. The *Annex* to the 2003 *Plan of Action* sets out a work agenda, which included developing an *ASEAN* charter which would affirm a commitment to human rights.

II (2) Working towards development of an ASEAN Charter which will inter alia reaffirm ASEAN’s goals and principles in inter-state relations, in particular the collective responsibilities of all ASEAN Member Countries in ensuring non-aggression and respect for each other’s sovereignty and territorial integrity; the promotion and protection of human rights; the maintenance of political stability, regional peace and economic progress; and the establishment of effective and efficient institutional framework for ASEAN.

With the *Vientiane Action Program* of November 2004, a reference to human rights appeared in both the program statement itself and an annex. As well it confirmed the placement of ‘human rights’ within the ‘security pillar’ of *ASEAN*.

### 4.1.3 ASEAN ISIS AND THE WORKING GROUP

*ASEAN ISIS* is a network of national institutes focused on issues of security and international relations. It began a series of meetings under the title the *ASEAN ISIS Colloquium on Human Rights (AICOHR)* in 1993. The colloquiums brought government people and civil society representatives together to discuss human rights. It was essentially a confidence-building measure that would make dialogue on the sensitive matter of human rights possible in a relaxed, elite, non-confrontational setting.

It became part of the process which made human rights and the language of human rights an increasingly acceptable part of the political discourse in ASEAN. This can be easily overlooked because even ASEAN now routinely acknowledges the importance of human
rights – a situation that was not normal when AICOHR was
established.\textsuperscript{138} 

The \textit{Working Group for an ASEAN Human Rights Mechanism} was created in 1995 by the Human Rights Committee of \textit{LAWASIA}, based in Manila, barely two years after the Bangkok and Vienna declarations.\textsuperscript{139} It was and is a remarkable organization that brought together a number of local organizations and figures in Cambodia, Indonesia, Malaysia, Philippines, Singapore and Thailand. The members were academics and individuals well-connected with both governments and intergovernmental organizations.

The co-chairs were Professor Vitit Muntabhorn of the law faculty at Chulalongkorn University in Bangkok, who has twice been named as a Special Rapporteur on specific human rights issues by the United Nations, and Marzuki Darusman, a former chair of Indonesia’s national commission on human rights, former attorney general under President Abdurrahman Wahid (1999-2001) and former parliamentarian. Both have held a variety of appointments to United Nations human rights projects. The Secretary General of the \textit{Working Group} was Carlos Medina, who headed the \textit{Human Rights Center} at the law faculty at Ateneo de Manila University.

The chair of the Indonesian working group, one of the local component groups, was and is Rafendi Djamin, who went on to become a commissioner on the \textit{ASEAN Intergovernmental Commission on Human Rights (AICHR)} when it was founded in 2009. The chair of the Thai working group, Sriprapha Petcharamesree, was the founding head of the \textit{Institute for Human Rights and Peace Studies} at Mahidol University in Bangkok. She also went on to be a commissioner on the \textit{AICHR} when it was established. The chair of the Malaysian working group was Param Cumaraswamy, president of the Malaysian Bar (1986-1988), president of \textit{LawAsia} (1993-1995), appointed in 1994 as the UN Special Rapporteur on the Independence of Judges and Lawyers, a commissioner with the \textit{International Commission of Jurists} since 1990 and its vice president in 2004-2005. He faced charges in Malaysia in the context of opposing moves by President Mahathir Mohammad to increase executive control over Malaysian courts and purge a number of judges. He is currently on the board of the \textit{Human Rights Resource Centre for ASEAN} in Jakarta.

\textsuperscript{138} Herman Kraft, quoted in Alan Collins, 2013, 86.
Marzuki Darusman was the founding director, and chair of the Human Rights Resource Centre for ASEAN at the University of Indonesia, stepping down in February 2015. One ‘out’ gay activist was involved in the Singapore working group, George Hwang, a lawyer.

The strategy of the Working Group for an ASEAN Human Rights Mechanism was to constantly remind politicians that consideration of a regional human rights mechanism had been promised, and to give the idea legitimacy through position papers, published studies and ongoing lobbying. The Working Group was composed of elites, mainly outside government, bringing reasoned arguments and reminders to the elites within governments, and to the politicians who in the end would take decisions on a regional human rights mechanism. Probably no lobby group on rights issues in the region has ever been as well organized, elite driven, tenacious over time and tactically sophisticated.\textsuperscript{140}

The Working Group has gained substantial goodwill through regular engagement with the ASEAN officials at a pace that is comfortable for each member state, as well as scaling back the suggestions that did not garner a favorable response... It is significant that an NGO has gained this degree of acceptance at the ASEAN governmental level such that it has conducted workshops in cooperation with foreign affairs ministries of Indonesia, the Philippines, Malaysia, Thailand, and, most recently, Singapore.\textsuperscript{141}

4.1.4 SOCIAL CONTENT

Human rights were included in the UN Charter in 1945, adding some ‘social’ content to a document designed to give the Allied Powers (the World War II victors), control over all matters of international peace and security. The Security Council, controlled by its five permanent members, was to manage military action anywhere in the world. This radical attempt at centralized control of the world order needed to be packaged along with some people-friendly social goals. Hence, in the final drafting work on the

\textsuperscript{140} Coalitions of CSO organizations have at other times provided important support for institution building. Kelly Gerard notes the coalition which participated in the drafting of the convention banning land mines: Kelly Gerard, 14. Another example is the coalition that was involved in the drafting process for the Convention on the Rights of the Child.

\textsuperscript{141} Tan Hsien-Li, 18.
UN Charter, ‘human rights’ was added to the document. In a similar way, it seems, human rights are part of ASEAN to help justify the goals of political and economic integration.

A major goal of ASEAN was to overcome Balkanization and gain recognition from world powers as a region. Europe had suffered from its divisions, in comparison to the ‘united’ US. ASEAN lay between the giants of China and India, and paid a price for disunity. A credible regional organization was an imperative. Including ‘human rights’ gave ASEAN additional credibility. It seems that human rights are part of ASEAN not so much because of the dedication of ASEAN member states to human rights principles, as the recognition that ASEAN gained credibility internationally by including human rights in its newly formulated over-all mandate.

4.1.5 THE ERA

One needs to recall the era.

With the ending of the Cold War, tight control over social and political activism eased, and “normative notions of civil society rose to prominence…”142 Foreign aid dropped dramatically in the 1990s, aid conditionality increased and economic sanctions were imposed on grounds of ‘human rights’ by the UN, the US, the EU and many Western states. A series of major UN sponsored world conferences were held to establish new roles and possibilities for the post-war era: the Rio World Conference on Environment and Development, 1992; the Vienna World Conference on Human Rights, 1993; the Cairo World Conference on Population and Development in1994; the Copenhagen World Summit for Social Development in 1995; the Fourth World Conference on Women in Beijing in 1995; the Second World Conference on Human Settlements in 1996; the World Food Summit in 1996. UN rules that restricted the presence or participation of CSOs in UN events to organizations that had already been granted “consultative status” were waived, for it was predominantly Western based organization that had the status. Three gay and lesbian organizations were accredited to the 1993 Vienna World Conference on Human Rights and eleven to the Beijing women’s conference in 1995.

142 Kelly Gerard, 17.
A Western led agenda of ‘trade not aid’ saw the revision of the General Agreement on Tariffs and Trade and the founding of the World Trade Organization in 1995. Massive demonstrations in Seattle in 1999 sought to block the holding of a WTO meeting, marking the start of a decade of major anti-globalization demonstrations. All meetings of the World Bank/International Monetary Fund faced public protests, including an annual meeting held in Bangkok in 1991. Sometimes meetings were held in locations civil society could not easily get to – Rocky Mountain House in Canada, Doha in the Gulf.

ASEAN was potentially on the bad-guys list of neo-liberal capitalist globalizing institutions, so it needed to be seen as more than just a trade organization. Provisions on human rights served this purpose. It was important that ‘civil society’ be inside conference events or in officially approved parallel gatherings, rather than blocking roads outside conference centers and clashing with the police. All of the world’s major inter-governmental economic and trade bodies sought to give civil society some space and some recognition, while expressing some extent of support for human rights and environmental protection.

With the left in decline in the region, and the weakness of trade unions, it was still necessary to contest critiques of ASEAN’s neo-liberal economic agenda, by packaging the alliance as ‘people oriented and people centered.’

…struggles in Southeast Asia over political representation in the last half century have been conducted in the context of legacies from Cold War suppression of independent civil societies and rapidly mounting economic globalization, a context decidedly unfavourable to the political left.

In this context, ASEAN appointed an Eminent Persons Group to propose the content of a charter for the organization. The members were told to be bold and visionary and to conduct wide-ranging consultations especially with “representatives of the civil society.” Consultations did

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143 Kelly Gerard sets out examples in Chapter2 of her book, with a chart for five major governance institutions on pages 18-19.
144 Garry Rodan, Competing Ideologies of Political Representation in Southeast Asia, 2012, 33(2) Third World Quarterly, 311 at 313. The political left has been eclipsed almost everywhere. Only in Latin America are LGBTI rights seen as a leftist project.
145 Kelly Gerard, 88.
take place, though decidedly limited. The EPG recommended language on human rights for the charter, but did not recommend the establishment of a human rights commission/mechanism/body.

### 4.1.6 THE CHARTER

The *ASEAN Charter* of 2007 committed member states to the promotion and protection of human rights, with provisions

- (a) in the preamble,
- (b) the stated “purposes” of ASEAN and
- (c) the “principles” of ASEAN.

As well there are commitments to non-interference in the internal affairs of ASEAN member states, in sections 2 (a), (e) and (f)). These references co-exist uneasily with the declaration of overarching human rights goals. We need to remember that this pairing of competing provisions parallels the provisions in the *United Nations Charter*, which speak of human rights, and also non-interference in domestic matters.

Principle 2 (h) of the *ASEAN Charter* speaks of adherence to “the principles of democracy”, though three member states in 2007 did not have democratic governments, and Brunei, one of the three, had no goal of establishing democratic institutions.

Indonesia, it seems, was particularly supportive on the inclusion of human rights. Tan Hsien-Li writes that Indonesia “tried to take the regional lead in human rights and democracy under Susilo Bambang Yudhoyono’s leadership.”  

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146 Tan Hsien-Li, 77.
The most contentious issue was the human rights mechanism. On the evening of 26 July [2007] the ten members of the HLTF [High Level Task Force, charged with drafting] were divided into three camps:

(i) Cambodia, Laos, Myanmar and Vietnam were opposed to the creation of an ASEAN Human Rights Commission;
(ii) Indonesia and Thailand were in favour; and
(iii) Brunei, Malaysia, the Philippines and Singapore occupied the middle ground.

The HLTF drafted a clause that would put off to some future time the establishment of a human rights body. But Foreign Ministers, who had earlier instructed the HLTF to include a human rights commission, rejected this clause. “Strong words were exchanged and emotions ran high.” A modest clause emerged pledging the establishment of an ASEAN “human rights body.” This was reviewed the following morning by the Foreign Ministers, who supported the provision. Some members of the HLTF greeted the Foreign Ministers decision supporting a “human rights body” with disbelief, for it was a surprise reversal of position by the opposing states.\(^{149}\) There had been a trade-off negotiated between Jakarta and Manila, on the one hand, and Laos, Myanmar and Vietnam on the other. In exchange for the dropping of a push for majority voting in ASEAN, the opposing states accepted the creation of a human rights body.

The topic that dominated the HLTF’s discussions concerned human rights and the contentious question of a human rights mechanism. It is over this topic that a bargain was struck which would stymie progress towards changing ASEAN’s constitutive norms. According to Dosch,

in July 2007 … Jakarta and Manila managed to achieve approval for the clause on the establishment of a regional human rights body in a compromise that avoided the introduction of a majority voting mechanism. The Vietnamese, Laotian and Burmese governments saw changes to consensus-based decision-making in ASEAN as the greater evil.

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\(^{149}\) Tommy Koh, The Negotiating Process, in Koh, Manolo, Woon, 2009, 59-60. Foreign ministers would have been the individuals most aware of the growing strength of international concerns for human rights. If economic ministers had been the guiding force, their perceptions would have been different. Human rights had been kept out of the GATT and the WTO, though they were becoming important for bodies like the World Bank and the Asian Development Bank.
Thus when the charter was unveiled consensus decision making and non-interference remained unchanged while the establishment of an ASEAN Human Rights Body was secured.\(^{150}\)

Acrimony continued in the HLTF over the issue. The *Terms of Reference* for the “body” would be determined by the *ASEAN* Foreign Ministers separately from *Charter* provisions.\(^{151}\)

4.1.7 THE ASEAN INTERGOVERNMENTAL COMMISSION ON HUMAN RIGHTS.

Article 14 of the *Charter* committed *ASEAN* to a human rights body:

In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

*ASEAN* formulated *Terms of Reference* (*TOR*) for the body. Article 3 of the *TOR* states that the body

…is an inter-governmental body and an integral part of the ASEAN organizational structure. It is a consultative body.

The “Purposes” of the *AICHR* are broadly worded. They contain one cautionary provision, some of which comes directly from the *Vienna Declaration and Programme of Action*:

1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.

As well the *AICHR* is authorized


\(^{151}\) Tommy Koh, pages 62-63.
1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.

The Terms of Reference tell the Commission to respect the ASEAN principle of “non-interference in the internal affairs” of member States (2.1 (b)), but also to respect “fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice” (2.1(e)). This familiar juxtaposition of ‘non-interference’ in domestic affairs together with overarching human rights standards, is part of the UN Charter, the TOR and the subsequent ASEAN Declaration on Human Rights.

Section 2.2 adds language that has regularly been used by states seeking to limit the scope or application of human rights in UN debates. The Commission must act with “impartiality, objectivity, non-selectivity, non-discrimination, and avoidance of double standards and politicization.” Article 2.3 cautions that the “primary responsibility to promote and protect human rights” rests with each member State. Article 2.5 calls for an “evolutionary approach” to the development of human rights norms (a ‘don’t rush us’ provision).

The various state actors involved in drafting the TOR each got the particular language formulations they wanted: “universality, indivisibility, interdependence and interrelatedness,” on the one hand, and concerns for national “religious backgrounds” and “non-interference” on the other.

1.4 To promote human rights within the regional context, bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities.

1.6 To uphold international human rights standards as prescribed by the Universal Declaration of Human rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN Member States are parties.\(^{152}\)

\(^{152}\) See also “universality” language in article 2.2.
The “particularities” wording (juxtaposed with the universality principle) comes from the *Vienna Declaration and Programme of Action*, and in *ASEAN* is repeated in the *Terms of Reference for AICHR* and in the *ASEAN Human Rights Declaration*.

There must be some drafting term for this amalgamation of competing themes. Drafters of labor collective agreements say that the different parties must all get something that they can cite as a victory or advance for their side. No one should leave the bargaining session completely empty handed. So it is with the various states of *ASEAN* in the *Charter*, the *TOR* and other agreed provisions. A precise resolution of the competing themes is put off for another day.

The *Terms of Reference* were desperately disappointing for the CSOs that had sought to help create an AHRB independent of government interference and one capable of protecting human rights. … Indeed, far from being independent of government the ToR detailed how the Representatives were dependent on government support to remain in office. Article 5.2 states that the Representative ‘shall be accountable to the appointing Government’, and in Article 5.6 that ‘the appointing Government may decide, at its discretion, to replace its Representative’.  

The ToR’s affirmation of ASEAN constitutive norms [of consensus and non-interference] thus revealed that the member states were not prepared to establish a body that was independent and able to hold them accountable for breaches of their own peoples’ human rights. Only one member – Indonesia – fought for a protection mandate, and this reveals that it was not only those HLTF members that had resisted the AHRB that had concerns about AICHR, but also so-called more liberal members. In this regard it is worth noting that neither Thailand nor the Philippines backed Indonesia.  

The *TOR* is being reviewed, five years after it came into effect. On 28-29 April, 2014, two consultations were held on revision. The first day was between *AICHR* and *ASEAN* sectoral bodies. The second day was with

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154 Alan Collins, 2013, 98. Collins goes on to describe then current issues in Thailand and the Philippines which would explain an aversion to outside monitoring.
“Civil Society Organizations and Stakeholders including national/regional/international CSOs, National Human Rights Institutions, Related Human Rights organizations.”

The members of the AICHR are appointed by each of the ten ASEAN states and “are accountable to the appointing Government” (5.2). The chair of the AICHR will be the representative from the state currently holding the chair of ASEAN, which changes each year. No one commissioner gets to dominate the body over time as the ongoing chair. Perhaps the major procedural constraint is the requirement of consensus in decision making, expressly provided in article 6.1. The major institutional constraints are that representatives are unpaid, part time, and have no separate secretariat to support their work. Representatives serve for three years, and can be consecutively re-appointed for only one additional term. The appointing Government has the power, in its discretion, to replace its representative at any time (5.6).

Open selection processes were established by two countries, Thailand and Indonesia, resulting in commission members with some independence from government (and who were already active in the Working Group). For the others, membership has been is a simple in-house government appointment.

Many of the AICHR representatives chosen had little experience in working on human rights issues and moreover had previously held official positions. The exceptions were Indonesia and Thailand who appointed experienced civil society leaders, Rafendi Djamin and Sriprapha Petcharamesre respectively, to AICHR.

The Thai commissioner was initially the only female member. She has commented that some of the ASEAN member states do not want the Commission to be strengthened.

AICHR has engaged with national, regional and international NGOS on particular occasions. It has developed terms of engagement with civil society organizations. Applications for accreditation have started.

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156 Tan Hsien-Li, 160.
Organizations must be registered in their home countries (a requirement not to date imposed for participation in the ACS/CAPF).

As to the powers that AICHR possesses, what AICHR professes to do is somewhat contradictory. On the one hand, it has an express purpose to promote and protect human rights and fundamental freedoms of ASEAN peoples and uphold international human rights standards as prescribed by the Universal Declaration of Human Rights (UDHR), the 1993 Vienna Declaration and Programme of Action, and other international human rights instruments to which ASEAN member states are parties. On the other hand, it is constricted by having to (only) ‘promote human rights within the regional context, bearing in mind national and regional particularities’, maintain respect for different historical, cultural, and religious backgrounds, and also strike the right balance between rights and responsibilities. Additionally, AICHR’s adherence to the ASEAN Way was reiterated, that it would pursue a non-confrontational agenda, and adopt an ‘evolutionary approach that would contribute to the development of human rights norms and standards in ASEAN. AICHR’s mandate specified in the TOR for its first five-year term of operation seems unduly limited. As mentioned previously, AICHR has no powers of investigation or to accept individual petitions. It is instead to develop an ASEAN Human rights Declaration, enhance capacity building and public awareness of human rights through education, research, and dissemination of information, provide advisory services and technical assistance, and carry out thematic studies of human rights issues in ASEAN.\textsuperscript{157}

A large (if soft) agenda for a body with no office or support staff.

Singapore had made a plea for baby steps on a human rights commission in a 2008 speech, already quoted in part. If there was “too much ambition” in a proposal, that would “scuttle” the whole project, the speaker said. Better to be cautious and look to evolutionary change.

A few years ago, it would have been difficult to imagine that ASEAN would commit itself to establishing a human rights body of any kind. But we have clearly moved ahead. Perceptions and policies towards

\textsuperscript{157} Tan Hsien-Li, 157-158.
human rights in ASEAN countries will continue to develop over time. So we should allow the functions of this human rights body to evolve. Too much ambition can as easily scuttle this important project as too little. Third, we must not set artificial deadlines for the creation of a new institution or create an institution simply to be able to say that we have established one. We must ensure that this ASEAN human rights body is credible and meaningful to its members. We must be realistic. However, a direction has been set from which there is no turning back. Thus, as we feel our way forward, realism and the need to establish consensus should not be an excuse for inaction. An important responsibility has been placed on ASEAN and we should not be found wanting.\textsuperscript{158}

We await the evolution of this commission. There is no express authority to receive complaints, seek visits, request government explanations, meet with NGOs and CSOs, report on individual issues or on the performance of particular governments. There can be a consensus decision to report on thematic issues. But Professor Vitit Muntabhorn, one of the founders of the \textit{Working Group for an ASEAN Human Rights Mechanism} is often quoted as saying that what the \textit{Terms of Reference} does not prohibit is not forbidden.\textsuperscript{159} The \textit{UN Charter} is also silent on such matters. Implementing ‘human rights’ at the UN level proved to be a very slow and incremental process over the last seventy years. There have been pauses and disputes, but over time no reversals, no backsliding. Human rights have become more and more central to the work of the world body. The same may prove to be the case with \textit{ASEAN}.

Tan Hsien-Li, in her study of the \textit{AICHR} is cautious:

\textbf{Even as ASEAN becomes more accepting of human rights, building the ASEAN Intergovernmental Commission on Human rights (AICHR) into a fully fledged regional mechanism is yet to be fully welcomed by its member states.}\textsuperscript{160}

ASEAN declarations now routinely speak of the promotion and protection of human rights. The \textit{Kuala Lumpur Declaration on a People-
Oriented, People-Centered ASEAN of April, 2015, is an example. Under the ‘political-security’ heading, the governments agree to:

Continue to promote the principles of democracy, rule of law and good governance, social justice, as well as to promote and protect human rights and respect for fundamental freedoms;

Encourage the ASEAN Inter-Governmental Commission on Human Rights and other Sectoral Bodies related to human rights to continue to have meaningful and constructive engagement with relevant stakeholders, including accredited civil society organizations, in the promotion and protection of human rights and fundamental freedoms, in accordance with the ASEAN Human rights Declaration.

We can note a decision of the African Commission on Human and Peoples’ Rights in April-May, 2015, to grant observer status to the Coalition of African Lesbians (after lengthy deliberations). An NGO forum precedes the sessions of the African Commission, and in April-May 2015 the Forum agreed on six country resolutions and recommendations on nine different thematic issues.161

4.1.8 THE ASEAN HUMAN RIGHTS DECLARATION

The Terms of Reference instructed the AICHR to draft a human rights declaration (4.2)

…with a view to establishing a framework for human rights cooperation through various ASEAN conventions and other instruments dealing with human rights…

The drafting process was only slightly open to civil society participation.

The actual drafting was done by a ‘drafting group’ of human rights experts appointed by AICHR. The terms of reference provided to the drafting group were not made public. No drafts of the Declaration were ever officially made public either, although two were leaked to the public during the course of the drafting process. Civil society

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organisations (CSOs), which had demanded from the outset that the
drafting process be transparent and inclusive, were largely excluded
from participation. Only two regional consultations were held
between AICHR and CSOs, and both occurred when the Declaration
was largely completed. Some individual AICHR representatives held
national-level consultations with CSOs, but it is difficult to say what
effect these consultations had. The UN High Commissioner for
Human Rights said of the drafting process, ‘[t]his is not the hallmark
of the democratic global governance to which ASEAN aspires, and it
will only serve to undermine the respect and ownership that such an
important declaration deserves’.

The ASEAN Human Rights Declaration was adopted by ASEAN in
2012. The Declaration is generally a conservative or somewhat restricted
restatement of current international human rights standards, with no
references to controversial issues in the region such as ‘indigenous peoples’
or LGBTI rights. A few parts of the Declaration can be noted:

- The standard non-exhaustive list of prohibited categories of
discrimination replaces the usual reference to “sex” with the term
“gender”. This was apparently in response to the Thai Commissioner
urging the inclusion of sexual orientation and gender identity. It is
unclear what the representatives thought “gender” would signify.
Were they thinking of the transgender categories familiar in most
parts of Southeast Asia (such as kathoey, bakla and waria). The terms
‘sex’ and ‘gender’ are often treated as synonyms, but the substitution
in Article 2 of the Declaration was deliberate, as if the terms had
separate meanings. Perhaps ‘gender’ is more open-ended.

- Article 6 states that the enjoyment of human rights “must be balanced
with the performance of corresponding duties as every person has
responsibilities to all other individuals, the community and the society
where one lives.” No equivalent provision is found in UN or
European instruments.

- Article 7 repeats the caution that human rights “must be considered in
the regional and national context bearing in mind different political,

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economic, legal, social, cultural, historical and religious backgrounds.” While this ‘balancing’ wording traces back to the Vienna Declaration, the Terms of Reference for AICHR and other ASEAN instruments, it has been used in practice to justify discrimination against LGBTI individuals on grounds of religious beliefs (as in Malaysia), or, using more secular language, state deference to the “conservative” social values in individual societies (as in Singapore). The main societal arguments against SOGIE rights are here given specific credibility.

- Article 16 refers to a right to seek asylum, but the right would not apply when national laws and international agreements are not in place (and that is the reality in most states in the region).

- Article 19 refers to the right of men and women to marry, language taken from the UDHR and the ICCPR. This language has been interpreted by the UN Human Rights Committee to cover only marriage between men and women. Legal constraints on intermarriage between Muslims and non-Muslims in jurisdictions with sharia law are apparently a violation of the article.

- Article 27 (2) on trade union rights would seem not to extend to industries for which unions are prohibited, as is the case, for example, in some sectors of production for export in Malaysia.

- Article 28 on the right to an adequate standard of living goes beyond UN and European provisions.

- Article 29 (1) on the right to health, specifically includes “reproductive health”, again going beyond UN and European treaty provisions, but consistent with UN and European declarations. Article 29 (2) on communicable diseases, specifically including a reference to HIV/AIDS, is notable. Article 30 (2) on paid maternity leave is also notable.

- The Declaration includes provisions on the ‘right to development’ and the ‘right to peace.’

What are the roles for AICHR? The Terms of Reference for AICHR are silent on any complaint process, any fact finding missions, any visits to
member countries. Perhaps ‘anything that is not forbidden is allowed’ as Professor Muntabhorn has often said. Article 4.10 says that AICHR can obtain information on what is going on in member states. In 2013 Indonesia voluntarily invited AICHR to meet with government representatives to discuss issues there. The government of Thailand followed, inviting a country visit and a discussion with a panel of government officials on migrant workers, particularly in the fisheries sector. Could the AICHR issue statements on issues like the commentaries issued by the UN treaty bodies?

There were no individual petitions or complaints when the Inter American Commission was established – it took 10 years before that became possible. The system now gets around 2,000 each year.

[Look at the August, 2015, Joint Communique of the Foreign Ministers, for it has a number of sections on human rights – “unprecedented” said someone.]

4.2 EMBRACING CIVIL SOCIETY

Are ASEAN and the AICHR open to the involvement of CSOs and NGOs?

One of the purposes stated in the ASEAN Charter reads:

13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building.

Subsequent statements speak of a “people-oriented” and “people-centered” ASEAN.

Article 16 of the ASEAN Charter speaks of “Entities Associated with ASEAN” with a preliminary listing of these entities as Annex 2. This has not meant any reaching out to human rights NGOs or CSOs.163

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163 That means that article 4.8 of the Terms of Reference of AICHR, which refers back to Article 16, does not give an opening to organizations like the ASEAN Sogie Caucus.
The *Charter* set out the three pillars of *ASEAN*, with human rights part of the Political-Security Pillar. The subsequent *ASEAN Political-Security Community Blueprint* section A.1.5 deals with human rights. The only provision relevant to civil society participation is A.1.5.iv:

Strengthen interaction between the network of existing human rights mechanisms as well as other civil society organizations, with relevant ASEAN sectoral bodies.

The *Terms of Reference of AICHR* calls for the body

4.9. To consult, as may be appropriate, with other national, regional and international institutions and entities concerned with the promotion and protection of human rights.

The *Five-Year Work Plan of AICHR (2010-2015)* has two relevant references:

4.9.1. Develop in the Rules of Procedure the modalities and guidelines for consultation with other national, regional and international institutions and entities concerned with the promotion and protection of human rights.

4.12.2 Hold workshop upon completion of the draft of the relevant thematic studies [on human rights issues] for discussion and consultation with the relevant stakeholders as provided for in the Guidelines on the Conduct of Thematic Studies for purposes of obtaining further inputs.

Officially the *AICHR* “consulted and dialogued with representatives of ASEAN Sectoral Bodies, national, regional and international civil society organizations (CSOs) and human rights experts” in the drafting of the *ASEAN Human Rights Declaration*.  

The deliberately cautious and limited references summarized in this section tell us little or nothing of what roles it may be possible for civil society or non-governmental organizations to play in the life of *ASEAN* or the *AICHR*. Such roles will be determined in practice over time.

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4.2.1 ACCREDITATION

There are three special provisions for the recognition or accreditation of civil society organizations with ASEAN or the AICHR.

ENTITIES ASSOCIATED WITH ASEAN

The ASEAN Charter refers to “entities association with ASEAN” and provided a preliminary list of these bodies. There are Guidelines on accreditation of entities associated with ASEAN. The ASEAN website, as of May, 2015, presents a list:

1. Parliamentarians
   ASEAN Inter-Parliamentary Assembly

2. Business Organizations
   Nineteen separate business associations.

3. Think Tanks and Academic Institutions
   ASEAN-ISIS Network (the network originally formed by five national think-tanks concerned with strategic and international studies, with a lead role played by the Singapore Institute of International Affairs).

4. Accredited Civil Society Organizations
   Forty-two separate CSOs, none of which are human rights organizations, though two bodies, one concerned with women and the second with rural poverty, could be so considered.

5. Other stakeholders
   Working Group for an ASEAN Human Rights Mechanism
   Three other organizations, concerned with auditing, food and fisheries.

Familiar human rights CSOs are absent.

In this list, only the privileged position of the ASEAN-ISIS Network and the Working Group for an ASEAN Human Rights Mechanism have been important on issues of promoting human rights and civil society involvement.
When Surin Pitsuwan was Secretary General of ASEAN he was criticized by government representatives for meeting with CSOs, so he had the Indonesian member of the ASEAN-ISIS Network make the arrangements, to minimize the visibility of his role, yet allow some formal discussions with CSOs on AICHR and human rights more broadly.\footnote{165} ASEAN-ISIS also tried to link CSOs with ASEAN by organizing ASEAN Peoples Assembly gatherings, as discussed below.

The role of the Working Group for an ASEAN Human Rights Mechanism has been discussed above. The ASEAN Inter-Parliamentary Assembly and the ASEAN Civil Society Conference/ASEAN Peoples Forum are not part of the formal structure of ASEAN. ASEAN institutions involve the executive branches of the ten governments, not legislatures or civil society organizations.

CIVIL SOCIETY ORGANIZATIONS AND ASEAN

ASEAN rules to accredit Civil Society Organizations were first issued in 1986, and revised in 2006 and 2012. The current document, from 2012, is the Guidelines on Accreditation of Civil Society Organisations. It refers to Article 16 in the ASEAN Charter that provides that ASEAN “may engage with entities which support the ASEAN Charter…” There is a List of Accredited CSOs as of May 11\textsuperscript{th}, 2015. It names fifty-two “Accredited Civil Society Organisations.” Two are concerned with women and youth.\footnote{166} Others, representing economic or employment sectors, may have some commitment to human rights.

CIVIL SOCIETY ORGANIZATIONS AND AICHR

Guidelines on the AICHR’s Relations with Civil Society Organisations were adopted on February 11\textsuperscript{th}, 2015. The organizations must have been in existence for at least two years “with a legally established entity in one of the ASEAN member states, appropriate mechanisms of accountability and democratic and transparent decision-making processes.” This and other qualifying characteristics require a degree of formal...
organization that is untypical of LGBTI advocacy organizations in the region. Singapore does not allow the legal registration of LGBTI rights organizations. In many parts of ASEAN it is gay-run health organizations which are registered, have offices, publish financial records and have some public advocacy roles in relation to human rights. At present there is probably no explicitly LGBTI human rights advocacy organization in the region which would qualify for accreditation. Entities such as the ASEAN SOGIE Caucus, the Asian branch of the International Lesbian and Gay Association, the regional office of the International Gay and Lesbian Human Rights Commission would not currently qualify. Accreditation by supportive international human rights organizations such as Amnesty International, the International Commission of Jurists and Human Rights Watch may or may not get accreditation.

**REASONS FOR ACCREDITATION**

At this stage in the evolution of ASEAN human rights activities there is a significant unanswered question. What are the benefits of ‘accreditation’? The general pattern, as already suggested, is that ASEAN institutions are not open to civil society engagement. It seems fair to say that none have institutionalized any patterns of engagement, even for the special exceptions of ASEAN ISIS and the Working Group. Such patterns will emerge, and for that reason there is justification for CSOs to seek accreditation – and patiently wait for the evolution of practice within ASEAN while working for change.

4.2.2 **THE ASEAN CIVIL SOCIETY CONFERENCE / ASEAN PEOPLES FORUM**

ASEAN People’s Assemblies began to be held organized independently from ASEAN itself. Funding came from various sources and coordination was by members of the ASEAN ISIS group of think tanks whose focus was on security and development (and who were already in a relationship with ASEAN political leaders as an academic/research organization). ASEAN ISIS had tried and failed to get official ASEAN sponsorship of civil society events. Over ten years (2000 to 2009), seven events were held, two in Indonesia and five in the Philippines. ASEAN ISIS set the agenda and chose participants. Some ASEAN and governmental figures attended, but that participation declined over time. CSOs chaffed at ASEAN ISIS’ control of the events.
CSO organized regional gatherings started in 2000. *Solidarity for Asian People’s Advocacy (SAPA)*, a network of CSOs was put together in 2006, bringing together around a hundred organizations.\(^{167}\)

SAPA has been a crucial organizing force for Southeast Asian CSOs seeking to target ASEAN. The source of its leadership lies not only in the willingness of civil society leaders to pursue broad alliances, despite political differences. SAPA has also played the lead role in the organization of the ASEAN Civil Society Conference, which has become the central parallel summit for groups seeking to influence ASEAN policy. Additionally, by drawing on the research capacities of its various members, SAPA has been able to present a coherent alternative regional project, articulating a concerted position for an alternative regionalism that constitutes “a counter-hegemonic challenge to the dominant ASEAN framework of conservatism, illiberal political governance and neo-liberal economics”.\(^{168}\)

In 2009 SAPA opened an *ASEAN People’s Centre* in Jakarta, the site of the *ASEAN Secretariat*.

Credit for institutionalizing the *ASEAN Civil Society Conference* in 2005 goes to Prime Minister Abdullah Badawi, when Malaysia was the rotating chair of *ASEAN*. Malaysian Prime Minister Mahathir Mohammad had stepped down in 2003 after two decades in power. Badawi was his chosen successor, a man with excellent family Islamic credentials, and a gentlemanly manner. He proceeded to initiate some liberal reforms, and to cancel or scale back some of his predecessors grand projects. In the 2004 election he received the strongest mandate in Malaysian history. In 2005 he was at the peak of his power and prestige, and still seen as a fresh breeze and a reformer.

Abdullah commissioned the ASEAN Study Centre at the Universiti Teknologi of Mara to coordinate the event. The ASEAN Standing Committee recognized this initiative as part of the official proceedings of the ASEAN Leaders Summit. This was a historic event as never before had there been a space for civil society at the

\(^{167}\) Kelly Gerard, 77.
\(^{168}\) Kelly Gerard, 78.
Leaders Summit. Approximately 120 representatives of CSOs from across the region participated and the ASEAN People’s Statement that they produced was posted on the ASEAN website. An interface meeting was held for 15 minutes, during which ASEAN leaders recognized the value of the ACSC and agreed that it should be convened annually. However, there had not been any discussion or negotiation of this decision prior to the interface meeting, and the idea of recognizing the ACSC as ASEAN’s official civil society forum was later dropped.  

Kelly Gerard correctly notes that Badawi’s creation of the *ASEAN Civil Society Conference* was

…a remarkable act when considered against the Malaysian state’s historical efforts to regulate, and restrain, civil society advocacy.  

The *ASEAN Civil Society Conference* has been held in subsequent years under each chair, except for Brunei in 2013. Kelly Gerard gives a lively account of the series of meetings, with heavy handed tactics sometimes used to censor and control CSO activities, particularly for the meetings in Cambodia.  

The chairing country controls arrangements, for the ACSC is not formally recognized as an official ASEAN event. Surprisingly, CSO representatives saw the 2014 chairmanship of Myanmar as quite successful. And in 2015 Malaysia kept boasting that it had started the whole process in 2005, and arrangements went very smoothly in Kuala Lumpur on that anniversary. 2015 may have been the best event in the series. What will happen in Laos in 2016?

The first recognized LGBTI presence in the ACSC/APF was in 2010, and the first LGBTI ‘caucus’ was active in 2011 in Indonesia, where three SOGI concerns were included in the final people’s statement. It was called the *ASEAN Peoples Forum* in 2009 and 2010, and since then ACSC/APF. ASEAN has had two leaders meetings each year since 2009, and the ACSC/APF is held each time. In April, 2015, with Malaysia as

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169. Kelly Gerard, 118.
170. Kelly Gerard, 159. Such an innovation would have seemed more likely to come from Thailand, Indonesia or the Philippines. Badawi’s time as Prime Minister was brief, and generally seen as unsuccessful. His initiatives in his early months were welcomed as promising, but implementation was seen as a failure. The ACSC was one innovation, and it failed to gain official status within ASEAN.
171. Kelly Gerard, 115-127,
ASEAN chair, 1,400 people participated in the ACSC/APF events. There was a mix of plenary sessions and workshops over three days, concluding with a ‘solidarity parade’ (technically in violation of Malaysia’s strict legal rules on demonstrations). The ACSC/APF statement was prepared in advance of the April meetings, so it could be circulated to ASEAN leaders in the period in which they were working out any joint declarations or decisions. It was formally presented to the ASEAN leaders in a brief ‘interface’. It possibly had some impact on the April, 2015, Kuala Lumpur Declaration on a People-Oriented, People-Centered ASEAN, which was already being drafted.

The ACSC/APF process has been criticized on the grounds that the ‘interface’ between civil society representatives and ASEAN leaders is very short (15-30 minutes), that the CSO representatives who attend the interface meeting are often those chosen or approved by their home governments and for the reality that some governments may not even be represented at the event. As well there are criticisms that ACSC/APF statements are routinely not reflected in decisions by the ASEAN leaders. The statements have not been focused on immediate decisions about to be taken by ASEAN. To accommodate the broad grouping of disparate CSOs who participate in the ACSC/APF, the statements strongly condemn the general thrust of economic development in ASEAN as elite driven, a maximum challenge to ASEAN and its ways. No reasonable observer would expect the statements to effect change.

The real benefits of the ACSC/APF seem to be
(a) the networking among civil society representatives that occurs,
(b) the information and analysis gained from the panels, speakers and workshops, and
(c) the reminder to governments that active CSO organizations are closely following their work.

4.2.3 ACTIVITIES OF AICHR WITH CIVIL SOCIETY

All the following examples of AICHR events from 2013 onwards are taken from the website of the AICHR. This retelling tries to note any involvement of civil society representatives. Though some events represent individual initiatives of particular commissioners, and are described as such, they are, however, reported on the AICHR website as AICHR events.
**AICHR** early took on two thematic studies, on migration, and on business and human rights, both clearly non-controversial choices. Migration is a well established regional and international concern. The UN was already drafting standards on business and human rights and ‘corporate social responsibility’ policies were increasingly common.

On 16-20 November, 2013, **AICHR** held a five day workshop on human rights training for around thirty people – police, government officials, judges, university educators - from the ten **ASEAN** countries. This was one of a series of annual training sessions that is part of the **AICHR**’s five year work plan. A number of civil society figures participated in the training, including Professor Vitit Muntabhorn from the Working Group for an **ASEAN Human Rights Mechanism**, and Gerald Joseph (who went on to chair the 2015 **ASEAN Civil Society Conference** in Kuala Lumpur).

For the launch of the **AICHR Thematic Study on Corporate Social Responsibility and Human Rights in ASEAN**, a workshop was held in Singapore on 13-14 June, 2014, with about 80 participants “comprising of CSR and human rights practitioners, and other regional stakeholders from government, business and civil society…”

**AICHR** has held two workshops on the UN Development Goals, the first in Jakarta in November, 2012, the second also in Jakarta in October 2014.

On 17-18 November, 2014, the **AICHR Workshop on Regional Mechanisms: Best practices on Implementation of Human Rights** was held in Bangkok, organized by Seree Nonthasoot with partial support from **UN Women** and under a **Regional EU-ASEAN Dialogue Instrument**. The workshop included participation of experts from other regional human rights systems (Europe, Americas, Africa) and representatives from government agencies, national human rights institutions and civil society organizations.

On 27-30, November, 2014, the **AICHR Training of Trainers on ASEAN Human Rights Mechanisms** for law enforcement officers was held in Bali. As in other training programs, experts not connected directly with **AICHR** or other **ASEAN** bodies were involved in some of the training.

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On 17-18 December, 2014, the AICHR organized a regional workshop on domestication of human rights obligations in Luan Prabang, Laos. Participants represented ASEAN institutions or member governments.

On 11-14 February, 2015, the 17th meeting of the AICHR adopted activities for the year:

The adopted activities include workshops, dialogues and consultations on prospective regional human rights instruments, protection of women and girls from violence, human rights training of journalists and the human rights dialogue with the ASEAN Community Councils and an ASEAN Youth Debate. The AICHR also began the groundwork for drafting the new Five Years AICHR Work Plan for the period of 2016-2020.

At the 18th meeting, 6-9 May, 2015, AICHR announced plans for (a) a Workshop on Human Rights Obligations Relating to the Environment and Climate Change, (2) a Regional Workshop on the Role of Youth in Promoting Human Rights in ASEAN, and (3) the first ASEAN Symposium and Dialogue on the Role of the Judiciary in the promotion and Protection of Human Rights in ASEAN. The last will be held in Kuala Lumpur on October 10th, 2015.

On 25-26 May, 2015, AICHR held the first AICHR Dialogue with ASEAN Community Councils on the ASEAN Human Rights Declaration in Jakarta. There are separate ‘councils’ of government officials for each of the three ‘pillars’ of ASEAN, political-security, economy and socio-cultural.

The First ASEAN Symposium and Dialogue on the Role of the Judiciary in the Promotion and Protection of Human Rights in ASEAN will be held on October 10th 2015 in Kuala Lumpur.

4.2.4 INITIATIVES OF INDIVIDUAL REPRESENTATIVES

When AICHR started its website it decided that it would include any national level activities of representatives on the site. Perhaps the fact that representatives are responsible to their home governments (which can replace them at will) suggested that control over national level activities was
a concern of home governments, not \textit{AICHR}. Since \textit{AICHR} made decisions by consensus, there would be no confusion as to what was a decision of \textit{AICHR} and what was an activity of an individual representative. Individual initiatives could not foist any programmatic commitments on \textit{AICHR} as a whole. Given that representatives were unsalaried and part-time, there was probably little expectation that representatives would have highly active programs of their own. In any case, such individual initiatives must have seemed unthreatening, potentially boosting the image of \textit{AICHR}, without committing it to any course of action. A provision in the \textit{Terms of Reference} limiting outside funding to ‘promotion’ and not ‘protection’ reflects some concern of the drafters to limit initiatives.

\textbf{4.2.5 THE THAI REPRESENTATIVE}

Sriprapha Petcharamesree, as an individual commissioner, gained funding from the \textit{Canadian International Development Agency} and the \textit{Open Society Institute} for projects. The \textit{Terms of Reference} specify that outside funding can only be used for “human rights promotion”, not “protection” (8.6).

On 14 March, 2013, her successor, Seree Nonthasoot, held a consultation with representatives of CSOs involved with women’s rights, to “inform the AICHR’s direction on drafting the ASEAN Convention on the Elimination of Violence against Women.”

On 17 April, 2013, Seree Nonthasoot participated in a meeting organized by the Ministry of Foreign Affairs of Thailand to consult with Thai civil society organizations. This consultation was in advance of the 22\textsuperscript{nd} ASEAN Summit in Brunei.

On 23 September, 2013, Seree Nonthasoot held a consultation with CSOs on draft guidelines of the AICHR’s relations with CSOs.

On 17 October, 2013, Seree Nonthasoot held a one day consultation on AICHR’s study on migration with experts from government agencies, academic institutes and CSOs.

On 4 February, 2014, Seree Nonthasoot held his annual consultation with CSO representatives.
4.2.6 THE INDONESIAN REPRESENTATIVE

Rafendi Djamin, the Commissioner from Indonesia, has been an active individual commissioner in convening events drawing in a wide range of participants, including representatives of CSOs. He has been responsible for a Jakarta Human Rights Dialogue series of meetings, the second held in November, 2013, on torture.

The Jakarta Human Rights Dialogue is an initiative aimed at fostering cooperation and building a culture of dialogue, looking to build trust between ASEAN governments, National Human Rights Institutions, academicians, Non-governmental Organizations, Civil Society, and Victims’ Organizations. The dialogue was supported by the Indonesian Ministry of Foreign Affairs, the German Embassy in Jakarta, the Swiss Embassy in Jakarta, the UN High Commissioner office Regional Office in Bangkok, Association for the Prevention of Torture (APT), and organized by Indonesia Representative to AICHR, CSIS, and Human Rights Working Group.174

On 21 April, 2015, Rafendi Djamin held a workshop ASEAN Human Rights Mechanism Post-2015: An Indonesian Perspective, in Jakarta, for over one hundred “key national stakeholders”, coming from government agencies, academia, media, civil society, and members of the diplomatic corps.

The event was the first of a series of Public discussion and Debate on Human Rights in ASEAN, which will be held throughout the year by the Representative of Indonesia to the AICHR in collaboration with the Dutch Embassy in Jakarta.

4.2.7 LGBTI INCLUSION?

In the events organized by AICHR itself, or by individual commissioners, no LGBT CSOs have been involved or included. Nor is there any evidence that SOGI issues were raised, considered or debated. This reflects

(a) the newness and lack of institutionalization of the ASEAN SOGIE Caucus, and any alternative regional or national LGBT entities,

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(b) the limited openings for CSOs in the work of *AICHR*,
(c) the limited openings for established human rights NGOs (all of which have SOGIE rights included in their concerns),
(d) the ‘conservative’ views of most *ASEAN* states on SOGIE issues,
(e) the openly hostile views on SOGIE issues of Malaysia and Brunei,
(f) the apparent lack of initiatives on SOGIE issues from any figures within *ASEAN* or *AICHR*.

This will change, but it is hard to see, at the moment, where effective initiatives will come from. And it must be remembered that any lack of access is a general pattern, in spite of *ASEAN* rhetoric. Kelly Gerard presents rather pessimistic conclusions to her excellent study. She concludes in her 2014 book that CSOs “are largely ineffectual in shaping *ASEAN* policy.”

Absent from all sanctioned modes of participation are groups working on issues deemed even more contentious by officials, such as political reform in Myanmar, land evictions in Cambodia or the disappearance of environmental activists. *ASEAN*’s issue-sensitive approach to civil society engagement thus sidelines advocacy that is deemed threatening to its political project. In doing so, a broad range of CSO concerns are excluded… *ASEAN*’s failure to institutionalize interactions established outside of official processes, namely the *ASEAN* People’s Assembly, the interface meeting of the *ASEAN* Civil Society Conference, the Regional Tripartite Social Dialogue, the *ASEAN*-ISIS Colloquium on Human rights and the Dialogue on Democracy and *ASEAN* Integration, ensures that officials can disregard these forums when CSOs use these spaces to contest policy or promote different ideas…

Which is to say that the struggle of LGBTI CSOs to be heard is still at an early stage. When participants in the 2015 *ASEAN Civil Society Conference* held a flag ceremony, with various representatives waving large national flags on stage, a handful of activists, in front of the stage, unfurled a rainbow flag. Off stage. But there. A brief flurry of rainbow colors.

### 4.3 BODIES SUPPLEMENTING THE AICHR

175 Kelly Gerard, 157-8.
The ASEAN Intergovernmental Commission on Human Rights is described in its Terms of Reference as “the overarching human rights institution in ASEAN with overall responsibility for the promotion and protection of human rights in ASEAN” (6.8). What this means is unclear, for a separate Commission the Rights of Women and Children has been established, said to reflect the fact that all ten ASEAN member states are parties to the UN conventions on women and on children. As well, in 2007 ASEAN adopted a Declaration on the Protection and Promotion of the Rights of Migrant Workers. The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers is charged with drafting an instrument or convention on migrant workers. ASEAN convenes a yearly Forum on Migrant Labour. An ASEAN Institution for Peace and Reconciliation began functioning in December, 2013. As in the UN and European systems, there are a number of bodies and processes, and more keep getting set up.

In 1988 the ASEAN Institute of Security and International Studies was established, bringing together leading national ‘think tanks’ in ASEAN. ASEAN-ISIS has a privileged “Track 2” status with ASEAN giving it privileged access. Its focus on economic and security issues puts it at the heart of ASEAN concerns.

...in 1993 the heads of the ASEAN-ISIS institutes began meeting annually with the ASEAN Senior Officials’ Meeting. In 1999, seeking contributions to post-crisis reforms, the ASEAN foreign ministers also began meeting with ASEAN-ISIS. ... The close ties between states and ASEAN-ISIS has limited the latter’s capacity to engage with CSOs... ...it was not until after the regional financial crisis, examined below, that ASEAN extended its engagement of non-state actors beyond business interests, through the ASEAN Chamber of Commerce and Industry, and economic and security policy technocrats, through the ASEAN-ISIS network.176

A prominent role in ASEAN-ISIS is played by the Singapore Institute of International Affairs (SIIA), which was established in 1961, headed now by Professor Simon Tay, a regular commentator on ASEAN and

176 Kelly Gerard, 62-63.
Asian issues, and a former nominated member of the Singapore parliament. The SIIA holds an annual one day ASEAN and Asia Forum in Singapore. The 8th annual forum will be held in 2015.¹⁷⁷ There is also an ASEAN Studies Centre as part of the Institute of Southeast Asian Studies at the National University of Singapore.

As well there is an ASEAN Corporate Social Responsibility Network. An ASEAN Business and Investment Summit ran parallel to the ASEAN Summit from November 11-13, 2014, in Nay Pyi Taw, when Myanmar was chair of ASEAN. There is an Asean Business Club and the Asean Business Advisory Council.¹⁷⁸

There are supporting academic or research bodies in the region, separate from ASEAN itself. The Centre for Human Rights and Peace Studies at Mahidol University in Bangkok, which has an Asian focus, was the lead body in establishing SEAHRN, the Southeast Asia Human Rights Network, which holds biennial conferences for people teaching human rights in various institutions throughout ASEAN. SEAHRN conferences have been held in Bangkok, Jakarta and Kuala Lumpur (and next in the Philippines). One SEAHRN project is the creation of a set of resource materials for teaching human rights in ASEAN, which will include a chapter on sexuality issues.

While the Mahidol program was the first graduate program in Asia on human rights, there are now other teaching programs in human rights. There are human rights centers at Ataneo de Manila and at the University of Indonesia, both connected with law faculties.

The ASEAN focused Human Rights Resource Centre is based at the Depok campus of the University of Indonesia in west Java. It has partnership agreements with eight or more universities in ASEAN. Its fourth major publication was a massive study on freedom of religion in the region released in early 2015.

Academic conferences sometimes include human rights issues, and sometimes issues of sexual orientation and gender identity. A large academic conference Sexualities, Genders and Rights in Asia was held in

¹⁷⁷ See www. siiaonline.org.
¹⁷⁸ Lim Cheng Teck, CEO for ASEAN at Standard Chartered Bank, Making the Asean economic integration a reality, The Nation (Bangkok) June 1, 2015, 3B.
Bangkok in 2005, with some papers published subsequently. It was organized by academics based in Australia and Thailand. The Centre for Asian Legal Studies at the National University of Singapore held a conference on The Life and Future of British Colonial Sexual Regulation in Asia in October, 2015. The chief organizer was NUS Assistant Professor Lynette Chua, whose study Mobilizing Gay Singapore: Rights and Resistance in an Authoritarian State, was published by Temple University Press and the National University of Singapore in 2014. Individual papers on human rights and LGBTI issues are often part of conferences such as ASLI, the annual Asian law schools meet, or sessions organized by Asian studies academic organizations, such as the Association for Asian Studies (US) and the International Centre for Asian Studies (based in the Netherlands).

There are coalitions or federations of human rights NGOs in the region, notably

**FORUM Asia (Asian Forum for Human Rights and Development)** with 49 member organizations in various parts of Asia, and an office in Bangkok,

**SAPA (Solidarity for Asian People’s Advocacy)** founded in 2006 and with around 100 member organizations, and 3 sub-regions, South Asia. Southeast Asia and East Asia, and an annual General Forum,

**SEACA (Southeast Asian Committee for Advocacy).**

On LGBT issues, there is

**ASC (ASEAN SOGIE Caucus),**

**ILGA Asia** (the Asian branch of the International Lesbian and Gay Association, which holds semi-annual conferences), and

**IGLHRC (the International Gay and Lesbian Human Rights Commission)**, a US based NGO with a staff member based in Manila and a

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179 Papers on SOGI issues are a regular feature in the annual meetings of Asian law schools, and in academic conferences such as those of the International Institute of Asian Studies and the Association of Asian Studies. The International Association for the Study of Sexuality and Culture in Society has met in Asia once, in Hanoi.

180 Kelly Gerard, 77-79.
SAPA has been a crucial organizing force for Southeast Asian CSOs working to target ASEAN. The source of its leadership lies not only in the willingness of civil society leaders to pursue broad alliances, despite political differences. SAPA has also played the lead role in the organization of the ASEAN Civil Society Conference, which has become the central parallel summit for groups seeking to influence ASEAN policy. Additionally, by drawing on the research capacities of its various members, SAPA has been able to present a coherent alternative regional project, articulating a concerted position for an alternative regionalism that constitutes “a counter-hegemonic challenge to the dominant ASEAN framework of conservatism, illiberal political governance and neo-liberal economics”. The SAPA Work Group on ASEAN established the ASEAN People’s Centre in Jakarta on 15 January 2009 to promote engagement between CSOs and ASEAN, given that the ASEAN Secretariat is also based in Jakarta.\footnote{Kelly Gerard, 78.}

Interaction between these two sets of entities is low, and publications of \textit{FORUM Asia}, SAPA and SEACA do not seem to touch on LGBT issues. SAPA has various task forces, with specific mandates. Perhaps it could develop one on issues of sexual orientation and gender identity (which could bring the \textit{ASEAN SOGIE Caucus} within a regional structure familiar to ASEAN politicians and bureaucrats.

Local LGBT NGOs in ASEAN are typically small, often health focused and with low visibility and limited resources. \textit{ASEAN SOGIE Caucus} has a fill-time coordinator, based in Manila and a floating set of activists from parts of the region. It is new. It is young. It has links to IGLHRC, and held a two day workshop following the \textit{ILGA Asia} regional conference in Bangkok in 2013. It has links to the \textit{International Commission of Jurists} and \textit{Freedom House}. ASC activists will meet again in Taipei for \textit{ILGA Asia} in October, 2015. ASC will continue to participate in the \textit{ASEAN Civil Society Conference/ASEAN Peoples Forum}.  

\footnote{Kelly Gerard, 78.}
4. INTERNATIONAL HUMAN RIGHTS

Human rights, as we now understand them, have evolved over the post-war period, with the United Nations and Europe playing lead roles. The 1945 *United Nations Charter* supported human rights and fundamental freedoms. The meaning of those terms was first spelled out in the 1948 *Universal Declaration of Human Rights*. In addition there are a dozen human rights treaties, some general, others on specific subjects like women or torture. These treaties are supplemented by various declarations, and by ‘expert’ rulings and studies. All ASEAN states are subject to the *Universal Periodic Review*, which examines their progress in implementing human rights, a ‘peer review’ conducted by other states who are members of the United Nations.

In 2012 UN Secretary General Ban Ki-moon in Kampala lectured the government of Uganda on gay rights. Such an action, by a top UN official, was inconceivable at any point between 1945 and 2011.

It is hard now to remember a world without computers, the internet, Lonely Planet guidebooks, or an international agenda called ‘human rights.’ Each was a new invention. Each was born at specific points in time, more or less – and each evolved dramatically.

The human rights agenda did not appear in 1945 as a result of NGO or civil society lobbying. The modern pattern of human rights NGOs came later. There would have been some international women’s organizations active in the 1940s, but they are not referred to in the literature on the formation of the UN or on the drafting of the *UDHR*. No LGBT NGOs existed in the period able to lobby internationally (and almost none at national levels as well). Human rights became part of the new international arrangements as a result of decisions of governments.

One of the surprising aspects of the innovation was that the leadership occurred at the international level. The *Universal Declaration of Human Rights* of 1948 went beyond the human rights achievements of any domestic legal system of the time. The US was just starting on racial desegregation. Discrimination on various grounds, such as sex, race and religion, was
commonplace in the West, and everywhere else. The *UDHR* was an agenda for change, and that agenda continues to be far from fully achieved anywhere.

The ‘human rights’ agenda was announced in the *United Nations Charter* in 1945 and initially elaborated in the *Universal Declaration of Human Rights* of 1948 and the *European Convention on Human Rights* of 1950. The founding documents have obvious limitations: (a) no provisions on minority rights, (b) nothing on decolonization, (c) no investigatory or enforcement provisions at the United Nations, and only a partial adjudicatory system in Europe. But ‘human rights’ as an agenda was launched. The baby was born. Would it survive infancy? The European Enlightenment had flourished and died.\(^{182}\) The *League of Nations* had fallen apart before reaching the age of 30. Success was far from certain for the UN and the new ‘human rights’ project.

It was decades before the *European Court of Human Rights* (a) got much business, in the way of cases (for years it had only part-time judges), and (b) became credible (by not simply deferring to states with a broad, deferential ‘margin of appreciation’). It was two decades before the UN (a) got actual human rights treaties, (b) permitted the discussion of violations by specific named states, and (c) established the potentially activist expert ‘special procedures’ (treaty committees, working groups, independent experts).

Adhesion to UN human rights treaties was slow. US President Eisenhower said the UN should drop the process of elaborating new human rights treaties, in favor of voluntary state reports. Since that time the US has been notorious for not signing or ratifying UN treaties – the refusal to adhere to the *Convention on the Rights of the Child* is simply the most famous.

As already noted, in the 1990s two founding members of *ASEAN*, Singapore and Malaysia, led a challenge to the ‘universality’ of the United Nations human rights system, a challenge that had broad support in the developing world. They argued that there were Asian values of deference to family, community, religion and society that were not recognized in the individualistic context of UN declarations and human rights treaties. Asian

\(^{182}\) Janet Polasky, in Revolutions without Borders, Yale, 2015, describes how enlightenment ideas spread, and how these initiatives lapsed in Europe and America. German sociologist Jurgen Habermas has referred to the Enlightenment as an “unfinished project…”
values, they said, formed part of the basis for the economic success of Asia in the period.

‘Asian values’ were a reaction to a new aggressiveness of Western states on human rights and labor rights in the 1990s, after the ending of the Cold War. Western critics saw the ‘Asian values’ arguments as designed to legitimate authoritarian governments and ‘crony capitalism.’ In their arguments, Singapore and Malaysia had support from many other states, including China (which sought to speak for the developing world). The Asian financial crisis of 1997-98 undermined ideas of Asian exceptionalism, dooming ‘Asian values’ arguments more than any other single factor. China moved on. It placed ‘human rights’ in its constitution, and signed the International Covenant on Civil and Political Rights as part of its campaign to gain entry into the World Trade Organization. Various other Asian countries signed additional UN human rights treaties.

Singapore, Malaysia and Brunei are now highly exceptional holdouts, having signed only the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Rights of People with Disabilities. Myanmar is similar in not having signed the two landmark general UN human rights treaties, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. Both opened for signature in the period after the 1962 military take-over in the country which began a period of self-imposed isolation.

The slow response of states in Asia to the new, evolving, international ‘human rights’ system is not really out of line with the slow response in general, just a bit of a longer lag.\textsuperscript{183}

The UN expanded the content of recognized human rights, slowly, step by step, with various treaties and instruments:
(a) the convention against racism in 1965,
(b) ICCPR and ICESCR in 1966,
(c) women in 1979,
(d) torture in 1984,

\textsuperscript{183} Major breakthroughs in the West involved the Helsinki Final Act in 1975 (between the US-led Western Bloc and the USSR-led Eastern Bloc), and the adoption of ‘human rights’ as an element in inter-state diplomacy (including aid conditionality) by US President Jimmy Carter in the late 1970s, copied quickly by foreign affairs ministers in the UK and Canada (David Owen and Flora McDonald).
e) children in 1989,
f) migrant workers in 1990 (the first UN human rights treaty to be initiated and pushed politically by an Asian state, the Philippines),
g) a declaration on cultural minorities in 1992,
h) a successful world conference on human rights in Vienna in 1993,
i) forced disappearances in 2006,
j) people with disabilities in 2006,
k) a declaration on indigenous peoples in 2007, and
l) resolutions in 2011 and 2014 supporting LGBT rights.

Asia is not strongly represented at the United Nations. Asia-Pacific accounts for roughly 55% of the world’s population and 44% of its annual income. It has two countries with populations over one billion, and five countries with populations in excess of 100 million. Africa has many countries with modest populations. It has roughly the same number of independent states as Asia, and so approximately the same voting strength in the UN General Assembly, where each state has one vote. In the UN Security Council Asia-Pacific has 3 seats out of the total of 15.

5. HUMAN RIGHTS COMMITMENTS OF ASEAN STATES

All ASEAN states are signatories to the United Nations Charter of 1945, and are expected to adhere to the provisions of the Universal Declaration of Human Rights of 1948. This means that they are committed to principles of universality, equality, and non-discrimination. They are also subject to various UN procedures, such as the investigations of human rights experts and the Universal Periodic Review process.

All ASEAN member states are parties to CEDAW, the Convention on the Elimination of Discrimination against Women, and CRC, the Convention on the Rights of the Child. CEDAW and CRC have repeatedly affirmed that all human rights are universal and that sexual orientation and gender identity are grounds protected from discrimination under international law.
(Cite particular recommendations of treaty bodies such as CRC General Comment 15 which identifies sexual orientation and gender identity as prohibited grounds of discrimination; and the 2009 General Comment No. 20, Non-discrimination in economic, social and cultural rights of the ICESCR.)

Most ASEAN member states are parties to other international human rights instruments, including the landmark two general human rights treaties, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.

The General Comments or Recommendations by treaty bodies relating to sexual orientation and gender identity under these international instruments are relevant to understanding the scope of human rights obligations of states. Decisions by treaty bodies, notably *Toonen v. Australia* (on sodomy laws) and *Young v Australia* (on equal spousal rights), are important moments of recognition of LGBTIQ rights in the UN human rights system.

ASEAN states have ratified various international human rights treaties:

**Brunei**: CEDAW, CRC [signed CRPD]

**Cambodia**: CERD, CCPR, CESR, CAT, CRC, CRPD.

**Indonesia**: CERD, CCPR, CESR, CAT, CEDAW, CRC, CMW, CRPP [signed CPPED].

**Laos PDR**: CERD, CCPR, CESCR, CAT, CEDAW, CRC, CRPD [signed CPPED].

**Malaysia**: CEDAW, CRC, CRPD.

**Myanmar**: CEDAW, CRC, CRPD.

**Philippines**: CERD, CCPR, CESR, CAT, CEDAW, CRC, CMW, CRPD.

**Singapore**: CEDAW, CRC, CRPD.

**Thailand**: CERD, CCPR, CESCR, CAT, CRC, CEDAW, CRPD.

**Vietnam**: CERD, CCPR, CESCR, CEDAW, CRC, [signed CRPD AND CAT].
Attitudes towards specific human rights issues in ASEAN states varies. All ASEAN countries, except the Philippines, retain the death penalty for certain offences, most famously for drug trafficking. Passengers on flights into ASEAN countries are regularly reminded of the fact that the death penalty has been retained for drug trafficking. In 2015 Vietnam moved to reduce the number of crimes for which the death penalty could be imposed. For now, at least, it would be retained for drug trafficking. Abortion is prohibited in the Philippines and in Thailand (and perhaps in other ASEAN states). Polygamy is recognized in some states or sub-state units, and not in others. Decentralization in Indonesia has resulted in some local ‘sharia’ laws regulating women’s clothing and activities as well as homosexuality. Uneven patterns.

Because of the limited pattern of ratifications of UN human rights treaties, discussions of ‘human rights’ in ASEAN rely on the Universal Declaration of Human Rights and the Vienna Declaration and Programme of Action (agreed to at the 1993 Vienna World Conference on Human Rights).

There are particular moments when ASEAN states decide to open to international human rights instruments. Cambodia’s adhesions are largely a result of the period in which the country was under UN trusteeship. Thailand ratified the Convention against Torture during the military government in 2007, to be seen as supportive of human rights. Indonesia responded to international criticism of the Santa Cruz massacre in what is now Timor Leste with the establishment of a human rights commission and the hosting of a UN human rights seminar. After the forced retirement of Suharto, the new president wanted to forge a progressive image.

…as interim president, [Habibe] had to respond to the people’s clamour for ‘reformasi’ – political and economic reform – right after Suharto stepped down from office, Habibe liberalized the media by revoking the 1984 law which allowed the cancellation of press publication licences and instituting Law No. 9 of 1998 on the “Freedom to Express One’s Views before the Public.” Political freedoms were upheld during this period as political prisoners were released, new political parties were allowed, parliamentary

184 Compassionate communists, The Economist, June 20, 2015.
adjustments made, and free elections were held in 1999. Nevertheless, there was not the open restitution of civil liberties especially with respect to the media and the holding of opinions. Habibe had exhorted that in the process of Indonesia’s reform, the freedom of expression needed to be exercised responsibly in line with Pancasila values through laws and a ‘maturing culture of democracy’.

International human rights were also acknowledged with Habibe’s government swiftly ratifying ILO conventions pertaining to the right to organize, minimum age of employment, gender-based wage discrimination, and the elimination of forced labour. The Convention against Torture (CAT) and the Convention on the Elimination of Racial Discrimination (CERD) were ratified in 1998 and acceded to in 1999 respectively. Indonesia had also announced in January 1998 a National Plan of Action on Human rights (1998-2003) to incorporate international human rights treaty commitments into domestic legislation, improve human rights awareness and public education. Unfortunately, however, this has not resulted in any significant policy follow-up or substantive improvements even after the National Plan of Action on Human Rights (2004-9). To entrench human rights further into the national consciousness, a Bill of rights was even introduced into the constitution under Chapter XA, thereby enlarging the standing protections that were provided by Article 28.\(^{185}\)

6. INTERNTIONAL HUMAN RIGHTS AND SOGIE ISSUES

THE BEGINNINGS

The evolution of “human rights” in the post-war period now includes equality rights on the basis of sexual orientation, gender identity and expression and intersexuality. This recognition came well after developments on race, sex and disability – and is still contested by particular states.

\(^{185}\) Tan Hsien-Li, 84-84.
The first known statement at the UN urging a recognition of homosexual rights was made by a woman, a junior minister in the Dutch government, at the *Third World Conference on Women*, in Nairobi, in 1985.\(^\text{186}\) The second, and the first by an ‘out’ activist, was made by the present author, a male, in 1992, in the *UN Sub-Commission on Prevention of Discrimination and Protection of Minorities*.

**THE TOONEN DECISION**

The first positive outcome on SOGIE rights in the UN system came in the 1994 decision of the Human Rights Committee in *Toonen v Australia*. The Committee, which monitors compliance with the *International Covenant on Civil and Political Rights*, heard a case from Australia arguing against an old British colonial era sodomy law that survived in the state of Tasmania. All other state governments in Australia had repealed such laws. Technically the case was against Australia, but the national government preferred to lose, while allowing Tasmania to submit arguments. Tasmania argued that the law should be retained in the face of the AIDS epidemic. Both Australia and UNAIDS regarded such criminal laws as making programs of education and prevention around AIDS more difficult. The health argument supported decriminalization.

The Human Rights Committee held that the law represented both a denial of equality rights and discrimination on the basis of “sex”, prohibited by the *Covenant*. There already had been three decisions of the European Court of Human Rights ruling against such criminal laws, so clearly a new specific human rights standard was being confirmed. When Louise Arbour, the UN High Commissioner for Human Rights, first spoke out in favor of LGBT equality at an international conference in Montreal in 2006, she was able to rely on the *Toonen* decision as establishing equality rights for LGBT individuals. Two subsequent decisions of the Human Rights Committee have upheld equality rights of same-sex couples in cases involving pensions.

Here is a quick summary of the major decisions by the Human rights Committee under the *International Covenant on Civil and Political Rights*.

\(^{186}\) Swiebel, 25. Other sources note the first UN statement by an “out” activist, made by the present author, a male, in 1992 in the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.
These are decisions by a UN ‘expert’ body, not a UN ‘political’ body, and apply, technically, only to countries that have ratified the ICCPR.

- In 1994, in Toonen v Australia, the United Nations Human Rights Committee ruled against an anti-homosexual criminal law in Tasmania on the ground of privacy and equality rights.
- In 2002, in Joslin v. New Zealand, the Committee rejected equal marriage for same-sex couples on the basis of the explicit language of section 32(2) of the Covenant, which, they held, restricted the right to marry, as set out in the treaty, to “men and women…”
- In 2002, in Young v Australia, the Committee ruled in favor of the same pension rights for a surviving same-sex partner as for a surviving heterosexual partner.
- In 2007, in X v Colombia, the Committee again ruled in favor of equal spousal pension rights for a surviving same-sex partner. Two members of the Committee dissented, disagreeing with the previous decision in Young v Australia.
- In 2012, in Fedotova v Russian Federation the Committee ruled that a broad Russian law against any public “propaganda” in favor of homosexuality that could be seen or heard by children violated freedom of speech. Expressing opinions and information about homosexuality could not be limited in the name of public morality.

It is now widely accepted that any criminal law prohibiting same-sex sexual activity violates international human rights standards. In the UN’s Universal Periodic Review process, countries with such laws are regularly told they should be repealed.187

LESBIANS IN BEIJING

The first major debate on homosexual rights in a UN political forum was at the Fourth World Conference on Women, in Beijing, in 1995. The first gay or lesbian organizations to gain NGO ‘consultative status’ at the UN were lesbian groups, the first in 1994 and the second in 1998 (working

in the context of women’s conferences and the women’s convention).  

The Beijing women’s conference is remembered as the real launch of these issues at the UN.¹⁸⁸

Eleven explicitly lesbian or lesbian and gay organizations were accredited to the conference in Beijing.¹⁹⁰ There was a ‘lesbian tent’ at the NGO forum and a lesbian march on September 5, 1995. Two Canadian women unfurled a banner “Lesbian Rights are Human Rights” from an observer’s balcony in the main conference hall. Security guards hastily intervened.

In preparatory meetings leading up to the Conference, several delegations, including South Africa, Canada, Israel and the EU proposed wording that referred to “sexual orientation.” One proposal addressed discrimination against women on multiple grounds, such as sex and race, sex and disability, sex and sexual orientation. The four references to “sexual orientation” in the draft Platform of Action were considered together in a drafting committee meeting that stretched into the early morning of the final day, Friday, September 15th, ending after 4 a.m. After an hour of debate on sexual orientation, the chair, Ms Patricia Licuanan of the Philippines, commented that this had been the first substantive discussion of the subject in any United Nations forum. She said it required much more discussion, but given the division, the references would be omitted.¹⁹¹ Thirty-three States indicated their support for the references.²⁰ Two States indicated

¹⁸⁸ They were the Coalition of Activist Lesbians and International Wages Due Lesbians. See Patricia Curzi, Lesbian Movements: Ruptures and Alliances, ILGA, 2009, 65-67. Because the lesbian organizations worked in women’s forums, they were invisible to gay men, who assumed that ILGA’s attempt to gain NGO accreditation in the early 1990s was unprecedented. But also they were invisible because they did not sustain an active presence at the UN.

¹⁹⁰ Many would see the decision of the UN Human Rights Committee in Toonen v Australia in 1994 as the launch. Others would remember the ‘Brazilian resolution’ events of 2003-2005 as the starting point. Others might see the December, 2010, resolution restoring “sexual orientation” to the mandate of the Special Rapporteur on extrajudicial killings as the launch. But each of those events is now eclipsed by the passage of the 2011 and 2014 resolutions in the UN Human Rights Council on June 17, 2011.

¹⁹¹ Information from Ms. Shelagh Day, NGO representative for EGALE (Equality for Gays and Lesbians Everywhere, Ottawa) and the National Association of Women and the Law (of Canada). See also Rod Mickleburgh, Lesbians and Fish Stories Conference Highlights, Globe and Mail (Toronto), September 15, 1995, 9; Jonathan Manthorpe, Lesbianism as “right” an Elusive Goal, Vancouver Sun, September 14, 1995, 11; Canadian Press, UN Officers Detain 2 Canadians, Vancouver Sun, September 9, 1995, 1; Jocelyne Dubois, Lesbians Ready for Beijing, Xtra Newspaper (Toronto), August 18, 1995, 18.

¹⁹² Information from Ms. Shelagh Day, NGO representative, who attended the drafting committee meeting. See also Rod Mickleburgh, Women’s Rights Spelled Out Clearly, Globe and Mail, September 16, 1995, 1; Patrick Tyler, Forum on Women Agrees on Goals, New York Times, September 15, 1995, 1. Australia, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Cook Islands, Cuba, European Union (15 States), Israel, Jamaica, Latvia, New Zealand, Norway, Slovenia, South Africa, Switzerland and
opposition. The diplomatic preference for consensus decision making prevailed. A fight on the floor during the closing plenary had to be avoided.

Five years after the Beijing conference, a special UN General Assembly session in June 2000, revisited women's equality issues. Again the debate was intense, and again there was no consensus on adding any reference to "sexual orientation" even in a sentence that was drafted as a factual comment.

EXTRAJUDICIAL EXECUTIONS

In the 1960s the UN began what are referred to as the ‘special procedures’ a set of mechanisms that are not based on wording in the UN Charter or in specific treaties. They include working groups on specific topics (such as arbitrary detention), and ‘special rapporteurs’, ‘special representatives’ and ‘independent experts’ appointed to report on individual countries or specific issues (such as human rights in North Korea or violence against women).

In the annual meeting of the Commission on Human Rights in 2001 certain delegates objected to the inclusion of cases of extrajudicial executions of sexual minorities in the report of Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions. Delegates argued that she had overstepped her mandate by addressing these crimes. The resolution renewing her mandate was stripped of language explicitly recognizing that sexual minorities, among other groups, were vulnerable to extrajudicial executions.

This incident came a couple of months before a letter was circulated by the Office of the High Commissioner for Human Rights indicating that six thematic special rapporteurs “were interested in receiving information on sexual minority issues falling within their respective mandates...” The
annual reports of these independent experts now contain information on sexual orientation issues if relevant information has come to the rapporteur’s attention. Individuals and NGOs can forward information directly to the special rapporteur.

Asma Jahangir, the Special Rapporteur on Extrajudicial, Summary, and Arbitrary Executions, continued to investigate cases involving sexual orientation and gender identity and send urgent appeals to particular governments about incidents. Again her work was challenged. In 2002, in the Commission on Human Rights, Pakistan, on behalf of the Organization of the Islamic Conference (OIC), moved to delete two references to sexual orientation in the resolution extending her mandate. The motion was defeated, 28 to 15, with 9 abstentions. This reversed the hostile decision taken by the Commission in 2001. The resolution on extrajudicial, summary and arbitrary executions, renewed periodically, was the only resolution ever adopted by the Commission on Human Rights to include an express reference to “sexual orientation.” When special procedures mandate holders include material on sexuality or sex/gender groupings, they routinely got criticism. This occurred, for example, in 2009 for both the Special Rapporteur on Violence against Women and the Special Rapporteur on Torture.

Opponents targeted the resolution on Extrajudicial Executions again in 2010. On November 17th, Benin, in the 3rd Committee of the General Assembly, acting on behalf of the African group, moved to delete the words “sexual orientation”. The motion passed by 79 votes in favor, 70 in opposition (with 17 abstentions). China and Indonesia voted to delete. India and the US voted to retain. None of the ten members of the Association of Southeast Asia Nations supported retention.

This loss was a bitter blow for the LGBT NGOs active at the UN, and a slap in the face to the High Commissioner for Human Rights and the

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Gender Identity, Action Alert, IGLHRC, June 5, 2001. The six were the Special Rapporteur on extrajudicial executions, the Special Rapporteur on violence against women, the Special Rapporteur on torture, the Special Rapporteur on the independence of judges and lawyers, the Special Rapporteur on freedom of expression, and the Special Representative of the Secretary-General on human rights defenders. The Commissioner had approached the thematic rapporteurs and not the country specific rapporteurs. Voting in favor of deletion were Algeria, Bahrain, China, Democratic Republic of the Congo, Indonesia, Kenya, Libya, Malaysia, Pakistan, Saudi Arabia, Sudan, Syria, Togo, Vietnam and Zambia. The countries abstaining were Argentina, India, Nigeria, Russia, Senegal, Sierra Leone, South Africa, Swaziland and Uganda.

Secretary General, both of whom had condemned criminalization and violence aimed at sexual minorities. The US announced on December 10th that it would move to restore the words when the resolution came before the plenary session of the General Assembly. In this tight eleven day ‘window of opportunity’ local LGBT groups were urged by Geneva based activists to lobby their home governments to support the restoration. On December 21st the words were restored by a vote of 93 in favor, 55 opposed, 27 abstentions and 17 member states absent. Supporting states had gone from 31 in 2005, to 54 in 2006, to 66 in 2008, and now to 93. This was still not a majority of UN member states, but enough to pass the motion, given abstentions and absentees.

In Asia supporters were India, Israel, Japan, Nepal, South Korea, and Timor-Leste. Opponents included members of the Organization of Islamic Cooperation and states in Sub-Saharan Africa. China and North Korea opposed. The Philippines, Thailand and Vietnam abstained. South Africa supported deletion in November (in solidarity with the African group), but backed the US sponsored resolution in December.

The resolution came up for reauthorization in November, 2014. In the General Assembly Egypt moved an amendment to remove all references to groups that were particularly at risk of extrajudicial killings. That gained 53 votes in support, but was defeated by 86 votes against. Subsequently the resolution was adopted with a yes vote from 111 states, and 64 abstentions.

THE BRAZILIAN RESOLUTION

In April 2003, with no advance warning, Brazil introduced a resolution, “Human Rights and Sexual Orientation”, in the Commission on Human Rights. In broad terms, it sought equal human rights for lesbians and gay men. The Brazilian representatives had not followed standard diplomatic practice in consulting with other government delegations in advance. Apparently they hoped that the resolution would slip through in the dying days of the Commission session. They wanted to act before the Cardoso administration came to an end in Brazil.

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198 Not included are votes of Australia, New Zealand or Pacific island countries.
199 A detailed account of the events around the Brazilian resolution is found in Francoise Girard, Negotiating Sexual Rights and Sexual Orientation at the UN, in Sex Politics, Sexuality Policy Watch, 311.
The resolution quickly gained 27 co-sponsors. Pakistan, on behalf of the Organization of the Islamic Conference, moved a “no action” motion. That procedural move was defeated, permitting consideration of the resolution itself.^{200} The United States delegation received instructions from Washington to abstain in any vote. Amnesty International issued a statement of support.

Amendments were proposed by Saudi Arabia, Pakistan, Egypt, Libya and Malaysia affecting all paragraphs of the draft resolution.^{201} Pakistan threatened to move a hundred more amendments. The goal was to block any vote. Time was running out. The resolution and amendments were put over for consideration to the next session in 2004. Pakistan, as coordinator of human rights and humanitarian issues for the Organization of the Islamic Conference, circulated a letter to other OIC missions in Geneva. It listed a set of arguments against the Brazilian resolution.

The concept of “sexual orientation” has never been defined in the UN. It has hardly ever figured in a UN document. Efforts to do so have always created enormous controversy and discord. … The list of sexual behaviour could always be expanded to include grossly errant behaviour like pedophilia. … In our perspective sexual orientation is not a human rights issue. Instead it is related to social values and cultural norms. Individual countries need to deal with this issue within the parameters of their own social and legal systems. … The concept of the traditional family constitutes the foundation of the human civilization.^{202}

The Holy See, which has observer status at the United Nations, also circulated its views on the Brazilian resolution.

This appears to be a preliminary step to claiming equal treatment regarding “marriage” for persons of the same sex, and regarding adoption for “unisexual households.” This attempt might be facilitated if a request were made to the Sub-Commission on Human

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^{200} 24 member States voted for action, while 22 voted for no action. 53 States were members of the Commission.

^{201} Andrew Osborn, Muslim alliance derails UN’s gay rights resolution, The Guardian, April 25, 2003.

Rights to undertake a study on discrimination on any grounds, including “sexual orientation.”

This short document dealt with marriage and adoption three times, clearly a central concern. Like the Pakistan Ambassador’s letter, it argued that “sexual orientation” has not been recognized in international human rights law (ignoring the 1994 Toonen decision).

Around fifty lesbian and gay activists traveled to Geneva for the 2004 session of the Commission to support the Brazilian resolution. No comparable lobbying effort had ever been made in the past and a number spoke in Commission sessions. The lobbyists were active and visible. They organized panel discussions, parallel to the Commission sessions. Argentina, Brazil, Canada, Germany and Sweden used their speeches in the ‘high-level’ session to state their concern with discrimination on the basis of sexual orientation. Brazil announced the launch of its “Brazil without Homophobia” educational campaign, but did not mention the resolution.

In contrast, opposition was silent or indirect.

Rather ominously the Pakistani delegate concluded his statement on behalf of the OIC by stressing the need for co-operation and understanding, and warning against “efforts to create new rights not sanctioned by existing treaty law” arguing that they would be “high fractious, divisive and counterproductive.” In implicit reference to the postponed resolution of Brazil on sexual orientation, the delegate asserted “attempts to develop norms which directly contradict fundamental value systems need to be avoided (…) No Islamic society would be able to accept any obligation which directly contradicts the basic tenets of our religion”.

Brazil did not reintroduce the motion in 2004. It issued a statement that more time was necessary for consultations with other states in hopes of building a consensus. The resolution was deferred to the next annual session.


In advance of the 2005 Commission session the International Commission of Jurists published a compilation of international human rights law references to sexual orientation and gender identity. It demonstrated, in over a hundred pages of detailed text, the extent to which sexual orientation issues had already been recognized in the special procedures, the treaty bodies and the refugee system. Around 60 gay and lesbian representatives traveled to Geneva, organizing parallel panel sessions and lobbying governments.

The resolution was not introduced again in 2005, ending the Brazilian initiative. The official reason given was a lack of support in the Commission. The resolution would not pass. Both the German delegation and Human Rights Watch, an NGO, believed that there were probably enough votes to pass the resolution if the obstructive tactics of opposing states could be overcome. One organizer analyzed the position of various countries, concluding that approval or rejection lay with 7 states whose votes he could not predict. In contrast, a prominent opponent estimated a vote at the 2005 session of the Commission of 23 against the resolution, defeating 20 or 21 supporters, with about 11 abstentions. What created the possibility of majority support for the Brazilian resolution was a combination of votes from the West and from Latin America – plus the possibility of support from countries like South Africa, South Korea, Japan and the Philippines – and abstentions.

Western states expressed a reluctance to take over sponsorship of the resolution from Brazil. The German delegation, probably the strongest supporter of the Brazilian resolution, said European sponsorship would be

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206 A delegation representing the Metropolitan Community Church met with the Honorable Nilmario Miranda, Brazilian Minister for Human Rights in Brazilia, May 5, 2004. The Minister told the delegation that the resolution was withdrawn because sufficient votes did not exist for passage. See Press Release, Metropolitan Community Churches, May 7, 2004, copy in possession of the author.

207 Scott Long of Human Rights Watch stated: “When we counted the votes, there was a strong possibility the resolution would pass.” Quoted in Brazil withdraws gay rights UN resolution, friday on-line magazine, friday com, April 9, 2004.

208 John Fisher of ARC International concluded that there were 16 member states that would vote “yes”: Argentina Australia, Austria, Brazil, Croatia, France, Germany, Hungary, Ireland, Italy, Mexico, Netherlands, Peru, Sweden and the United Kingdom. In addition 8 others were likely to vote yes: Armenia, Chile, Honduras, Paraguay, Russia, South Africa and Ukraine. The votes of the following member states could not be predicted: Costa Rica, Cuba, Dominican Republic, Guatemala, Japan, Republic of Korea and the United States. Probable “no” votes were predicted for Bahrain, Bhutan, Burkina Faso, China Eritrea, Ethiopia, Gabon, India, Nepal, Sierra Leone, Sri Lanka, Swaziland and Togo. “No” votes would come from Congo, Egypt, Indonesia, Mauritania, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Uganda and Zimbabwe. Analysis of March 12, 2004, circulated on the list chr@list.arc-international.net.

the “kiss of death.” It would further polarize the issue between Western and non-Western countries, already a major problem for the issue within the UN. A member of the South African delegation said that the perception of developing states was that Brazil “was being used by the EU to push the resolution” because, it said, Brazil gave no reason for the initiative. South Africa had no interest in taking over the Brazilian initiative, saying it would only support resolutions that dealt with discrimination in general, or focused on development issues. South Africa wanted to retain a leadership role in the African group, and support for the Brazilian resolution conflicted with that goal. So different reasons led various states to do nothing.

AFTER THE FAILURE

After the failure of the Brazilian resolution, a pattern developed of a grouping of states making a statement supporting SOGIE rights in the Commission on Human Rights. As a statement, not a resolution, there would be no vote. In 2005 New Zealand delivered a joint statement on behalf of 31 states (both current Commission members and other UN member states). In 2006, 54 states signed on to a Norwegian statement that urged attention to the issues. The French-Dutch-Argentinean statement in the General Assembly in 2008 gained 66 supporters, then 67 when Barack Obama came to office in the US and retroactively added the US to the list. A joint statement in 2011 had 85 states. The General Assembly vote on the Extrajudicial Executions resolution in 2010 saw 93 states support the resolution. Support was growing.

The UN High Commissioner for Human Rights and the Secretary General began speaking on the issues. As noted earlier, Louise Arbour, as High Commissioner, supported SOGIE rights at a 2006 world conference on LGBT human rights in Montreal, relying on the Toonen decision. The convening of the gathering of human rights experts to draft the Yogyakarta Principles was very much a strategy of using the “expert” parts of the UN system in a period when substantial movement in the “political” bodies still seemed impossible. After all, the Brazilian resolution had failed, and the only resolution to pass was on Extrajudicial Executions, saying that LGBT people should not be murdered.

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211 This was stated by a member of the South African delegation to LGBT activists in 2004: Minutes of the LGBT Working Group – April 15, 2004, copy in possession of the author.
The Yogyakarta strategy of an “expert” document had been suggested by Mary Robinson to leaders of the International Lesbian and Gay Association, when she had been High Commissioner for Human Rights. At the time she made it clear that her office would play no role in such an initiative. When the Yogyakarta meeting took place she was no longer High Commissioner, and she participated in the gathering.

In 2008, Navi Pillay, the current UN High Commissioner for Human Rights, stated:

No human being should be denied their human rights, simply because of their perceived sexual orientation or gender identity. … Those who are lesbian, gay or bisexual, those who are transgender, transsexual or intersex, are full and equal members of the human family, and are entitled to be treated as such.

The High Commissioner’s Strategic Management Plan for 2010-2011 included combating discrimination on the basis of sexual orientation as one of six thematic priorities.

Ban Ki-moon was the first Secretary General to make a statement on SOGI issues. The statement was read at a ‘high level’ panel co-sponsored by 13 states and three NGOs, held in Geneva on September 17th, 2010. Also on the panel were High Commissioner Pillay, and civil society speakers from Guyana, India and Uganda. By video link, Archbishop Desmond Tutu spoke from South Africa. Also by video, transgender activist Sass Rogando Sasot spoke from the Philippines. Ban Ki-moon stated:

Laws criminalizing people on grounds of sexual orientation and gender identity violate the principle of non-discrimination. They also fuel violence, help to legitimize homophobia and contribute to a climate of hate. That is why, in May of this year, during a visit to Malawi, I called for such laws to be reformed worldwide. No doubt deeply-rooted cultural sensitivities can be aroused when we talk about sexual orientation. Social attitudes run deep and take time to change. But cultural considerations should not stand in the way of basic human rights.\textsuperscript{212}

In May, 2011, the High Commissioner’s office issued a document “Tackling discrimination on grounds of sexual orientation and gender identity” quoting from twenty-one agencies and experts. Accompanying the statement was a video, in which the High Commissioner rejected the idea that sexual orientation and gender identity were “new concepts” (as regularly argued by opponents at the UN). She stated that discrimination on such grounds was “no different” than discrimination based on sexism, racism and xenophobia, which were “universally condemned.” She proclaimed:

Equal rights for everyone, whoever they are, whoever they love. It is a great human rights cause, and one that I am proud to support.

THE SOUTH AFRICAN RESOLUTION, JUNE 17, 2011

The South African constitution was the first in the world to prohibit discrimination on the basis of sexual orientation. One of the heroes of the anti-apartheid struggle of the African National Congress, Simon Nkoli, had come out as gay years earlier. The 1955 “Freedom Charter” of the ANC condemned sexual orientation discrimination and leaders said that their experience made them committed to ending discrimination of all kinds. It was clear that this strong ANC commitment to SOGI rights did not reflect majority views in South Africa, but the principle was entrenched in the new constitution of post-apartheid South Africa. It led to judicial decisions ending criminal prohibitions, recognizing spousal rights and opening marriage. As already noted, these developments conflicted with South Africa’s goal of being the leading international voice for Sub-Saharan Africa. South Africa could not be counted on to support initiatives on sexual orientation and gender identity at the UN.

In 2010 and 2011 the politics of these issues were changing at the UN. Both the Secretary General and the UN High Commissioner for Human Rights now publicly condemned criminal sanctions and violence against LGBT individuals. Latin America, as a bloc, now supported LGBT rights, with active leadership from Brazil and Argentina. The Organization of American States passed a resolution on sexual orientation and gender identity at the UN.

“persecution of people because of their sexual orientation or gender identity…” He said that “cultural practice cannot justify any violation of human rights.”
identity on June 7th by consensus. That month the UN Political Declaration on HIV and AIDS recognized the need to address the human rights of men who have sex with men. China, which saw itself as a leader and voice for developing states, was investing heavily in Africa and Latin America (whose positions on sexuality issues were in conflict). Strategically China was prepared to move from opposition to abstention. A court in India had struck down the 1860 criminal prohibition, used in the past by Indian diplomats to say that the best they could do would be to abstain on any vote. Russia and Eastern Europe had decriminalized in the 1990s. Russia was grumpy, with its domestic religious revival and active neo-Nazis, but there was support in some parts of Eastern Europe. Asia had some supporters, sometimes.

After the joint statement on SOGI issues in the Human Rights Council, delivered by Colombia in March, 2011, South Africa tabled a resolution to establish an open-ended intergovernmental working group to elaborate “new” concepts like sexual orientation and define their parameters. This would take place “prior to their integration into existing norms and standards of international human rights law.” LGBT activists were opposed, for they had long argued that sexual orientation issues were not “new.” South Africa was rather naively adopting the language of opponents, not supporters. South African diplomats, they said, were taking seriously the spurious arguments of various African and Muslim speakers. But South Africa was open to negotiations about the resolution, and in March any action was deferred. In the June session of the Council, LGBT NGOs gave a one page document to the South African delegation, specifying their problems with parts of the proposed resolution.\footnote{Specifically they criticized (1) categorizing sexual orientation as a “new” issue, (2) the idea that a “single modality” in the Council should undertake consideration of sexual orientation issues, and (3) the idea of an open ended intergovernmental working group which would address definitions and scope, not violations of rights.} South Africa presented a revised text on June 7th, and again LGBT NGOs promptly submitted critical comments in writing. To emphasize the importance of the issues, a second document was circulated, listing violations of the rights of LGBT individuals, including murder, death threats, violence, imposition of the death penalty and arbitrary detention. All the concerns raised by NGOs were accommodated in a new draft circulated by South Africa on June 14th. The final version, considered on June 17, 2011, read as follows (omitting the first three routine preambular paragraphs):
Expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity

1. Requests the High Commissioner [of Human Rights] to commission a study to be finalized by December, 2011, to document discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity;

2. Decides to convene a panel discussion during the 19th session of the Human Rights Council [in 2012], informed by the facts contained in the study commissioned by the High Commissioner and to have constructive, informed and transparent dialogue on the issue of discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity.

3. Decides also that the panel will also discuss the appropriate follow-up to the recommendations of the study commissioned by the High Commissioner;

4. Decides to remain seized of this priority issue.214

The resolution passed with 23 votes in favor, 19 against and 3 abstentions215. Opponents represented the Organization of Islamic Cooperation and Black Africa. Nigeria, purporting to speak for the African group, said South Africa had broken with the consensus tradition of the African group. He claimed that 90% of South Africans did not support the

215 There were 31 co-sponsors, led by South Africa and Brazil (which included members and non-members of the Council). Council members voting in favor of the resolution were Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, UK, USA and Uruguay. Voting against were Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda. Abstaining were Burkina Faso, China and Zambia. Kyrgyzstan was absent. Libya was suspended.
resolution. “It grieves my mind because South Africa is the giant pillar of Africa.”

Opponents cited the statement from the Vienna World Conference on Human Rights that religious and cultural differences should be “taken into account” and the rejection of “sexual orientation” language at the Durban world conference on racism, xenophobia and other forms of intolerance.

Later in the day, the US ambassador to Geneva noted that “very recently, we didn’t expect that we would be able to see this kind of a result.” She noted the strong Latin American support and South Africa “taking a risk.” Maybe everyone was surprised at the outcome, particularly after the hostility and procedural aggression shown during the earlier Brazilian resolution.

The Office of the High Commissioner for Human Rights completed the study authorized by the resolution. The promised panel on SOGI issues was held as part of the 19th Session of the Council, with Pakistan protesting and delegates representing OIC states walking out of the room as it began. Some inter-governmental seminars occurred, outside the scope of the resolution. Regional seminars were held in Kathmandu, Paris and Brasilia, followed by a global event in Oslo in April, 2013, with more than 200 participants from 84 countries. The final summary of conclusions included the following paragraph:

3. We acknowledge that the issues addressed are sensitive for many. Other struggles, such as for racial and gender equality, have been equally controversial in their time, and these objectives are now universally recognized. Lesbians, gays, bisexuals and transgender people are part of all our societies, and on this 20th anniversary of the Vienna Declaration and Program of Action, we recall that while “various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”

216 AFP, UN declares equality for all sexualities, Bangkok Post, June 18, 2011, 5.
A campaign “Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law”, with Nordic funding, was launched by the OHCHRs, with a 60 page booklet that included striking color photographs and some activist history. As well, a set of very well produced videos were released, and made available on social media. These materials included statements by LGBT individuals and by Navy Pillay, the High Commissioner for Human Rights, and Ban Ki-moon, the UN Secretary General. The most amusing video was a take-off on India’s lavish Bollywood musicals, with the eldest son bringing home his male partner to meet the parents and extended family, all richly attired in silks and saris. Initial shock on the part of the matriarch quickly turns into a happy family celebration with singing and dancing.

A second resolution on SOGI rights, sponsored by Brazil, Chile, Colombia and Uruguay and 42 additional co-sponsors, was approved by the Council on September 24, 2014. It repeated language from the 2011 resolution, but now, as well, welcomed “positive developments” on SOGI rights, and authorized the High Commissioner to update the 2011 report “with a view to sharing good practices and ways to overcome violence and discrimination…”\(^{218}\) Egypt had moved to delete all references to sexual orientation and gender identity, a motion rejected by the chair as fundamentally changing the resolution. 25 States voted in favor, 14 against, with 7 abstentions. Asian states voting in favor of the resolution were Japan, Philippines, South Korea and Vietnam. Asian states voting against were

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\(^{218}\) The resolution, after rather routine preambular statements, reads:
Expressing grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity,
Welcoming positive developments at the international, regional and national levels in the fight against violence and discrimination based on sexual orientation and gender identity,
Welcoming also the efforts of the Office of the United Nations High Commissioner for Human Rights in the fight against violence and discrimination based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,
1. Takes note with appreciation of the report of the United Nations High Commissioner for Human Rights entitled “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity” (A/HRC/19/41) and of the panel discussion held on the nineteenth session of the Human Rights Council,
2. Requests the High Commissioner to update the report (A/HRC/19/41) with a view to sharing good practices and ways to overcome violence and discrimination, in application of existing international human rights law and standards, and to present it to the Human Rights Council at its twenty-ninth session;
3. Decides to remain seized of this issue.
Indonesia, Maldives, Pakistan and Saudi Arabia. China, Kazakhstan and India abstained. 219

Secretary-General Ban Ki Moon has spoken many times on the issues, and not just at UN headquarters:

U.N. Secretary-General Ban Ki-moon in recent years has emerged as a champion of LGBT rights around the world. Ban in January [2015] during an event in India that marked the 70th anniversary of the U.N.s founding said anti-sodomy laws “breed intolerance.” He called for an end to anti-LGBT discrimination and violence in a speech he gave in the Russian Black Sea resort city of Sochi on the eve of the 2014 Winter Olympics. 220

The legitimacy conferred on SOGI issues by the United Nations and other intergovernmental organizations has not yet been reflected in statements, decisions, programs and research in the ASEAN region. It is as if the UN decisions and programs have not yet occurred.

There has been some discussion over steps to implement the UN resolutions of 2011 and 2014. Both resolutions authorized the Office of the High Commissioner of Human Rights to produce documentation on LGBTI rights issues. Could that authorization become an ongoing mandate? Could there be a special rapporteur or independent expert to monitor LGBTI issues on an ongoing basis? Should a working group be established to draft a declaration on LGBTI rights? No decision has yet been taken on these possibilities. The Parliamentary Assembly of the Council of Europe has a General Rapporteur on the Rights of LGBT People, appointed by its Committee on Equality and Non-Discrimination, but the mandate is limited to the 43 members of the Council of Europe. 221

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219 States voting in favor were Argentina, Austria, Brazil, Chile, Costa Rica, Cuba, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Romania, South Africa, Macedonia, United Kingdom, United States of America, Venezuela and Vietnam. Opponents were Algeria, Botswana, Cote d’Ivoire, Ethiopia, Gabon, Indonesia, Kenya, Kuwait, Maldives, Morocco, Pakistan, Saudi Arabia, United Arab Emirates, Russian Federation. Abstaining were Burkina Faso, China, Congo, Kazakhstan, India, Namibia, Sierra Leone. Benin was absent.


221 Press Release, Parliamentary Assembly of the Council of Europe, February 10, 2013, Robert Biedron, General rapporteur on the rights of LGBT people. Biedron is the second person to hold this mandate.
The UN has not been wholly consistent since the 2011 resolution.

In 2009, the Council adopted its first resolution on traditional values and human rights [pushed by Russia]. Five years later, in 2014, the Council adopted a resolution on the protection of the family that excludes any reference to the existence of diverse forms of family. These resolutions illustrate continued resistance to SOGI human rights at the UN...

During this period, in September, 2013, the *Sixth Asia Pacific Population Conference* took place in Bangkok. It was one of a number of intergovernmental conferences following up on the 1994 Cairo *International conference on Population and Development* which marked a breakthrough in dealing with sexual rights. No specific reference to sexual orientation or gender identity had occurred in the Cairo outcome document. At the Bangkok Asia Pacific gathering, 400 delegates from 47 countries agreed to a final outcome document that called for the elimination of discrimination on grounds of sexual orientation and gender identity. Thirty-eight countries voted in favor of the statement. Russia, Iran and Azerbaijan, voted against. Malaysia voiced reservations, but voted in favor.

In debates on formulating a new set of international ‘goals’ to follow on the *Millennium Development Goals*, Brazil and the United Kingdom sought some language that included or could include LGBTI rights. Others sought protections for ‘the family.’ Neither side prevailed. References to ‘gender’ in the document, the *Sustainable Development Goals*, were dropped in favor of the narrower ‘sex.’ Protection of ‘social groupings’ was eliminated.

THE SECURITY COUNCIL INFORMAL SESSION

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222 Dodo Karsay, How far has SOGII advocacy come at the UN and where is it heading? ARC International, 2014, 4.
223 Recognition of SOGI-rights at Asia Pacific Population Conference, October 18, 2013, www.soginews.com/recognition-sogi-rights-icpd/, accessed November 18, 2014. The Latin America and Caribbean regional conference in Uruguay also referred to sexual rights, sexual orientation and gender identity. The *UN General Assembly Special Session* in 2014 marking 20 years since Cairo had no outcome document. There was an outcome document from the 47th *Commission on Population and Development* in 2014, but this did not include references to sexual orientation or gender identity.
224 Andrew Potts, LGBTI rights language stripped from UN’s 2030 Sustainable Development Goals, GayStarNews, August 4, 2015.
On August 24th, 2015, on an initiative of the United States and Chile, the United Nations Security Council held an informal closed session concerned with the killing of gay men by the Islamic State (IS or ISIS) in areas it controls in Syria and Iraq. This was the first time that the Security Council had considered an LGBTI issue. IS had posted a number of video clips in which blindfolded males, condemned as homosexuals, were thrown off roofs. In at least one case, the body was stoned by onlookers on the ground to ensure death. A gay Iraqi man testified by telephone. Subhi Nahas, now settled as a refugee from Syria in the United States, earlier threatened by an al Qaeda branch, testified in person on behalf of a refugee organization. Jessica Stern, Executive Director of the International Gay and Lesbian Human Rights Commission, also spoke, saying that at least 30 executions are known since June 2014.

Thirteen of the fifteen members of the Security Council were present. Chad and Angola refused to attend. China, Russia, Nigeria and Malaysia attended, but did not speak.

“This is the first time in history that the council has held a meeting on the victimization of LGBT persons,” U.S. Ambassador Samantha Power said in her remarks. “It is the first time we are saying, in a single voice, that it is wrong to target people because of their sexual orientation and gender identity. It is a historic step. And it is, as we all know, long overdue.” ...

[Jessica Stern] argued that given the Security Council’s past discussion of ISIS’s treatment of women, the minority Yazidi community, and Christians, it was important not to exclude LGBT individuals in order to truly document the brutality of ISIS.225

SPECIAL RAPPORTEURS, INDEPENDENT EXPERTS, SPECIALIZED AGENCIES

A number of the independent experts have, at times, dealt with SOGI issues and courted controversy in so doing. Notable have been Asma Jahangir as Special Rapporteur on extrajudicial, summary or arbitrary executions, and experts on health, security and human rights defenders:

...the Special Rapporteur on Human rights Defenders has done a lot of important work on SOGI issues from the very early days and has taken up concerns through individual complaints, and regular and thematic reports. The office has played a key role in identifying and acknowledging the work of LGBTI human rights defenders as well as in protecting individual activists. ...

The Special Rapporteur on Torture was primarily commended by many trans and intersex activists, particularly for his last thematic report on torture in healthcare settings. This had called for abolishing both forced sterilization of trans people as a requirement for legal gender recognition and corrective surgeries performed on intersex children. This demonstrates the ability of Special Rapporteurs to apply core human rights principles (such as nondiscrimination, and freedom from violence and torture) to the specific experiences of people based on their SO, GI or intersex status.

The Special Rapporteur on health was highlighted by many interviewees as particularly useful. Its office was seen as friendly and sensitized from the beginning. Both Paul Hunt and Anand Grover were commended for their really good work on SOGI and intersex issues, which has enabled other Special Rapporteurs to pick up this work. Trans and intersex activists noted that this office has very usefully helped to raise human rights issues faced by their communities.

Women respondents and interviewees appreciated the work of the Special Rapporteur on Violence against Women for taking an intersectional approach at times. One responded highlighted her report on Namibia that discussed issues of discrimination against LBT sex workers. However, others mentioned some less positive examples, when the office’s relatively low awareness on issues faced by lesbian and trans women was apparent and resulted in a lack of engagement.226

The LGBTI initiative by the Human Rights Council was welcomed by the Office of the High Commissioner for Human Rights, the various independent experts and, in September, 2015, by a joint statement of

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226 Dodo Karsay, How far has SOGII advocacy come at the UN and where is it going?, ARC International, 2014, 16-17.
specialized agencies entitled *Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people*. The wording of the statement reflects particular concerns of individual agencies. It read in part:

**Failure to uphold the human rights of LGBTI people and protect them against abuses such as violence and discriminatory laws and practices, constitute serious violations of international human rights law and have a far-reaching impact on society – contributing to increased vulnerability to ill health including HIV infection, social and economic exclusion, putting strain on families and communities, and impacting negatively on economic growth, decent work and progress towards achievement of the future Sustainable Development Goals.**

The statement was endorsed by the OHCHR, the International Labor Organization, UNDP, UNESCO, UN Fund for Population Activities, UN High Commission for Refugees, UNICEF, UN Office for Drugs and Crime, UN Women, the World Food Program, the World Health Organization and UN AIDS.

“This is the first time that so many members of the UN family have joined forces in defence of the basic rights of lesbian, gay, bisexual, transgender and intersex people,” said the UN Human Rights Office’s chief of Global Issues, Charles Radcliffe. “It’s both an expression of commitment on the part of UN agencies, and a powerful call to action for Governments around the world to do more to tackle homophobic and transphobic violence and discrimination and abuses against intersex people.” The statement highlights the link between human rights abuses against LGBTI people and ill health, family break-up, social and economic exclusion and lost opportunities for development and economic growth.227

**OTHER INTERGOVERNMENTAL BODIES**

Recognition of LGBTI rights as human rights at the United Nations is vital for the Asian region, because of the general lack of effective regional...
and sub-regional inter-governmental organizations. The organizations that exist at the Asian or sub-Asian regional level have no history of addressing human rights. *ASEAN*, with its *Charter*, its *Intergovernmental Commission on Human Rights* and its *ASEAN Human Rights Declaration*, has no sister intergovernmental organizations in Asia with any mandate on human rights.

*SAARC*, the *South Asia Association for Regional Cooperation*, barely exists, given the tensions between India and Pakistan. The *Shanghai Cooperation Organization* brings together China, Central Asia and Russia, but its concerns are security. No ongoing intergovernmental organization brings together China, Japan and South Korea, though trade and investment across these borders is enormous. There are various free trade agreements in Asia, for example agreements between China and Thailand, and between China and *ASEAN*. They follow the general patterns on economic relations set by the *World Trade Organization*, and, like the *WTO*, they have no provisions on human rights or for civil society engagement.

**COUNCIL OF EUROPE**

Europe has the *Council of Europe*, a 47 member intergovernmental body that is responsible for the *European Convention on Human Rights*. In Europe, only Belarus is outside the *Council of Europe*. All members accept the jurisdiction of the *European Court of Human Rights*. The longest series of decisions on any specific subject in the history of the *European Court of Human Rights* deal with LGBT rights, starting with the *Dudgeon* decision of 1981. The major decisions, listed chronologically, are the following:

- In 1981, in *Dudgeon v United Kingdom*, the European Court of Human Rights ruled against an anti-homosexual criminal law in Northern Ireland on the basis of privacy rights.
- The *Dudgeon* ruling was repeated in *Norris v Ireland* in 1988 and *Modinos v Cyprus* in 1993.
- In 1997, in *Sutherland v United Kingdom*, the European Commission of Human Rights struck down an unequal age of consent for

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228 For the full text of decisions go to www.echr.coe.int.
homosexual and heterosexual acts, reversing earlier decisions. The Court came to the same conclusion in *S.L v Austria* in 2003.

- In 1997, in *S, Y & Z v United Kingdom*, the Court was not willing to order the granting of legal parental status to a transman whose legally married female partner had borne children through donor insemination, though a non-trans male in the circumstances would have gained the status.

- In 1999, in *Lustig-Prean v United Kingdom*, and *Smith & Grady v United Kingdom* the Court ruled that discrimination in employment in the military based on sexual orientation offended the *Convention*.

- In, 1999, in *Mouta v Portugal*, the Court found a breach in a case where a man had lost custody of his child on the basis of his homosexuality.

- In 2002, in *Goodwin v United Kingdom*, the Court ruled that governments must alter personal identity documents for transsexuals who have completed sex reassignment surgery.

- In 2003, in *van Kuck v Germany*, the Court held that German courts had violated privacy rights by interpreting a health insurance contract as not requiring reimbursement for the costs involved in gender reassignment.

- In 2003, in *Karner v Austria*, the Court ruled in favor of equal spousal benefits for heterosexual and homosexual partners, in the context of successor rights to a rent-controlled apartment. A very similar ruling came in *Kozak v Poland* in 2010.

- In 2006, in *Grant v United Kingdom*, the Court ruled that a post-operative male-to-female transsexual was entitled to a pension available to women 5 years earlier than the parallel pension for men.

- In 2007, in *Baczkowski v Poland*, the Court held that the banning of the gay pride parade in Warsaw in 2005 violated rights of freedom of association and assembly and the prohibition of discrimination. Similar decisions occurred in *Alekseyev v Russia* in 2010 and in *Genderdoc-M v Moldova* in 2012.

- In 2007, in *L v Lithuania*, the Court held that the state medical system was required, in proper cases, to provide sex reassignment surgery to transsexuals.

- In 2008, in *Schlumpf v Switzerland*, the Court held that applying a mandatory two year waiting period before sex reassignment surgery

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229 Commission Report, July 1, 1997. The United Kingdom did not appeal the decision and changed domestic law in line with the ruling.
was discriminatory (where the individual had been living in the desired sex for a significant period).

- In 2008, in *E.B. v France*, the Court held that any discrimination on grounds of sexual orientation in decisions on adoption violated the *Convention*.

- In 2010, in *Schalk v Austria*, the Court was satisfied that Austria had brought in a registered partnership law for same-sex couples, remedying the inequality complained of.

- In 2012, in *Gas & Dubois v France*, the Court ruled that second-parent adoption could be restricted to married couples. (A 2013 law opened marriage to same-sex couples in France.)

- In 2013, in *X v Austria*, the Court upheld second-parent or step-parent adoption for same-sex couples, on the basis of equality with different-sex couples.

- In 2013, in *Vallianatos v Greece*, the Court held that a new registration system, as an alternative to marriage for heterosexuals, must be open to same-sex couples as well.

- In 2013, in *Eweida v United Kingdom*, the Court held that a public or private employer could dismiss an employee who refuses to serve same-sex couples on the basis of personal beliefs.

- In 2014, in *Hamalainen v Finland*, the Court upheld restricting the legal recognition of sex reassignment to individuals who had divorced their prior legal spouses. The Court was not prepared, it seems, to allow the creation of legal same-sex marriages in this specific way. Again, as in the *Gas & Dubois* outcome, the negative ruling was nullified by the opening of legal marriage to same-sex couples in Finland.

- In 2015, in *Y.Y. v Turkey*, the Court held that sterilization cannot be a condition of access to gender reassignment surgery.

- In 2015, in *Identoba v Georgia*, the Court held that the police failure to adequately protect a march marking the *International Day against Homophobia and Transphobia* against blockage and violence by religious counter-demonstrators violated the participants’ rights to freedom of assembly and association, as well as their rights against inhuman or degrading treatment.  

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230 The decision is interesting for Georgia, strongly asserting a European identity, had liberal legal provisions, including identifying discriminatory acts, on a number of grounds, including sexual orientation and gender identity, as aggravating factors in criminal acts. The law as described in the decision allowed peaceful demonstrations with adequate prior notice. The idea that the police should protect demonstrators was not contested by the state. Part of the facts in the case included evidence of widespread hostility in Georgian society to LGBT rights, which made the likelihood of a counter-demonstration very likely. The
- In 2015, in *Oliari v Italy*, the Court held that governments must give some form of legal recognition to same-sex relationships. Italy was the only country in Western Europe to give no recognition.
- We await a decision in the case of *Milica Dordevic v Serbia* on Serbia’s decisions to block pride parades in central areas of Belgrade.

These are the most remarkable series of decisions on any subject in modern human rights law. The heavy reliance on litigation is a sign of weakness, not strength. It is a weakness, in the sense that it has frequently proven impossible for homosexual rights movements to gain equality rights through legislative reform. Politicians very regularly avoid SOGI issues in their work. Judges do not operate under the same constraints as politicians (who fear offending public opinion, or getting too far ahead of public opinion). Judges may lead or may follow. In countries like Canada, South Africa, the United Kingdom, and the United States, sometimes the courts lead and sometimes the legislatures lead.

In many countries there is no tradition of ‘activist’ judges or of judicial enforcement of human rights standards (and no constitutional provisions on human rights). So in Australia and New Zealand, for example, reform campaigns have been aimed at legislatures, not courts. The courts in Singapore have rejected any ‘activist’ role (though they could have solved political problems facing politicians by ending anti-sodomy laws that dated back to British colonial times).

**EUROPEAN UNION**

The European Union is authorized by its treaty to require the member states to prohibit discrimination on a number of grounds, including sexual orientation. It has enacted an employment directive requiring member states to ban discrimination in employment in public and private sectors on grounds of sexual orientation. A decision of the European Court of Justice held that discrimination on the basis of sex reassignment was discrimination on the basis of “sex”, with the result that such discrimination is also barred in the public and private sectors in EU countries. In 2011 in *Romer v*
Hamburg the Court of Justice of the European Union held that spousal pension benefits must be equal for married couples and same-sex couples who have entered into registered partnerships.

ORGANIZATION OF AMERICAN STATES

In November, 2011, the Inter-American Commission on Human Rights, a body established by the Constitution of the Organization of American States, in response to instances of violence and discrimination in the region, established an LGBTI unit. In February, 2014, the Commission designated one of its Commissioners as a Special Rapporteur on LGBTI rights.

A SOGIE caucus met at the Seventh Summit of the Americas, April 8-10, 2015, in Panama City.

The Coalition of Lesbian, Gay, Bisexual, Travesti, Transgender, Transsexual and Intersex Organizations from Latin America and the Caribbean brings together groups from more than 20 countries, was part of the civil society and youth forum at the 7th Summit of the Americas.

More than 50% of the funding for the Inter-American Human Rights system comes from external sources.

[Add information about the resolution of the OAS on SOGI rights]

AFRICAN UNION

The African Charter of Human and Peoples’ Rights was drafted in 1981. The present organization, the African Union, was created in 2001. The Charter of the African Union has been ratified by 53 of the 54 African states. A protocol on the rights of women came in 2005. Three more instruments have followed. In 1988 the International Commission of Jurists was the first international organization given observer status by the African Union. There is a Commission on Human and People’s Rights. The commissioners serve in a personal and independent capacity, but it has not been uncommon for commissioners to be closely linked to governments, perhaps as ambassadors, and once with an attorney general. So independence has not always been upheld. Commissioners serve for terms of 6 years and are able to be re-elected. CSOs can gain accreditation with
“observer status.” The Coalition of African Lesbians, very controversially, was accredited, but it seems that accreditation is likely to be revoked when the AU receives the annual report of the commission. One resolution had been passed, supportive of LGBTI rights.

At the moment, each of the regional intergovernmental organizations that has a mandate on human rights has spoken against discrimination on the basis of sexual orientation (and perhaps gender identity as well). That is, all except ASEAN.

INTERNATIONAL OLYMPIC COMMITTEE

Principle 6 of the Olympic Charter enshrines the IOC’s opposition of any form of discrimination. In advance of the Olympic winter games in Sochi in February, 2014, Russian President Putin signed a law banning propaganda favoring homosexuality. While said to be protective of children, the law broadly banned advocacy for LGBT equality (and attempts to achieve LGBT visibility). UN Secretary General Ban Ki-moon spoke at the International Olympic committee session in advance of the games, specifically condemning “attacks on lesbian, gay, bisexual, transgender or intersex people. We must oppose the arrests, imprisonment and discriminatory restrictions they face.” He noted that the theme for Human Rights Day in December, 2013, as “Sport comes out against homophobia.” The Chair of the IOC said he had sought and gained assurances from the Russian government that LGBTI athletes would face no discriminatory legal treatment while participating in the games. In December, 2014, the IOC amended Principle 6 to specifically prohibit discrimination on the basis of sexual orientation. This meant that the IOC would not allow a country to host any Olympic games if it discriminated on the basis of sexual orientation.

In May, 2015, a distinguished grouping of 27 athletes called on the Olympic Committee to bar the 2022 Winter Games from being held in Kazakhstan, on the basis of the Kazakhstan senate’s adoption of a Russian style anti-propaganda law. They said:

We were extremely proud to see the leadership of the IOC amend Principle 6 of the Olympic charter to include sexual orientation and
believe these changes in principles will strengthen the Olympic movement for generations to come.231

Almost immediately, Kazakhstan’s Constitutional Council ruled that the law had unclear wording and “was not in line with the constitution” of the country. This blocked the possibility of the bill being signed into law by the president.232 A quick victory. While Kazakhstan was back in the running, the IOC awarded the 2022 winter games to Beijing instead in a close vote in July, 2015.

UNESCO

UNESCO held a consultation on homophobic bullying in educational institutions during 2011-1012. On May 16, 2012, UNESCO published a report on the issues. It has undertaken a worldwide promotion of more attention to homophobic bullying in schools through its regional offices.

LGBTI students across Asia are being made to feel safe in the classroom thanks to a new campaign. Backed by groups including the United nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Development Programme (UNDP), the campaign #PurpleMySchool, encourages young people to wear, draw or make something purple in support of LGBTI youth. ‘Many young lesbian, gay, bisexual, transgender and intersex people are bullied over their sexuality or gender identity, and walking into school every day can fill them with fear and dread,’ the Purple My School Facebook page explains. ‘Show that they can feel safe with you, in your classroom or school.’233

The anti-bullying law in the Philippines specifically refers to bullying on the basis of “gender”. The rules developed for the implementation of the law refer to bullying on grounds of sexual orientation and gender identity.

INTERNATIONAL REFUGEE LAW

231 Joe Morgan, Martina Navratilova and 26 other athletes fight to stop Olympics from happening in anti-gay Kazakhstan, GayStarNews, May 16, 2015.
233 Mel Spencer, Asian pupils, parents and teachers turn schools purple of support LGBTI youth, GayStarNews, August 15, 2015.
The International Commission of Jurists has convened two expert roundtable discussions on asylum claims based on sexual orientation and gender identity grounds, the second in October, 2014.

7. BEING LGBT IN ASIA

The years from 2012 to 2015 have seen the completion of ‘Phase 1’ of “Being LGBT in Asia” (BLIA). And what is BLIA? There are no parallel programs in any other world region, so it needs some explanation. It isn’t even well known in its homeland.

In June, 2011, the UN Human Rights Council placed violence and discrimination against LGBT individuals on the UN human rights agenda. This was our first BIG success in any of the ‘political’ bodies of the United Stations. The resolution authorized a study by the Office of the High Commissioner on Human Rights, which was completed in December, 2011. That month the United States made a major double announcement. US Secretary of State Hillary Clinton, at the UN, announced a US commitment to combating LGBT discrimination internationally. In Washington, President Obama issued an Executive Order telling all US agencies with international programs to promote LGBT human rights. The Netherlands and Sweden, in particular, had already been active on LGBT rights promotion overseas for a number of years, so the US move was an innovation, but also a catch-up.

The Asia Pacific regional office of the UN Development Program (UNDP) acted quickly. By mid 2012 there was agreement for US funding of the “Being LGBT in Asia” program, to be run by the UNDP. The program was launched in December 2012. Eight countries were selected – Cambodia, China, Indonesia, Mongolia, Nepal, Philippines, Thailand and Vietnam.

Prior government approval of the initiatives in each of these countries was, apparently, not sought. But that was ok, for governments that would be hostile or demand control over the process, were outside the program – governments such as Bangladesh, Brunei, India, Laos, Malaysia, Pakistan and Sri Lanka. Also outside the project were Muslim majority states in
Central Asia and the Middle East (technically part of Asia, but handled by the UN in most matters as a special sub-region). Some Asian countries were obviously not eligible for UNDP activity, being too developed – Brunei, Japan, Korea, Malaysia and Singapore. Myanmar was too early into its political transition in mid-2012 to be included. Exiled LGBT activists had not yet returned to the country.

Governments usually did not play important roles in the BLIA process. The government of Thailand, facing domestic political instability, barely participated. The Vietnamese government, in contrast, gave some active support. If governments played marginal roles in the BLIA programs, the same was true for LGBTI civil society organizations. When the Blue Diamond Society in Nepal was refused the role of organizing the ‘dialogue’ sessions, it walked away from the program. In other countries LGBTI NGOs were pretty weak. Sometimes the main authors of the final reports were from the country in question, as with Indonesia, but often not. The UNDP wanted one national dialogue event in Vietnam, but local NGOs and activists insisted on two, one in the North, one in the South. The process in each country was somewhat different, reflecting local realities and leadership.

There were three outcomes.

First: Eight country reports were published by UNDP and are available on the UNDP website. They each contain an overview of the country situation, followed by a description of the national ‘dialogue’ organized with local activists and representatives.

The publication of these reports received almost no publicity either nationally or regionally. Was this the UN being cautious about the program, choosing a low profile to avoid criticism from governments? Or was it media disinterest in yet more long reports from UN agencies? Or does it tell us that media in the region aren’t yet very interested in our news? All three, probably.

Second: A final, sum-everything-up, Asia-Pacific ‘dialogue’ was held at the UN Conference Centre in Bangkok on the 26th and 27th of February, 2015, a big event. Around two hundred people were brought to Bangkok from countries ranging from India to the Pacific Islands. Participants were selected on the basis of written submissions outlining who they were and
what they wanted to say (by-passing any selection role by NGOs). They did not have to be representatives of organizations. There were also expert panels, with Asian and non-Asian speakers. Most of the older established activists were not there.

The whole event was tightly scripted, with no open discussions or proposals from the floor. Still, it was a showy and exciting affair. Sweden was there, and will be a funder, along with the US, of Phase 2. We have some information on Phase Two. A focus on China, Indonesia and Thailand will continue. There will be support for APTN and the ASEAN SOGIE Caucus.

Third: The February Dialogue event was co-sponsored by the APF, the Asia Pacific Forum of National Institutions for the Promotion and Protection of Human Rights – the organization representing the national human rights commissions in the Asia-Pacific region. The APF held a two day workshop in advance of the dialogue, at which it discussed the work of the national commissions on LGBT issues. The workshop developed a statement of principles to guide work in the years ahead. Commission representatives came from Afghanistan, Australia, Bangladesh, India, Indonesia, Kazakhstan, South Korea, Malaysia, Mongolia, Myanmar, Nepal, Philippines, Samoa, Thailand and Timor Leste. The very positive outcome document is available on the APF webside – www.asiapacificforum.org. The workshop and action plan built on earlier work of the APF on LGBTI issues, including a report of its Advisory Council of Jurists (also available on the website).

8. STATE INITIATIVES

The Netherlands was the first state, as far as we know, to include LGBTI rights in its international activities. Since perhaps the 1960s, funding has been available for human rights initiatives in developing states from Dutch foreign aid, or through the HIVOS Foundation, a humanist foundation, that receives funding from the Dutch government. Funding for local and regional organizations and for the conferences of the International Lesbian and Gay Association (ILGA) came from HIVOS, and the HIVOS logo is a constant, it seems, on various human rights initiatives supporting SOGI rights. Following the Dutch lead, a number of states have expressly
introduced ‘human rights’ in their foreign aid and foreign diplomacy activities, particularly after the collapse of the Soviet Union in 1989-91. States that have such express policies include Australia, Canada, Denmark, Finland, France, Germany, New Zealand, Netherlands, Norway, Sweden, the United Kingdom and the United States.

Perhaps five years ago funding for the International Lesbian and Gay Association (ILGA) was significantly increased, and on a stable basis, by Sweden and Finland. US AID has generously funded the *Being LGBT in Asia* program from 2012 to 2015, a program handled by the UN Development Programme. The Swedish International Development Agency is a partner in Phase Two of that program.

An Executive Order by US President Barack Obama in December 2011 instructed all US agencies with international activity to ensure that their work was supportive of LGBTI rights. The order was made on the same day that Hillary Clinton, then Secretary of State (that is, the foreign minister) gave a speech in Geneva endorsing LGBTI rights as human rights, in front of a specially assembled audience of LGBTI human rights defenders from all UN regions.

The Obama Presidential Memorandum required all US agencies engaged abroad “to ensure that US diplomacy and foreign assistance promote and protect the human rights of LGBT persons.” The US established the *Global Equality Fund* specifically for grants to LGBT rights organizations in various parts of the world. Various countries, businesses, foundations and rights organizations have joined the *Global Equality Fund*. Partner countries are Croatia, Denmark, Finland, France, Germany, Iceland, the Netherlands, Norway and Sweden. In its first two or three years it provided $7.5 million in assistance in over 50 countries.²³⁴

The President’s initiative also led to the convening of a *Global Lesbian, Gay, Bisexual, and Transgender Human Rights Forum* in Washington DC, June 24, 2014. On February 23, 2015, the US government named Randy Berry as its first LGBTI rights envoy, with a mandate to promote LGBTI rights internationally.

²³⁴ The Global Equality Fund was launched in December, 2011, and has varied programs, including emergency funding for human rights defenders in peril. See www. state.gov / globalequality.
The openly gay diplomat is currently the US consul general in Amsterdam and has served in Bangladesh, Egypt, Uganda, and South Africa. … Berry holds a State Department Superior Honor Award and is a nine-time Meritorious Honor Award recipient.235

Berry immediately began extensive travels in Latin America and Africa, areas where US links and involvement have important histories. He visited Uganda in July, 2015, a country whose ‘anti-homosexual law’ had spurred a new level of Western, internationally focused, activism (and a state where he had previously served before his new ambassadorship).236 As of mid-2015 he had not visited Asia, a more complicated region on LGBTI issues.

In September, 2015, President Obama nominated Eric Fanning as secretary of the army. The openly gay male will hold the most senior civilian post among the branches of the US armed forces.237

The Labour Party in the United Kingdom pledged to appoint Lord Michael Cashman as a LGBTI Global Envoy, but they failed to win power in the election in 2015. The Conservative government of David Cameron had opened marriage and promoted decriminalization in the Commonwealth, perhaps eclipsing the earlier Labour government’s lead role on LGBTI rights. The two major parties now contest over these issues. Both actively support lesbian, gay and transgender rights.

These state level initiatives support the international LGBTI rights movement. They are exclusively initiatives of states in the ‘Western’ bloc. But they come after the decisions of the Human Rights Council in 2011 and 2014, which had support from representatives of all five official UN regions. South Africa, and a couple of sub-Saharan African states are in support. States in Latin America have instigated reforms, but have not announced international advocacy programs. Brazil pioneered with its Brazil without Homophobia program, and Argentina set international standards for transgender rights and was the first in Latin America to open marriage. Latin American states have not announced specific international advocacy programs, like the ten, or so, Western states, noted above, though they are

235 Darren Wee, US names first-ever envoy for gay rights, GayStarNews, February 24, 2015; J Lester Feder, The U.S. LGBT envoy wants to get by with a little help from our friends, Buzzfeed, May 30, 2015. The first openly gay ambassador was appointed by President Clinton, and a few others get noted in various news stories, in particularly the current ambassador to Vietnam.


237 The world this week; Politics, The Economist, September 26, 2015, 8.
now reliable supporters of initiatives at the UN and in regional intergovernmental organizations. Support of LGBTI rights issues at the international level is still dominated by the Western and Latin American groups, though none of the five official UN ‘regions’ is uniformly opposed.

It is now unremarkable to have gay or lesbian members holding cabinet positions in many countries, including the United Kingdom, Canada, Australia, New Zealand (and countries in Northern Europe and Latin America).

9. SEXUAL DIVERSITY IN THE ASEAN REGION

INVOKING THE PAST

When students formed the pioneering gay organization at the University of the Philippines in 1992, they chose the name UP Babaylan, honoring transgender shamanic figures who featured in early histories of Spanish contacts in the Philippines. The Babaylan included effeminate gender-crossing males who appear in several colonial accounts as native “priests,” “healers,” and “sacrificers.” They occupied social positions of some prestige. Other Babaylan student groups sprang up on various campuses.

This action, by modern activists, honoring pre-colonial figures as forbears, seems to have no parallel in the other examples of modern LGBTI activism in Asia. The students were linking modern sexual diversity to traditional culture, not to Western or simply modern influences. There was a traditional culture, even if it was distant. A recent report concurs.

Gender non-conformity in the Philippines pre-dates the arrival of the Spaniards in 1521. Reported from Spanish accounts of encounters


\[^{239}\] In 2014, the Babaylan group at UP Los Banos in Laguna, as part of the annual campus fair, held traditional wedding ceremonies where same-sex couples fed each other cooked rice from the same plate, showing mutual support. Philippine university ‘conducts’ gay weddings, GayAsiaNews, February 12, 2014.
between conquistadores and the archipelago’s original inhabitants, crossing gender and transvestism were cultural, exemplified by the babaylan. …the babaylan was a spiritual leader … akin to a priestess or shaman in the English-speaking world.240

Michael Tan, from the University of the Philippines, agrees: “Cross dressing shamanic healers were common throughout the Southeast Asia Region.”241 Professor Michael Peletz suggests general patterns of gender crossing roles for spirit mediums in Southeast Asia in early modern times.242 Elements, at least, of gender-crossing shamanic traditions survive in parts of Indonesia, but have no direct links to modern discourse or activism on sex/gender diversity.243

In March, 2013, a candidate for appointment to the Indonesian Constitutional Court was asked his position on same-sex marriage. He replied that western reforms were not applicable, “because theologically Indonesia defines marriages as being between a man and a woman.” Activist Hartoyo, who had been tortured by police and civilians in Aceh when found living with a male partner, wrote an open letter to the successful candidate:

The fact is that when Western countries were criminalizing same-sex love, our archipelago was celebrating the plurality of sexuality in our cultures. For example we can cite the traditional plurality of sexuality here, such as the cultures of the Bissu, the Warok-Gemblak,

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242 Michael Peletz, Gender Pluralism: Southeast Asia since early modern times, Routledge, 2009.
243 King Oey of Arus Pelangi writes on gender-crossing traditions: “In Indonesia we also have the ‘bissu’ culture (South Sulawesi) and the Warok and Gemblak culture (East Java). Remnants of those cultures still exist, but failed to attract large numbers of LGBT to identify with their cause. Perhaps because the differences between the old and the new is too large. Modern-day transwomen in South Sulawesi prefer to become a waria hairdresser (modern) above a ritual-performing bissu (traditional). Such juxtaposition does not happen in the Philippines, because the babaylan are extinct, thus safe to appropriate.” Personal communication, July, 2015. A similar alternative between spirit mediumship (traditional) and work as a beautician (modern) in present day Myanmar is described in Ward Keeler, Shifting Transversals: Trans Women’s Move from Spirit Mediumship to Beauty Work in Mandalay, (2015) Ethnos, 1. The Being LGBT in Asia: Indonesia Country Report, speaks at 16 of differing ‘traditional’ roles or categories, adding that the modern transgender categories of banci, bencong, (later renamed waria, emerged only in the second half of the twentieth century.
the Mairil in the Islamic boarding schools, the Ludruk, the history of the Lengger dancers, the poetry of Abu Nawas and more, there are many Indonesian cultures that have a place for same-sex partnerships.  

The constitutional court judge responded with a partial apology, and a statement that Hartoyo and his partner “should be protected from violent acts.”

A young Bugis transwoman in South Sulawesi, Tiara Tiar Bahtiar, launched a book on the local transgender culture in 2012 at the Makassar International Writers Festival. She was vice-president of the Transgender Society of South Sulawesi. She was from a Bugis family, perhaps the best known cultural group in Indonesia to have a key transgender figure as a continuing part of their culture. Sharyn Davies writes that the Bugis believed in five genders, masculine men, feminine women, feminine men, masculine women and bissu, holy transgender women. Tiara Tiar Bahtiar had grown up as a waria, the well-known Indonesian transgender category. Now she was in training to play the traditional role of a bissu. Her parents had come to accept her. It seemed a unique story of a modern transgender linking with a valued traditional transgender role.

In particular historical examples, a public valuing and acceptance of same sex relationships was very clear in significant periods, but the specific social patterns did not continue into modern life. In Korea this public acceptance ended with the rise of neo-Confucianism in the 17th century. In Japan and China it ended around the turn of the twentieth century, when Western influenced modernization condemned same-sex attraction as pathological, and British penal laws spread to half the world. Same-sex relationships did not end. They take place in all societies. But their public acknowledgement, acceptance, visibility and valuing slipped away.

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245 Indonesian judge apologizes to LGBTs for anti-gay comments, Andrew Potts, GayStarNews, March 14, 2013.
247 Ng Yi-Sheng, My name is not ‘waria’, fridae.asia, August 31, 2012.
Stories of the past tell us that present patterns can change. In a memorable phrase, “memory is always about the present.”\textsuperscript{248} We think of the past largely in terms of its meanings or possibilities for the present and future.

**TRADITIONAL ROLES OF WOMEN**

While it seems that there are long standing patterns of the acceptance or tolerance of gender-crossing in Southeast Asian cultures, there is a stronger consensus that the region has a legacy from a more equal status for women than in Confucian influenced areas of East Asia, or in Hindu/Muslim South Asia.

Women in Southeast Asia benefited from (a) bilateral kinship patterns (tracing families through both male and female lines), (b) the requirement of a bride price, paid to the woman or her parents (not a dowry, paid to the groom or his family), (c) a tendency for a newly married couple to live with or near the wife’s parents, and (d) women’s roles in traditional ritual, food production and local markets.

The British recognized the high social status of women in Burma, and granted them the vote (but not in India)\textsuperscript{249}. In central Siam and other parts of the region there was little differentiation between men and women in clothing and hairstyles. Names were often gender neutral. Foreigners said they had trouble differentiating men from women. In Siam current gendered patterns were initiated around the turn of the last century with royal decrees on clothing, hair styles and names. This was a self-conscious westernisation, designed to protect Siamese independence by asserting a civilized modernity that would be recognized as such by Europeans.

What of sex-selective abortion in Southeast Asia? Middle class couples from India regularly come to Thailand for ultrasound tests to determine the sex of unborn children, a procedure outlawed in India. Sex selective abortion has led to the modern stories of ‘missing women,’ stories that mainly come from China and India. Such sex selection is not practiced in Southeast Asia, where sex ratios follow natural biological lines. An

exception is Vietnam, where the ratio of males to females at birth grew to 113.8 in 2013.\textsuperscript{250}

Same-sex relationships are simply less ‘deviant’ (and therefore more acceptable) in societies where the status and roles of women are relatively more equal to those of men.

**PRESSURE TO MARRY**

Young people face varying degrees of family and societal and religious pressure to enter into heterosexual marriage and found a family, mild in Thailand, quite intense in Indonesia. There is, it is said, “oppressive pressure to engage in heterosexual marriages” in Indonesia.\textsuperscript{251}

The fact that women and men’s sexuality can be diverse and the pressure to form a heterosexual family is very strong means that bisexuality is fairly common, although a bisexual identity is not.\textsuperscript{252}

A study of 99 males in three Indonesian cities who engaged in sexual relations with other males, showed the dominance of heterosexual marriage as a goal in life:

Nearly all the young single men in this study imagine a future where they will be married with children. Some intend to give up what is described as “this lifestyle” and become “normal,” but not right now. Marriage for most of these men is an imagining, partly based on obligation to family, but also an inability to see possibilities beyond the dominant normative institutions. Most of these men want to get married, to be fathers and have someone look after them in old age. Budi, who is 28, wants to get married. The only alternative, he said, “is to be alone.” He commented on the fact that gay men do not grow old together in Indonesia: “Until now, I’ve never seen gay people stay together when they get old.”\textsuperscript{253}

\textsuperscript{250} Yan Hui Yee, Kor Kian Beng, Nirmala Ganapathy, Lifting the veil on Asia’s gender imbalance, Straits Times, Asia News Network, The Nation (Bangkok) July 18, 2015, 9A. The imbalance in society is increased by foreign husbands seeking Vietnamese brides.

\textsuperscript{251} UNDP, Being LGBT in Asia: Indonesia Country Report, 2014, 20. Pressure to marry varies significantly in the region, being very high in Java and fairly light in Thailand.

\textsuperscript{252} UNDP, Being LGBT in Asia: Indonesia Country Report, 2014, 16.

\textsuperscript{253} Stephen McNally, Jeffrey Grierson, Irwan Martina Hidayana, Belonging, community and identity: Gay men in Indonesia, in Bennett, Davies, 2015, 203 at 208.
CONTEMPORARY TRANSGENDER PATTERNS

Many contemporary commentators see striking levels of gender crossing in Southeast Asia, clearly setting the region apart from Confucian influenced East Asia and the industrialized West. Most obviously there are named transgender categories for gender-crossing males – kathoey in Thailand and Laos, mak nyah in Malaysia, waria in Indonesia, bakla in the Philippines, apwint in Myanmar.\textsuperscript{254}

Do these named groupings have long histories? Kathoey is an old Thai term, but it seems to have had different meanings over time. The names mak nyah, waria and bakla are recent coinages, consciously invented to replace earlier derogatory terms. The identity categories are older than those modern names. Gender crossing females in Thailand are called toms, and are highly visible in day to day life in the Kingdom. Megan Sinnott calls the ‘tom/dee’ patterns of gender presentation a modern construct, with the terms coming into use only a few decades ago.\textsuperscript{255}

Throughout Southeast Asia, it is male-to-female transgender individuals who are the public face of sex and gender diversity. A segment of kathoey in Thailand have high status as cabaret entertainers. There are around eight theatres in different parts of the country staging daily transgender cabaret performances for tourist audiences. Some are major local businesses. Tiffany Show in Pattaya, now in its 40\textsuperscript{th} year, has three daily shows in peak periods in a theatre that can seat 1,000 people. The national Tiffany transgender beauty contest is broadcast live on television each year. Tiffany also stages an annual international contest, the largest transgender beauty pageant in the world, with contestants from all world regions. Winners of the national and international contests feature in color photographs in the major newspapers. Local and national beauty contests and cabaret shows seem to exist throughout most of Southeast Asia.

\textsuperscript{254} Even for the very large hijra populations in India we have only two book length studies, and no overview of the new social programs for these populations, from the reforms in Tamil Nadu almost a decade ago. There is no comparison of the more recent court cases in Pakistan, India, Nepal and Bangladesh recognizing these groupings.

\textsuperscript{255} Megan Sinnott, Toms and Dees, Hawaii, 2000.
Some transgenders work in various parts of the beauty industry. In the Philippines they are so associated with beauty parlors that they are often called “parloristas.” In Laos

**Beauty shops are the prime locale associated with both work and sociality for kathoeys. It has been this way for generations.**²⁵⁶

But many others live marginalized lives, barred from most jobs. They are visible as street sex workers in many places. Bangkok also has a few ‘host’ bars featuring kathoey, copying the pattern of the Thai bars that have male or female ‘hosts.’

Transgender men have gained some visibility in the current decade. At the large Bangkok meeting of the *World Professional Association on Transgender Health* in 2013, it’s first meeting outside the West, the members of a panel and chair were all transmen. They came from Europe, Nepal, Singapore and South Asia. The *Asia Pacific Transgender Network* began exclusively for transwomen, but is now inclusive. Separate small organizations of transmen have started in Thailand, Philippines and other parts of the region.²⁵⁷ In Indonesia the word ‘waria’ was coined for transwomen perhaps three decades ago, and now ‘priawan’ has been coined for transmen. Both are combinations of the words for male (“pria”) and for female (“wanita.”)

**THE CONFLATION OF SEXUAL ORIENTATION AND GENDER**

There is a regional pattern of understanding ‘sexual orientation’ in terms of ‘gender’ – both in terms of mental identification and in self presentation. In Myanmar it would be said that it is because particular male-bodied individuals identify in their mind/heart as a woman (and may present as a woman) that they seek sexual activity with a man.

As Hla Myat Tun of *Colors Rainbow* and others emphasize, a ‘gay’ (or homosexual) identity (with no necessary other sex/gender implications) is rare in Myanmar. A Burnet Institute paper on HIV prevention strategies from 2008 comments “we hesitate to even use the word gay – as there is no

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²⁵⁷ See Philippine transgender men fight for equality with very own posterboy, GayStarNews, July 1, 2014.
such label as yet in Myanmar.”

The males who play ‘active’ roles in sexual activity with men (and perhaps women as well), are not seen (and do not see themselves) as ‘gay’ or as ‘bisexual’ (paralleling patterns often identified in Latin America and other regions). The ‘top’ figure is not stigmatized, not given a special ‘identity.’ He retains an unproblematized male self image.

These categorizations have significant implications for the stories of police harassment. Police demanding to have sex with the transgendered individuals they have detained (either by anal intercourse or receiving oral sex) are not compromising their masculine heterosexual identities. They are confirming their ‘normalcy’ as males, able to play the active role in intercourse with females and males (and the passive role in oral sex). In Europe or North America a heterosexual identity is more likely to be threatened by playing such sexual roles.

The liberal Philippine Daily Inquirer newspaper ran a “Young Blood” series, featuring columns written by “the twenty-something and below.” In August, 2015, it published a column entitled ‘LGBTs and me’ by Marj Casal, 24, who had written for adobo magazine. Casal’s first images of gays as a child was of ‘drag queens’ performing in pageants and the gay Flores de Mayo. She talks of overcoming that stereotype, but then defines activist goals in terms of gender presentation:

Members of the LGBT community still have to fight for their right to wear the clothes they prefer, as highlighted by a recent incident in which transgender designer Veejay Floresca, who was cross-dressed at the time, was barred from entering a bar because of its cross-dressing policy. Young gays and lesbians in conventional schools are yet to be given the choice to grow their hair or cut it short like the other male and female students do, or the liberty to choose whether they want to wear a dress or a tux to the prom.

VISIBILITY

A major issue in ASEAN states is the public visibility of gays, lesbians, transgendered individuals and intersexuals. No elected or

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258 Tin Aung Win, Kim Benton, HIV and sexual identity in Myanmar, Burnet Institute Myanmar (no date, obtained from Burnet Institute participants in the 2008 ILGA Asia conference in Chiang Mai).
259 Marj Casal, LGBTs and me, Philippine Daily Inquirer, August 16, 2015, 17.
appointed individuals in the ten ASEAN states are publicly identified as gay, lesbian, transgender or intersexual. No notable academics speak publicly as gay, lesbian or transgender. No prominent entertainers are so identified. Many films and television dramas with LGBT characters are highly discriminatory, making transgender individuals comic figures. In 2015 a number of activists in Vietnam publicly protested the slapstick depiction of an effeminate gay man in a highly popular mainstream film. Such depictions are routine in films in Thailand, though recent films have moved away from such depictions. The highly controlled media in Brunei, Singapore and Malaysia generally avoid any coverage of LGBTI lives, and never report on progress in acceptance in the region or other parts of the world. On line media fills some of this gap,

But there is progress. Nine local governments in the Philippines now bar discrimination on the basis of sexual orientation. Public “pride” events now occur in Cambodia, Myanmar, Philippines, Singapore, Thailand and Vietnam (and Hong Kong and Taiwan, nearby). Thammasat University in Bangkok lists two SOGI courses in its offerings, and now requires all incoming students to take a three hour class on gender and sexuality issues as part of a larger introductory program. There is no coverage of these developments in the Straits Times (Singapore) or the New Straits Times (Malaysia). Invisibility is enforced in those countries.

Student groups emerged at the University of the Philippines, Diliman campus, and university groups were the first public expression of gay and lesbian organizing in South Korea. No such groups have been publically recognized as established in schools or universities in Southeast Asia, apart from the Philippines. PFLAGG groups, involving parents and friends of lesbians and gays as supporters and advocates, have been established in Vietnam and in Shanghai, but not, it seems, outside Vietnam, in Southeast Asia. Patterns of ‘coming out’ to parents are not consistent in the ASEAN region. Express coming out is avoided with parents in Thailand.

In the West, the visibility of prominent figures as gay or lesbian began in the entertainment industry – Elton John, Melissa Etheridge, Ellen DeGeneres, Sir Ian McLellan and some boy bands like the Backstreet Boys.

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260 Exceptionally, out candidates have run for office in Singapore, Indonesia and the Philippines, but none were elected.
261 Stefanie Gendes, Thai University introduces mandatory class on trans issues, GayStarNews, September 8, 2015. A speaker will be a well known transman.
In the May 7th, 2015 UK election, twenty-seven ‘out’ individuals were elected to the national parliament, thirteen for the Labour Party, twelve for the Conservatives, and two for the Scottish National Party. This was only one person more than in the previous parliament, but was said to represent the highest number of elected ‘out’ individuals in any national parliament in the world.\textsuperscript{262} ‘Out’ individuals have held cabinet positions in the UK, as they have in a number of other Western countries including Australia, Canada and New Zealand. ‘Out’ individuals have led governments in Iceland, Belgium and Luxembourg.

IDENTITIES

It is gender normative (or cis gender) gay men and lesbian women who have been largely invisible in Southeast Asia.\textsuperscript{263} Neil Garcia makes the point that tolerance or acceptance of the gender crossing bakla in the Philippines does not automatically indicate broader patterns of the tolerance or acceptance of homosexual desire.\textsuperscript{264}

Apart from transgender individuals and groupings, there can be a denial of the existence of ‘homosexuals.’

Why do we think in terms of gay, lesbian and transgender ‘identities?’ Why do we see our particular sexual attractions as defining us in such a basic kind of way?

- Perhaps it is in reaction to hostile views of others. Foucault, who rejected ‘identity’ politics, saw the gay activist movements as a reaction to repression. In other words, it is the irrational, fearful, neurotic views of others that elevates our particular sexual attractions to the status of being an ‘identity.’

- Perhaps it is because the societies in which we were raised made contact between gays and between lesbians, difficult. Many recount feeling in their youth that they were the only ones who had these urges. It was important to find others to relate to as

\textsuperscript{262} Stefanne Gerois, Britain has elected the most LGBTI MPs in the world, GayStarNews, 8 May, 2015.
\textsuperscript{263} ‘Cis-gender’ has come to replace ‘gender normative’ to avoid the implication that only certain forms of gender expression are ‘normal’ or ‘normative’.
\textsuperscript{264} Garcia, 152.
friends and partners – other individuals who also had the same desires, understandings and experiences. There is comfort in a sense of belonging to some kind of ‘community.’ We were socialized to be heterosexual in our birth families, and needed to reach out from limiting parental models.

- Perhaps a gay identity is also a strategy, a necessary reifying of our particular attractions so as to demand changes to peculiar religious doctrines, legal prohibitions and medical diagnoses. We had to be a ‘minority’ – a collectivity that was organized in some way, in order to fight for change.

Reaction? Reassurance? Strategy?

What we do know is that a ‘gay identity’ (a) has not been a constant in societies over time, or (b) something equally established or understood in different countries and social groups in our time.

The word “homosexuality” was coined in 1869, in the context of activism seeking to end criminal prohibitions of male same-sex acts in German areas in Europe. David Halperin in 1990 wrote a book “A Hundred Years of Homosexuality” and contributed to another “Before Sexuality”, both of which saw the medical writings and the activism in the last half of the 19th century as a historical turning point. Michael Foucault, in his groundbreaking “History of Sexuality” said homosexuality had been an activity, but ‘homosexuals’ became a species. Robert Beachy wrote

…the emergence of an identity based on the notion of a fixed sexual orientation was initially a German and especially a Berlin phenomenon. …[it was] a new group identity.265

Dr. Magnus Hirschfeld was the single most important figure in the creation of a new homosexual rights movement. His Scientific-Humanitarian Committee established in 1897 was the first ‘gay rights’ organization in world history.266

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266 Beachy, 85-86.
The modern rights movement began with a focus on gay men, but expanded to include lesbians, transvestites, transsexuals and intersex. The first continuing international organization was the *International Gay Association*, begun in 1978. It became the *International Lesbian and Gay Association*, and now describes itself as the international association for gay, lesbian, bisexual, transgender and intersex individuals. The acronym used to describe the broad constituency of modern activist groupings can expand to LGBTITQQAA.\(^\text{267}\) This listing of categories emphasizes that this is an ‘identity’ based movement. Being gay or lesbian is not simply about sexual acts, but a personal identity. Gays, lesbians and trans are ‘minorities’ defined by their erotic attraction or bodily understandings. In contrast, a fondness for brie cheese or open-toed sandals does not involve an ‘identity’ or establish oneself as the member of a self-conscious minority. In 2015 the International Gay and Lesbian Human Rights Commission, a non-governmental organization, long conscious of the limited categories in its name, changed to *OutRight Action International*. SOGI came to replace LGBTI, but expanded to SOGIE and then to Sexual Orientation, Gender Identity and Expression and Intersex status.

Many in Asia who are involved in same-sex activity, do not have a ‘gay identity.’ Hla Myat, of Colours Rainbow in Myanmar, is one of many who have said that local social patterns do not include a ‘gay identity.’ Establishing a gay identity in Myanmar life is a goal of his organization. A recent study on HIV/AIDS among gay men in Thailand saw the lack of a ‘gay identity’ or ‘social’ identification as gay as problems for reaching young men who were having sex with men.\(^\text{268}\) Joseph Massad, author of “Desiring Arabs” remembers life as rather relaxed and pleasant in the Middle East in the past, giving space for sexual play between men. When Western ideas of a gay ‘identity’ were imported, society began actively stigmatizing ‘homosexuals.’ The spread of a ‘gay identity’ caused problems, he says, that the frequency of homosexual acts never had before. People writing about the Thai gay bars have often said that the bar boys, who go back to homes or hotels with male customers, are not ‘gay.’ Of course ‘lady boy’ sex workers are not being considered in this commentary. What is meant is that the gender normative, masculine appearing young men

\(^{267}\) Lesbian, gay, bisexual, transgender, intersex, two-spirited, queer, questioning, asexual, ally.

\(^{268}\) Jan W. de Lind van Wijngaarden, Timo Ojanen, Identity management and sense of belonging to gay community among young rural Thai same-sex attracted men: implications for HIV prevention and treatment, *Culture and Health*, Routledge, published on line 28 September 2015.
working in the bars do not have a ‘gay identity.’ Perhaps they enjoy sexual activity with both men and women. Probably they see themselves as men, and understand that men can play an active role in sexual activity with women or men, without stigma or concern. In North America such casual bisexuality is very stigmatizing for males trying to maintain a masculine or ‘straight’ identity. The phrase ‘gay for pay’ developed over the last decade in the West, clearly suggesting that without pay, these males would not be having sex with other men. Money seems to erase or counter the stigma of engaging in homosexual acts.

Gay identity is weak in most of Southeast Asia. Many, many gay men marry women, accepting societies dictates. In some areas most ‘gay men’ marry women – some say at least 80% in Java. Wives, typically, do not know that they are marrying a male whose preferences are not heterosexual. Chiang Mai based activist Natee has often campaigned against such marriages, as bad for the wife and bad for the husband.

Distinctive to LGBTI existence and organizing is the role of ‘the closet.’ Only intellectual minorities – Jews, Communists, Jehovah’s Witnesses – have an ability to pass without detection in the same way as homosexuals.

Attempts to organize homosexuals faced a basic dilemma. Most homosexuals hid their sexual identity from family and co-workers, staying ‘in the closet.’ This protected them from rejection and discrimination. Hiding was made easier by the fact that public media paid little attention to sexual variation. In the west, transsexuals sought to be recognized in their new sex, not as ‘transwomen’ or ‘transmen’, and not as a ‘third sex.’ They wanted to disappear, as individuals, into the mainstream categories of male or female.

Only if social attitudes changed would it be safe to come out of the closet. But social attitudes would only change if people became comfortable with the existence of gay people. This meant that gays had to come out of the closet to change social attitudes. The ‘closet’ was a trap, but for most it was the only realistic choice. Prejudice reinforced prejudice. It was a

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269 In Latin America it is often said that the ‘active’ partner is unstigmatized in male-male sexual activity. This seems true of the male partners of Bakla in the Philippines. David Gilbert (2013) notes at 242 a category termed “guy” for males who are open to having sex with effeminate gay men, gender normative gay men and women.
vicious circle. Allies were rare, for they feared being tainted as gay for their efforts. Gays within academic, professional or government systems might anonymously give some support.270

A few years ago gay activist Natee Teerarojjanapongs said that he wanted to be referred to in media as Gay Natee. It was important that he have this public title. Why? We have to be visible if we are going to be able to bring about change. Natee has always been the most visible gay man in Thailand and worked to maintain that visibility.

Conditions slowly improved. The Kinsey studies showed that we were far more numerous than people had assumed. Studies showed that we were not maladjusted. Homosexuality was removed from the list of pathological conditions by medical associations in the United States and United Kingdom in 1973, by the World Health Organization (WHO) in 1990, and by medical associations in many countries, including China in 2001. In the early twenty-first century, medical experts generally assume that sexual orientation and gender identity are determined either genetically or physiologically. This suggests they are not ‘chosen’ and cannot be altered by treatment. Progress! We were not ‘sick’ anymore.

The WHO declassification of homosexuality in 1990 is such an important indicator of changed views that the anniversary of the decision is celebrated as the International Day against Homophobia and Transphobia (IDAHOT). But it is really in the context of second generation feminism, the new social movements and the AIDS pandemic that we gained our present visibility. Only now, 46 years after the birth of ‘gay liberation’ in 1969, can we say that “the historic invisibility of homosexuality in everyday social life and in popular culture” has largely been overcome in the West.271 Much less so in Asia.

SOCIETAL RESPONSES

270 There were no ‘out’ individuals involved in the drafting of the Model Penal Code in the United States which decriminalized same-sex acts. In the curious way in which the closet can work, individuals might have been ‘out’ to colleagues in this work, but not publicly identified, leaving no trace of how the process actually worked. Even with the Yogyakarta Principles, there has been no public identifying of the drafters who were gay, lesbian or transgender. Of course, it would be seen as very incorrect to so list individuals, both as a breach of privacy and for implying that there might be some question whether those individuals could be competent/impartial experts. Delisting of homosexuality in the DSM was pushed by a masked psychologist at an American Psychological Association gathering.

In ASEAN today, we see a variety of societal responses to sex and gender diversity. In Cambodia, former king Norodom Sihanouk called for the opening of marriage to same-sex couples, and President Hun Sen has urged Cambodians not to discriminate against gays and lesbians. In sharp contrast, Prime Minister Najib in Malaysia has defended colonial era criminal laws, saying homosexuality is a threat to Islam and to Malaysia.

All countries in ASEAN have laws, constitutional provisions or treaty obligations which condemn discrimination on the basis of sex. None have provisions expressly condemning discrimination on the basis of sexual orientation, gender identity or gender expression. Brunei, Malaysia, Myanmar and Singapore have colonial era criminal laws prohibiting male homosexual sexual acts. Many transgendered individuals are part of highly marginalized groupings, the victims of discrimination in public and private spheres. Transgender citizens are often denied any recognition of their transgender status in personal documents, and sex reassignment surgery is sometimes not available or forbidden.

10. THE EMERGENCE OF A PUBLIC ‘GAY SCENE’

The Asian cities with the oldest and most extensive ‘gay scenes’ are Tokyo and Bangkok. They are very different from each other.

JAPAN

In 1948 Tokyo’s first modern gay bar, the Brunswick, opened in the Ginza district. Miwa Akihiro, who became Japan’s most famous transgender entertainer, began working in the Brunswick in 1951.

In 1949 Sumi Tasuya published the novel Grove of Male Prostitutes about transgender prostitutes in Tokyo’s Ueno Park. In 1951 Japan’s first gay organization Adonis Kai was founded and began publication of the privately circulated Adonis magazine (until 1962).
In 1957 Japanese sex educator Ota Tenrei published The third Sex, a positive account of male homosexuality written with the cooperation of gay men. In 1959 Japan’s 1958 _Anti-Prostitution Law_ began to take effect and numerous gay bars sprang up in recently vacated red-light districts such as Tokyo’s Shinjuku Ni-chome, now home to the largest concentration of gay bars in the world. Following Japanese patterns the bars are each quite small, and with individual loyal Japanese followings. They are not very accessible to foreigners.

From 1971 to 2004, the first Japanese gay magazine, Barazoku was published, followed by Adon (1972 – 1996) and Sabu (1974 – 2001). Gay magazines have been published continuously in Japan since that time and marketed openly. Some gay groups functioned. The first lesbian social group, Wakakusa no Kai (Young Grass Club), was founded in 1971, continuing for fifteen years.

**THAILAND**

In the late 1960s the first public gay bars opened in Bangkok, the Sea Hag and Tulip. They followed the patterns of the heterosexual bars that had expanded in Thailand in response to the presence of visiting soldiers, engaged in the Vietnam-American war and taking “rest and recreation” breaks in the Kingdom. Thailand was a US ally, and contributed troops to the war effort. Connected with the gay bars were young men, ‘hosts’ or dancers, who would go with customers who paid the bar an ‘off’ fee, which compensated the bar, the theory went, for its temporary loss of the services of the host. Payment to the host by the customer was separate and not regulated by the bar.

A mix of gay venues developed in Bangkok, with bars, saunas, massage parlors, ‘host’ bars and restaurants. By the 1980s there were around a hundred different venues in Bangkok, spread around the city. These places were accessible to foreigners, though many were hard to find. Peter Jackson links this first gay ‘boom’ to the expansion of the Thai middle class in an era of rapid economic expansion, in which Thailand often had the

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272 Gay Times reported in December, 2004, 79: “After 33 years, one of the world’s oldest gay magazines has been forced to close through bankruptcy. Barazoku, established in 1971, had been a trailblazing publication in its time, and the first in Asia to be sold in mainstream bookshops. The magazine’s owner/publisher blamed the fall in sales and advertising on the rise of the internet. … Barazoku’s name translates as ‘rose tribe’, which has since entered the language as a synonym for ‘homosexual.’”
highest growth rate of any country in the world. Gay saunas began in the 1980s, mostly located in residential neighborhoods, quite separate from bar areas. They occasionally ran into problems from neighbors, who complained about late night roof partying and street congestion. The very up-scale Babylon Sauna opened in 1987, and quickly became world famous in gay travelling circles. In 2000 it relocated further up the side-street, now four times larger, with a hotel, gym, massage service, an atrium, a pool, a restaurant, a wine bar, and cruising areas and rooms.

In 1987 the first of seven editions of Eric Allyn’s guidebook, The Men of Thailand, was published, selling in the various gay and lesbian bookstores that had come into being in the West. For many years it was not for sale in Thailand. Around five gay guidebooks on Thailand have been published since, one in Mandarin. In recent years free gay maps and free English language gay magazines have emerged for tourists, widely available in the bars and saunas. Peter Jackson notes a twenty-first-century boost in the number of commercial gay venues in Bangkok – 165 in 2003 and 216 by 2007. This second ‘gay boom’ involved clusters of gay bars in two or three new areas, distant from those already known to tourists. As well, the number of venues expanded in Chiang Mai, Pattaya and Phuket, and bars and saunas have appeared in smaller centres like Chiang Rai, Hua Hin, Hat Yai, Korat, and Khon Kaen.

In 1983 the first Thai gay magazine, Mithuna, began publication in Bangkok. Various Thai language gay magazines have been published in Thailand since that time. The British Library funded an ‘endangered archives’ project, in which the Thai magazines were collected and digitalized. Mainstream Thai language gay magazines, easily available in magazine racks, began in the 2000s. Notable and successful were Tom Act, a Thai lesbian magazine, launched in 2008, and a Thai edition of Attitude, the first foreign language edition of the popular British magazine. A number of mild gay male skin magazines are published, with no full nudity or interaction between models. They are only available at a small number of outlets.

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In mid-2015 two high quality Thai movies featuring gender normative same-sex gay relationships got mainstream screening, P’Chai, My Hero/Winning at Checkers Every Time, and Red Wine in the Dark Night. There were a number of earlier films, including the very popular Love of Siam, Bangkok Love Story, Metrosexual, Beautiful Boxer and the famous Iron Ladies (a camp international hit). Over a dozen films could be listed, though many were low budget comedies with insulting depictions of kathoey. According to director Tanwarin Sukkhapisit more than ten gay films were set to be released in 2015, most not for regular commercial showings.275

While Thailand has continued to prosper, it has been politically unstable. The 1980s was a period of threatened coups, which resulted in a highly restrained government headed by a former General, unmarried and said by many to be gay. Military coups in 1991, 2006 and 2014 resulted in periods of non-democratic governments. No governments, military or civilian, have launched crack downs on sex-oriented venues, whether heterosexual or homosexual.276 Government and police concerns have been with enforcing closing hours, combating drug use and excluding under age hosts and patrons. The bars, like some other businesses, make regular payments to the police, a stable pattern. Owners, workers and customers have no reason to fear police raids. Over a hundred females and males were arrested in June, 2015, on prostitution related offences. They were all from street prostitution areas. None were from the bars, saunas or massage parlors.277 A new law brought in by the military government is aimed at illegal nightspot operations:

Under the new law, any pub or nightclub that allows entry to people aged under 20, or operates after the legal closing time of midnight, will have its licence revoked or be shut down for five years.278

This news story told of the closures of two karaoke bars, noting that they were unlicensed, had hired illegal migrant workers and provided female escorts for customers. It is clear that the availability of female (or male) escorts alone would not have provoked police action. The famous ‘social

277 Crackdown on Prostitution, The Nation, June 6, 2015, 3A.
278 Two karaoke bars shut for flouting ban, Bangkok Post, August 6, 2015, 2. There seem to be zones where bars can stay open until 2 a.m.
order’ campaign under Prime Minister Thaksin a decade ago, like subsequent police actions, have not targeted ‘host’ bars and have never targeted gay bars for special treatment.

Some gay men and transgender sex workers may choose to work in tourist zones such as Pattaya because they offer spaces of relative autonomy from the restrictive cultural norms that obtain in the rest of the country. Timo Ojanen reports that the transgender manager of an NGO in Pattaya, an organization focused on transgender health and rights issues, said many kathoey considered Pattaya to be an area of freedom because it is home to one of the biggest communities of transgenders and transsexuals in the country. They provide mutual support and help for each other. Many Thai gays, lesbians, and kathoeys find their own society highly restrictive. The problems are with family and society, not with law, police or religion.

SINGAPORE

Bangkok became the Asian gay capital, not simply for a growing number of Western gay tourists, but for Asians. Alex Au has written of how Singaporean gays would travel to Bangkok when little was available or accessible in their city-state. There was an expansion of the gay scene in Singapore around 1995. The first gay karaoke parlor in Singapore was named Babylon, signaling its gay character by using the name of the famous Bangkok sauna. The first gay sauna in Singapore opened in 1997.

Bangkok had showed Singaporean gays that an open gay scene was possible, and also, Au argues, the Bangkok example countered the focus of many young Singaporean gay men to get a ‘white bread’ (Caucasian) boyfriend, and emigrate. Access to the Bangkok gay scene, he suggests, stimulated the formation of gay venues in Singapore and politicized some Singaporean gay men.280

279 Peter Jackson, Capitalism, LGBT Activism, and Queer Autonomy in Thailand, in Peter Jackson (ed) Queer Bangkok, HK, 2011, 195 at 201
280 While access to the gay scene in Bangkok may have stimulated activism in Singapore, it had a different impact within Thailand. Many have commented over the years on the weakness of CSOs in Thailand and the persistence of a very small number of spokespeople, without effective organizations supporting them. On the Thailand scene’s impact on other places, see also Ben Murtagh, Bangkok’s Beautiful Men: Images of Thai Liberality in an Indonesian Gay Novel, in Peter Jackson (ed), Queer Bangkok p 163. The novel is Lelaki Terindah (The most beautiful man) by Andrei Aksana and published in 2004.
On May 30th, 1993, Singapore police raided Rascals, a gay-on-Sunday disco, harassing and detaining some of the patrons. Twenty-two gay people, including lawyers, doctors and other professionals, signed a letter of protest addressed to the chief of police in an unprecedented public move. They received an official apology. Such harassment of gay venues ended. The event prompted the formation of the group People Like Us. Now there are a small number of bars and saunas.

PHILIPPINES

Sexually oriented bars flourished in Manila, another ‘R&R’ destination for American soldiers. But famously, in the period 1988-1993, Alfredo Lim, first as police chief, then as mayor, cleaned up Malate, the old central area of Manila, on instructions from President Corazon Aquino. This drove the bars into other parts of sprawling Metro Manila. The result was a number of bars and saunas, but difficult for foreigners or tourists to locate, though the internet provides listings and maps. The situation over the years has been quite unstable, with bars and saunas opening and closing. Academic Ronald Baytan has written on “The death of Gay Malate: One-Time Gay Capital of the Philippines.” Bobby Benedicto has written on the privileged gay scene in Metro Manila in the 2000s, when three up-market gay dance bars in Malate and Makati strove to connect with international DJs and the ‘circuit party’ scene. New glossy magazines emerged, such as Icon in 2004. But by 2014 when his book was published the specific venues and the magazines were gone.

Filipino ‘macho dancers’ are famous, and a half dozen Filipino movies feature them. But the particular style of erotic dancing has ended, though a scattering of what Benedicto calls male ‘strip’ bars exist in greater Manila and other urban centers, opening, closing, moving, changing names. These bars do not follow patterns elsewhere, and paying an ‘off’ fee for a dancer is fairly rare. Often Filipino women, and sometimes Korean women tourists, enjoy visiting the bars, having drinks with dancers, and going home alone.

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281 Garcia, 413; Rene Ofreneo, Rosalinda Ofreneo, Prostitution in the Philippines, in Lin Lean Lim, The Sex Sector: The Economic and Social Bases of Prostitution in South East Asia, International Labour Office, 100-129.
In 1980 Tony Perez published Cubao in Tagalog, a collection of short stories and poetry, subtitled ‘The first cry of the gay liberation movement in the Philippines.’ The lesbian organization CLIC (for Can’t Live in the Closet) was formed in 1983. The Library Foundation began informally in 1989 and was registered as a society in 1991, focused on HIV/AIDS education and prevention. Katlo, a second gay run HIV/AIDS organization, dates from 1992. Metropolitan Community Church, linked to the US gay-oriented denomination, was established in 1992. UP Babaylan, as earlier noted, was also formed in 1992. It gained official recognition at the University of the Philippines, and it, together with its sister lesbian organization, UP Sappho, were able to hold national conferences on the spacious Diliman campus. The fourth, and last, regional conference of the Asia Lesbian Network was held there in 1998. ProGay, another student group, was established in 1993 at the large Polytechnical University of the Philippines, a militant, nationalist, leftist organization, very successful in publicizing its activities. It is quiet these days. The Womyn Supporting Womyn Centre was started in 1994. There seem a dozen or more organizations these days, with little solidarity.

Continuously, the Philippines has had more activist LGBT organizations than any other country in Southeast Asia. There are no accounts of difficulties in registering the groups, though CLIC said in the early 2000s that it was the only legally incorporated activist group.

The first pride parade in Asia was held in Manila on June 26th, 1994, co-organized by ProGay and the Metropolitan Community Church. It commemorated the 25th anniversary of the Stonewall riots in New York. Father Richard Mickley, pioneer of gay and lesbian marriage in the Philippines, conducted a pride worship service. A second parade was held in 1996 with about 500 participants. It has been held every year since.

A literature, unique in the region, began with the publication in 1994 of Ladlad, an anthology of Filipino gay writing, edited by two academics from leading Manila universities, J. Neil C. Garcia (University of the Philippines) and Danton Remoto (Ateneo University), followed by Ladlad 2 and perhaps Ladlad 3. In 1993 a clinical psychologist, Margarita Go-Singco Holmes had published “A Different Love:; a collection of her sexual advice

columns. These publications, and subsequent ones, were available in the archipelago-wide chain of National Book stores, where students of all ages congregated to buy school supplies and text books. There was no difficulty in accessing this new LGBTI literature.

In 1996, the University of the Philippines published Garcia’s Philippine Gay Culture, a massive study, with a cover illustration of a punk St. Sebastian. It was one of a set of books published by UP to mark the centennial of the founding of the university. Garcia speculated that the 19th century political hero Jose Rizal, unmarried, was likely to have been gay. He introduced the theories of Michael Foucault and Eve Kosofsky-Sedgwick to Filipino readers.


In June, 1999, the Lesbian and Gay Legislative Advocacy Network, or Lagablab, was formed to lobby the Philippine Congress. It was put together by nine or ten activist NGOs, including UP Babaylan, CLIC, the Library Foundation and Father Mickley’s Order of St. Aelred. It has worked for over a decade lobbying the Congress for anti-discrimination legislation.

There was a national lesbian conference in 1996 and a national youth conference in 1997. A national conference of lesbian and gay leaders was held in 1997. LeAP, a lesbian organization, organized a second national conference, in June, 2011, in partnership with the Embassy of the Netherlands. The UNDP/US AID project, Being LGBT in Asia, organized a national LGBT Dialogue in June, 2013. None of these events led to plans for regular national conferences or the creation of a national umbrella LGBT organization. Umbrella organizations are not typical of minorities anywhere, so their absence in LGBTI Southeast Asia is unremarkable.

Uniquely in Southeast Asia, the Philippines has a party list system exclusively for marginalized groupings whose small and scattered
populations may exclude them from success in constituency based elections. Akbayan, a progressive, socially conscious party list party, succeeded in gaining a small number of seats in the Congress. It was the only party to support LGBTI rights, and was active in pushing for an anti-discrimination law. Danton Remoto, author and academic, and a charming public speaker, was the lead figure behind creating an LGBT party list party, Ang Ladlad, in 2003. It applied to the Commission on Elections for accreditation. The application was rejected in 2007 on the basis that Ang Ladlad lacked sufficient groupings of supporters across the nation. In a second application in 2009, the Commission on Elections rejected accreditation on grounds of immorality, saying that “the petitioner tolerates immorality which offends religious beliefs.” Offending religious beliefs is a criminal offence in the Philippines. An appeal went to the Supreme Court, which overturned the ban, with language that supported LGBT rights more strongly than in any other judicial decision in Asia. The Supreme Court stated that the rejection of registration “on purely moral grounds amounts more to a statement of dislike and disapproval of homosexuals, rather than a tool to further any substantial public interest.”

To gain any seats it was necessary for Ang Ladlad to gain at least 2% of the national vote. It failed to gain seats in the elections in both 2010 and in 2013, with the result that its accreditation as a party-list party lapsed. Perhaps it will seek a new accreditation in the future.

OTHER PARTS OF SOUTHEAST ASIA

In general, stable gay scenes involving public venues, are limited, difficult or absent in Brunei, Cambodia, Indonesia, Laos, Malaysia and Myanmar.

Laos has no public or commercialized sex scene, ‘gay’ or otherwise, to rival some of its neighbours, although [sex] is neither minimal nor always discrete. … …local radio or television remains heavily controlled and typically avoids inclusion of sexual material of any nature. … By and large, lesbianism remains profoundly undisclosed and unseen in Lao society. The same cannot be said for male-male sexuality, where throughout Laos the commonplace presence of the

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kathoey symbolizes non-normative ways of embodying gender and sexuality.\(^{288}\)

Blueboy bar has functioned for decades in Kuala Lumpur, and now has a few competitors. Gay saunas are successful in the Malaysian capital, and perhaps other cities. Two large gay discos functioned in Yangon, but the older one has now closed, while its competitor flourishes (now baring transgenders). Venues come and go in Muslim areas of Indonesia. Three gay bars are well established in the Kuta Beach area of Bali. GC has endured as a modest gay bar in Hanoi for a decade or two. Vietnam has some gay karaoke bars, with hosts, as well as mixed crowds at some bars and discos. There are some venues in Cambodia, Indonesia and Laos. Maybe nothing in Brunei.

Activist, advocacy organizations in Indonesia go back to the founding of Gaya Nusantara (originally named Lambda Indonesia) in 1981. Pink Triangle, now PT Foundation, began in Malaysia in 1988, working on HIV education and prevention, but with a broader mandate. Two organizations in Vietnam, iSEE in Hanoi and ICS in Ho Chi Minh City, are less than ten years old. Three organizations in Cambodia, Rainbow Community Kampuchea (Rock), Cambodia Center for Human Rights (CCHR – SOGI project) and CamASEAN, are also fairly new. Colors Rainbow began to work within Myanmar perhaps in 2003, when exile activists were able to return to the country.

11. LGBTI CIVIL SOCIETY ORGANIZATIONS AND HUMAN RIGHTS DEFENDERS

HUMAN RIGHTS DEFENDERS

The UN, from its beginnings in 1945, recognized a role for civil society organizations, and established a process for their recognition through the granting of “consultative status” by the Economic and Social Council. At present more than a dozen explicitly LGBTI civil society organizations

\(^{288}\) Chris Lyttleton, Mekong Erotics, UNESCO, 2008, 4-5.
have consultative status at the UN. They include the *International Lesbian and Gay Association* and the *International Gay and Lesbian Human Rights Commission* (now renamed *Out Rights International*), both of which have had some activity in Asia. No Asian SOGIE groups at present have UN consultative status, but they can appear at UN human rights meetings under the auspices of accredited umbrella organizations. As well, SOGIE issues are actively supported by a number of well established international human rights organizations, including *Amnesty International*, *Human Rights Watch*, *International Commission of Jurists* and the *International Service for Human Rights*.

Of particular importance is the *Declaration on Human Rights Defenders* and the Special Representative on Human Rights Defenders.

Activists said ...the special Rapporteur on Human rights Defenders [[perhaps special representative]] has done a lot of important work on SOGI issues from the very early days and has taken up concerns through individual complaints, and regular and thematic reports. The office has played a key role in identifying and acknowledging the work of LGBTI human rights defenders as well as protecting individual activists.289

The Laotian activist Sombath Somphone disappeared in December, 2012. In Thailand the ethnic Karen activist Pholachi “Billy” Rakchongcharoen disappeared in April 2014. The activists who have ‘disappeared’ in Southeast Asia in recent years have sometimes been activists on economic and environmental issues, protecting local traditional land and harvesting rights against developers, or in the case of Somchai Neelapaijit in 2004 for giving legal defense to ethnic Muslim activists charged by Thai authorities. Kelly Gerard specifically notes that “the disappearance of environmental activists” is not an issue deemed suitable for civil society consultations in *ASEAN*.290

In Asia no LGBTI activists have been targeted with physical violence by police or have disappeared on the basis of advocacy of SOGI rights. There are prominent cases of killing of LGBTI human rights defenders in parts of Africa. In October, 2015, a very prominent trans rights activist,

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289 Dodo Karsay, How far has Sogii advocacy come at the UN and where is it heading?, ARC International, 2014, 16.
290 Kelly Gerard, 35.
Diana Sacayan, was murdered in Argentina. A young marcher was stabbed and died at the Jerusalem pride march in late July, 2015. There have been no comparable cases in Asia. Pride marches in the former Eastern Europe have often been attacked by opponents, requiring police protection.

In Asia we have instances of aggressive actions against LGBTI meetings and workshops by the Islamic Defenders Front in Java, and the judicial action against Alex Au in Singapore for suggesting some manipulation of process by the Chief Justice in the litigation challenging Singapore’s sodomy law. Legal registration of organizations may be difficult, but usually is possible (except in Singapore and Laos). No instances have been reported of barring receipt of foreign funding by LGBTI groupings in ASEAN countries. SOGIE activism does not challenge vested economic interests. Opposition is on cultural and religious grounds and tends to be strong but somewhat passive in Asia.

There are examples of the killing or forced disappearance of certain activists in ASEAN, who have pressed economic and political issues. The iconic cases in Thailand are the disappearance of Karen environmental defender Billy and of activist lawyer Somchai Neelapaijit who had vigorously defended Muslims in the far south of the country who had been charged with treason, terrorism or separatist related violence.

SPECIFIC SITUATION OF LGBTIQ DEFENDERS IN ASEAN

Patterns of civil society organizations and human rights defenders that address SOGIE issues in the region vary greatly. Early organizations, such as Pink Triangle in Malaysia and FACT in Thailand were active on HIV/AIDS issues, had positive relations with government health ministries, and received overseas funding. They, like their equivalents in other countries, were gay-run, and assumed something of a human rights advocacy role, broader than simply health concerns.

Registration or incorporation of SOGIE groups as non-profit societies has been barred in Singapore, though in reality ‘informal’ groupings exist to organize fairly high profile public events, notably IndigNation (a series of

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292 Nanthida Phuangthong, Pratch Rujivanarom, OHCHR voices concern over lack of progress in finding missing Karen Activist Billy, The Nation (Bangkok) April 17, 2015, 3A.
performances and events each August) and Pink Dot (a celebratory mass gathering each March). Organizations in Malaysia and perhaps elsewhere are likely to incorporate as companies, to avoid restrictions on registering as civil society organizations. Sriprapa Petcharamesree has estimated that 90% of human rights non-governmental organizations in Thailand are not registered.

A new registration law for CSOs in Cambodia has been widely protested by human rights organizations. The Cambodian representative on the ASEAN Intergovernmental Commission on Human Rights says that organizations which already have established themselves with various ministries in the past will not have to re-register under the new law.

LGBTI groups from all over Southeast Asia, through concerted advocacy, attempted to gain specific recognition of SOGIE rights in ASEAN (specifically in the ASEAN Human Rights Declaration, and the terms of reference of the ASEAN Intergovernmental Commission on Human Rights), but without success. However, they have secured an ongoing role in some ASEAN related events.

LGBTI human rights defenders are working to overcome the relative invisibility of LGBTI issues in domestic and regional life. What strategies are being used or envisaged to counter the silence of the politicians in most ASEAN states, and the hostile statements of politicians in certain others (notably Malaysia and Brunei)? The only head of government to call for an end to discrimination on grounds of sexual orientation is Hun Sen in Cambodia.

The Charter of the United Nations makes provisions for the granting of ‘consultative status’ to civil society organizations, to allow them to participate in the human rights work of the world body. A few thousand organizations have this status. Discrimination within the UN system blocked the accreditation of many LGBTI organizations in the 1990s and early 2000s. In that period major international human rights organizations began advocacy on SOGIE issues, and LGBTI individuals were able to be present at UN human rights meetings, and present information within the rules of procedure of the meetings. Perhaps a dozen or more explicitly LGBTI organizations now have consultative status.
Over the last few years there have been strong reprisals against LGBTI activists in parts of Africa, highlighted by the murder of certain prominent figures, notably Fanny Ann Eddy in Sierra Leone, David Kato in Uganda and Eric Ohena Lembembe in Cameroon.

In Southeast Asia we have seen ‘disappearances’ of activists/defenders who have challenged state actions in the far south of Thailand, or who have been active in different countries against economic projects, either on environmental grounds or to protect local villagers property and livelihood rights. In Southeast Asia, these days, instances of aggressive non-state interference with LGBTI gatherings is limited, pretty much, to the actions of the Islamic Defenders Front in Indonesia, which also targets religious minorities. Police and politicians in Java allow this aggression to continue. We have seen the selective, apparently political use of a colonial-era sodomy law against opposition political leader Anwar Ibrahim in Malaysia, and a contempt action against blogger activist Alex Au in Singapore.

LGBTI activism does not challenge economic or class interests. While it is associated with the left in Latin America, it has no political coloration in Asia. It generally does not attract violence. Violence and police harassment against transgender sex workers is spasmodic. It has been documented in parts of South Asia, but not adequately described in Southeast Asia, where it seems less pervasive.

[see reference to hate crimes in Being LGBT in Asia: Philippines, 25-26.]

In general, the work of LGBTI activists and human rights defenders in Asia these days is against entrenched discriminatory attitudes that manifest themselves in a range of public and private settings – within families, local communities, public and private media and some religious traditions. There can be problems in getting legal registration of civil society organizations, and public events may be strictly regulated. Government agencies may be hostile or simply inaccessible.

Public opinion polls show majority disapproval of homosexuality in Asia, with the notable exception of the Philippines. The well-respected Pew Global Attitudes and Trends report has asked “Do you personally believe that homosexuality is morally acceptable, morally unacceptable, or is it not a moral issue? Forty countries were surveyed. In Ghana and Egypt 98% and 96% said it was morally unacceptable. In Germany and Spain only 8% and 6% answered in that way.
The Southeast Asia countries covered responded as follows:

Indonesia: 93% unacceptable, 3% acceptable, 2% not a moral issue.
Malaysia: 88% unacceptable, 4% acceptable, 6% not a moral issue.
Philippines: 65% unacceptable, 25% acceptable, 9% not a moral issue.

East Asia countries surveyed responded as follows:

China: 61% unacceptable, 13% acceptable, 17% not a moral issue.
Japan: 31% unacceptable, 38% acceptable, 25% not a moral issue.

India was also surveyed:

India: 67% unacceptable, 9% acceptable, 11% not a moral issue.

In Being LGBT in Asia: The Philippines Country Report, 25, a Pew survey in 2013 is quoted in which 73% of Filipino respondents said that homosexuality should be accepted by society, with 78% for respondents in the 18-29 age group. This is anomalous, for Philippines is rated as having high religiosity which usually correlates to negative views on homosexuality.

Majority acceptance of sex and gender diversity is fairly new in the West and in Latin America. It developed rather slowly. The number of people who personally know an ‘out’ lesbian, gay man or transgender person is low in Asia, because social attitudes ensure that most stay ‘in the closet’ as a rational, protective, personal measure.

As a result, the agenda of activists and human rights defenders is a broad one of changing public attitudes. The agenda does not actually ask people to change their behavior, beyond giving space and respect to individuals who are seen as members of particular sexual or gender minorities. The radical agenda of early ‘gay liberationists’ is nowhere to be found in Asia (or in the West, for that matter).

In all of this, politicians, legislators, public officials, educators and police often play a passive role, effectively supporting a status quo which is highly oppressive for LGBTI individuals. Physical gay bashing is rare in Asia, often said
to be non-existent for all practical purposes. Oppression comes in different forms, and it is very real for most LGBTI individuals, though increasingly, at least in some parts of the region, life is getting better.

**THAILAND**

In Thailand lesbian organisations have often been more prominent than gay male groups, with the lesbian group Anjaree, founded in 1986, becoming the most active and vocal LGBT organisation in Thailand. Anjaree took on its first public fight in 1996. In December of that year the Rajabhat Institutes, a national system of teacher training colleges, announced a ban on effeminate male students phrased in terms of opposing “gender/sex deviance” (*khwam-biang-ben thang-phet*). This ban constituted an express, official discriminatory policy that Thai activists could challenge, and Anjaree led the fight. The organization brought together prominent academics and medical professionals to speak at a public forum, and Thailand’s English-language newspapers supported the campaign. After public controversy, the ban was rescinded. A Rajabhat official said that the policy had been misunderstood, giving a garbled explanation for its withdrawal. It was only intended to apply to perverts not inverts, a spokesperson said.293 Former journalist Rakkit Rattachumpoth has commented on the Anjaree victory as follows,

**Feminist-inspired lesbians have been politically active in Bangkok, and they played an impressive role during the Rajabhat controversy in publicly countering the discriminatory ban against homosexual students and appearing before a parliamentary committee which inquired into the ban.**

(1999, xi)

Anjana Suvarnananda, or Tang, of Anjaree, became a spokesperson the Thai media regularly turned to for an informed viewpoint on gay and lesbian life. She is an attractive figure and speaks excellent English. When Anjana subsequently left Thailand for a job with a foundation in the United States and later to study in the Netherlands, Chanthalak Raksayu, or Lek, who had been with Anjaree from before the Rajabhat campaign, became the head of the organization.

Anjaree had another media success with a public day-long seminar in 2002 publicizing a written statement from the Thai Ministry of Public Health that homosexuality was no longer officially considered a pathological condition. But after that 2002 event, Anjaree faded from public view for a number of years.

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293 Megan Sinnott, Toms and Dees, Hawaii, 2004, 194.
Anjana returned to Thailand in 2006 and revived the Anjaree name. In the interim, Chanthalak had created a new lesbian organisation, Sapaan, which published a newsletter, as Anjaree had earlier, and developed a newsy website. Chanthalak came to work closely with the National Human Rights Commission, which was established under the provisions of the 1997 Constitution.

The first modern visible gay rights organization in Thailand was the Fraternity for AIDS Cessation in Thailand (FACT), founded in 1989 by Natee Teerarojjanapongs, who, in the early 1980s, had studied and lived in the United States. In many Asian countries AIDS led to the establishment of health-focused gay-run activist organizations, often with some foreign funding support. In Thailand the government health ministry was supportive. FACT became famous for its White Line Dancers, who performed HIV/AIDS education shows in Bangkok gay host bars for male sex workers. In the 1990s, the HIV education and prevention role of FACT was eclipsed by government programs when Dr. Mechai Viravaidya, head of the national family planning organization, and famous for promoting condom use, became the cabinet minister responsible for HIV/AIDS prevention. FACT became inactive by the mid-1990s, but Natee continues to appear episodically as a public figure, author, and gay spokesperson. More recently, newer, largely gay-run health organizations have become active in Thailand on HIV issues, notably Rainbow Sky Association of Thailand, M-Plus, and SWING. In effect, they are the heirs of FACT and all have foreign funding, offices and staff. Rainbow Sky has often been the lead LGBTI rights organization in the country, going beyond its health mandate. Another NGO, Bangkok Rainbow, appealed to members of the gay middle-class. For a period it screened foreign gay movies, including Brokeback Mountain, held parties, did some HIV/AIDS work, and organized one or two media awards events for gay-friendly mainstream press and TV. The lead figure has moved on to head a new organization, the HIV Foundation. The Pattaya-based organization Sisters seems the only organization of kathoeys, and works on health for trans sex workers.

It was not easy for CSOs involved with LGBTI to secure incorporation as a charitable body, something usually necessary to gain overseas funding. The new National Human Rights Commission in Thailand worked with Rainbow Sky, then also new, to gain registration. The groups name is suggestive, but closeted, and the aims of the group had to be written to suggest a broad health mandate. While Bangkok is home to a great number of non-governmental organizations, both local and international, when ILGA Asia (the Asian branch of the International Lesbian and Gay Association) planned to incorporate in Thailand, other NGOs strongly advised against the plan. There was no way to ‘closet’ the ILGA name.
Incorporation proceeded later in Hong Kong. Incorporation in Thailand may be easier now.

**SINGAPORE**

As in other places, a gay-run AIDS organization was created in the 1980s, Action for AIDS, with government support. Unlike in other places, it has kept close to its mandate, avoiding being seen as a rights advocacy grouping.

As noted earlier, in May, 1993, Singapore police raided Rascals bar, and detained overnight a number of middle class gay men, who were not carrying their national identification cards. They were released in the morning without charges. A group of gay men signed a letter of protest, which pointed out the illegality of the police actions. They received an apology. Such police raids have not been repeated. The incident, and the success of the protest, led to the formation of People Like Us, an informal grouping of gay men and some lesbian women.

The formation of “societies” of ten-or-more persons is illegal without approval under the Societies Act. Approval for groups organizing around issues of religion, gender, sexual orientation, or politics is subject to the discretion of the Registrar of Societies – whether he or she believes that the group could prejudice “public peace, welfare or good order” or “national interest.” A gay-movement organization [People Like Us] has been denied registration twice on such grounds. The stringent rules also constrain local groups from openly associating with international non-governmental organizations (NGOs), especially in formal funding relationships, because they could lead to accusations of coming under the influence of foreign organizations that plot to interfere in domestic politics.294

People Like Us has functioned since 1993 as an illegal organization. One activist has jokingly referred to ‘criminals at the table’, for PLU activists have had many meetings with government officials and have organized public events since 2005.

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In December, 1993, police used entrapment techniques to arrest twelve men along Fort Road in the Tanjung Rhu district, a popular cruising ground. Local newspapers published the names, personal details, and photographs of those who were arrested. To this day, the arrests are remembered by older activists. A judge in an appeal from sentence in a Tanjung Rhu case mused that the charge of “outrage of modesty” was bemusing, for the undercover police officer had encouraged an advance, and then claimed to be ‘outraged’.  

Police entrapment more or less ceased after 1994, when the Chief Justice found it “somewhat disquieting” that a man who had been entrapped had been charged under Section 354 of the Penal Code, with outraging the modesty of a police officer to whom “it must have been plain,” said the Chief Justice, that homosexual activity was to be expected. … However, it was not obvious to the general public that police operations against the gay community had ceased until at least a decade later. The gay community’s memory and fear of police raids would persist for a very long time.

From the mid-1990s on, more and more pubs and karaoke bars opened in Singapore to serve gay men. For a long time before that, the only bar that was gay on all nights of the week was Vincent’s located on one of the upper floors of a shopping centre along Orchard Road, the main downtown shopping street. Even the Sunday night gay disco was an itinerant event that leased a straight dance club one night a week from an owner who was prepared to make better use of an otherwise slow evening, when few heterosexuals went out to party. Other bars that figured in Singapore’s gay history in the 1980s, such as Niche, Shadows and Marmota, did not operate as exclusively gay venues. And in any event, none of these was still operating in the 1990s, partly the result of licensing difficulties and repeated police visits.  

In 2003, Prime Minister Goh volunteered the information in a Time magazine interview, that the Singapore government had quietly changed its policy on hiring gays. Even though the criminal laws against same-sex sexual conduct would remain, he said the government has been hiring openly gay people, even for “sensitive” positions, and said, “So let it evolve,

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295  Chua, 53-55.
296  Alex Au, Speaking of Bangkok, in Jackson (ed), 2011, at 186.
and in time the population will understand that some people are born that way. … We are born this way and they are born that way, but they are like you and me”. Local newspapers reprinted excerpts of the Time interview and set off a flurry of letters to the editor. It was oddly typical of the slow, incremental adjustments by the Singapore government. Goh had not been asked a question on government hiring policies. He clearly wanted a safe forum to announce a policy already in place. He seemed also interested in countering the international image of Singapore as rigid and puritanical. And, very important, he was not giving in to activist pressure. His rationale for the change seemed to be that gays and lesbians should not look to charity or the state to survive, so, it followed that they should have equal employment opportunities.297

From out of nowhere, it seemed, fridae.com emerged as a sophisticated commercial gay news, dating, shopping and travel internet site.298 The name apparently echoed the famous native figure in the novel Robinson Crusoe. To avoid Singaporean government control, the servers were in Hong Kong, then in the US. Offices and staff were in Singapore. It became the best LGBTI news source for Asia.

With some entrepreneurial zeal, fridae began organizing circuit parties. With some chutzpah fridae organized a “Nation” party, held on Singapore’s national day in early August on Sentosa Island, a public park that was available for events. Everything was legal. The parties had permits.

The fourth annual Nation party was held over three days in August, 2004, a huge success. Four thousand people. Gay men flew in from Taiwan, Hong Kong, Japan. Lots of news coverage in Asian media, but no mention in the Straits Times, as if it hadn’t happened at all. The government acted. No more permits. Fridae moved the event to the resort island of Phuket in Thailand, but only for two years. Activists in Singapore started IndigNation in protest of the banning of the Nation parties. IndigNation is a month of public events in August; poetry readings, talks, art exhibits, plays. Permits were no longer required for such events, held indoors, and limited to Singaporean presenters. The participation of foreigners in these public

297 Chua, 90-91.  
298 See Atkins, 2012. In 2013 there were some bitter internal shifts within fridae.asia, and Stuart Koe, the most prominent figure, was ousted. Later Sylvia Tan, responsible for news coverage, left. News coverage now is feeble.
events required that they enter the country with a special visa. The present author was denied that visa in 2007, in the year in which criminal law reform was taking place and a public campaign was calling for the repeal of the “gross indecency” law. The banned talk could be given one year later on the National University of Singapore campus, as part of an Asian law schools conference. No permit for foreign speakers is required for academic events, safely isolated from local politics or local activism.

An incremental government reform ended the total ban on public gatherings. A “speakers corner,” modeled on Hyde Park in London, was allowed on a park safely distant from the busy central business district. No permit was required for speakers, and after a few years, entertainment was permitted as well. There could be no parades, marches, or talks on issues of race or religion.

Singapore calls itself the “Red Dot”, a tiny island on the map that boxes above its weight (having created the richest economy in Asia on a rocky island with no adequate fresh water supply). LGBT activists arranged to hold a “Pink Dot” event – a picnic with speakers – at the Singapore speakers corner park. Like the Nation parties, however, Pink Dot grew and grew. In 2015 probably five to six thousand people will be there, wearing pink, listening to speakers, singing along with local entertainers, and at dusk holding pink flashlights. Lynette Chua’s book Mobilizing Gay Singapore, has a now famous picture taken from a nearby high rise. It shows the huge glowing pink dot, surrounded by evening darkness, and the central business district in the far background (with the giant Ferris wheel marking the far end of the landscape). The regulation allowing speakers and entertainment in this park is suspended each time there is a national election, so it could easily be suspended for Pink Dot. But no. A bit of accommodation. After all no one is marching. Both sides are playing by some rules.

Other events – the 2007 campaign to repeal the sodomy law – court actions against the criminal law – and the charges against Alex Au - will appear later in this report.

REGISTRATION OF ORGANIZATIONS

Registration of organizations focused on sex and gender diversity rights has very often been a problem. Over time most have probably been unregistered.
The Lao government issued a decree in the first half of 2012 which allowed non-governmental organizations to register for the first time. “With the former system you could only register if you had connections,” said Luke Stephens, country director for the Irish-based NGO Concern Worldwide.

The United Nations Development Programme worked with Concern Worldwide and local authorities to back the decree, which the UN said would allow local not-for-profit associations to register and operate as independent entities for the first time. The gay-run Positive Health Association applied for registration. The process was slow, but registration was accomplished. No other LGBTI oriented organizations have formed and tried to gain registration in Laos.

In Myanmar a new Association Registration Law took effect in July 2014. Colors Rainbow has continued, to date, to use its earlier registration in Thailand, when it was located, in exile, in Chiang Mai.

Kenya’s National Gay and Lesbian Human Rights Commission, an NGO, applied for registration. The application was refused, with officials citing the prohibition of homosexual acts in the country’s criminal law. “Many LGBTI groups, facing outright rejections of their applications, have been forced to resort to changing their names, objectives and activities.” But in April, 2015, the Kenya High Court rejected moral and religious grounds for a refusal of registration, supporting the local NGO’s right to be registered.

In Mozambique the LGBTI rights group Lambda, since 2008, has sought registration. The Ministry of Justice made no ruling approving or rejecting the application. A section on the “vice against nature” was dropped in a law reform in July, 2014, ending any criminal prohibition.

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299 Govt allows NGOs to register for first time, Bangkok Post, May 12, 2009, 6.
300 Chua, Gilbert, 2015, 7.
301 Tris Reid-Smith, Gays take Kenya to court saying officials are breaching Constitution, GayStarNews, October 29, 2013.
Later in the year, the group started a public campaign “Register Lambda, Register Equality”, gathering signatures on a petition to the government.\textsuperscript{303}

In November, 2014, the Botswana High Court ordered the government to grant registration to the LGBTI rights group LEGABIBO. It ruled that homosexual citizens had the right to organize, in spite of homosexual acts being criminalized. The government has appealed the decision.\textsuperscript{304}

When LGBTI NGOs in Botswana were routinely denied registration, local activists notified the Special Rapporteur on Freedom of Assembly and Association. Soon after, the Special Rapporteur voiced concern over the situation at the Human Rights Council and sent information to the State Delegates. Activists welcomed these measures as the government had to publicly respond to the allegation at the Council.\textsuperscript{305}

Many LGBT organizations in the Philippines choose not to register with the Securities and Exchange Commission, though it is important to allow organizations to receive funds from international agencies. The SEC does not have LGBT-specific categories, but applicants have to choose from an existing list. If they want to be a “foundation” they have to prove resources at least the equivalent of US$ 23,000. Many organizations already operate without registering, so see no need to register. Some register as “non-stock, non-profit” corporations, which only requires resources of about US$ 100. Some register with local government units.

...because many organizations are not legally registered, only those that are registered with the Securities and Exchange Commission (SEC) often claim to represent the LGBT community.\textsuperscript{306}

People Like Us, in Singapore, applied for registration twice and was refused each time. No advocacy organizations have registered status in the

\textsuperscript{303} Miles Tanhira, Mozambique’s LAMBDA takes action to get registration, Sogi News, November 14, 2014.

\textsuperscript{304} Miles Tanhira, Sign of victory as LEGABIBO wins two year registration battle, Sogi News, November 14, 2014.

\textsuperscript{305} Dodo Karsay, How far has SOGII advocacy come at the UN and where is it heading?, ARC International, 2014, 17.

country. Action for AIDS was established by the government, and so has legal status.

As noted earlier, Ang Ladlad applied to the Commission on Elections in the Philippines for recognition as a “party list” under particular provisions of the constitution. Registration was refused on ‘moral’ grounds, a decision reversed in a dramatic and very positive decision of the Supreme Court.

In Indonesia all civic organizations must register with at least one government ministry. Human Rights organizations are registered at the Ministry of Justice and Human Rights. All ministries refuse to accept registration from organizations which mention gay, lesbian, transgender or even sexuality in their names or statutes. There has not yet been an open challenge to this policy. 307

On July 18 [2014], the government adopted the Law Relating to Registration of Organizations, which effectively voided State Law and Order Restoration Council (SLORC) Law 6/1988. The new registration law stipulates voluntary registration for local NGOs and removes punishment for noncompliance for both local and international NGOs. In a marked improvement from previous years, the government consulted broadly with NGOs in drafting the new law, revising it many times in response to civil society concerns (see section 7.a). Activists reported that civil society groups, community-based organizations, and informal networks operated openly and continued to discuss openly human rights and other political problems. 308

ACCREDITATION WITH REGIONAL INTERGOVERNMENTAL ORGANIZATIONS OR REGIONAL INTERGOVERNMENTAL HUMAN RIGHTS BODIES

ILGA Europe is not only accredited to function in relation to EU institutions, but has received financial support from the EU. Information is not at hand about the involvement of LGBTI CSOs in Latin America with the Organization of American States and the Inter-American Commission on Human Rights, but there seems to be productive relationships. In early 2015

307 Information from King Oey, Arus Pelangi organization, Jakarta.
the African Commission on Human and Peoples Rights granted consultative status to the Coalition of African Lesbians (though only after lengthy deliberations).\textsuperscript{309}

**OPENINGS COME AND GO**

The effectiveness of CSOs reflects (a) their command of public support, (b) their expertise and (c) organizational competence, but crucially, as well, (d) an opening for change in the particular governance system that they are trying to influence.

For our purposes there was what can be seen as an opening for CSOs to influence ASEAN in the period in which the decision was taken to remake this Cold War relic into a regional political and economic entity. There were no longer any easy credits for ASEAN being a bulwark against communism, for the Cold War was over. There was competition for investment, as China emerged as the new workshop of the world, followed many steps behind by India. A shift in foreign investment to China, and away from ASEAN, was a crucial factor in the Asian financial crisis of 1997-8. ASEAN had to remake itself in the face of these two important changes. The remaking of ASEAN created an opening to argue for an inclusion of human rights in regional goals. That argument could succeed (a) because it served ASEAN goals of external credibility as a region, and (b) because effective lobbying by the *Working Group for an ASEAN Human Rights Mechanism* kept the issue continuously alive from 2005 onwards, with effective interaction by civil society elites with government elites.

Opportunities arose in Thailand at certain points of political transition. Women lobbied to gain recognition in the new constitution of 1998. LGBTI groups were not visible in that process. When the opening was repeated in 2007 after another military coup, and another rewriting of the constitution, public hearings and a public debate on revisions in the constitution drafting assembly gave an opening for LGBTI groups to seek change. Effective lobbying came about because of the active sponsorship of the national human rights commission. The lobbying almost succeeded in getting an explicit inclusion of LGBT in the equality provision of the constitution. In a compromise, a formal Statement of Intention of the Drafters was issued

\textsuperscript{309} International Service for Human Rights, Commission Review: Looking back at the 56\textsuperscript{th} session of the African Commission on Human Rights and Peoples’ Rights, May, 2015.
saying that the existing wording included sex and gender minorities.\textsuperscript{310} The 2007 opening was repeated again in 2015, after another military coup and with a grander project of constitutional revision, with a more closed process. There was no LGBT attempt at lobbying and no proactive initiatives from the Human Rights Commission. Yet the need for legitimacy on the part of the new military government seemed, in effect, to revive the lobbying goal of 2007, by including a reference to transgender in a gender equality law that was basically about women. It seems that the lobbying of 2007 had not been in vain.

Singapore opened up its penal law in 2007 for a number of revisions, including the repeal of one of two anti-homosexual provisions (because it caught some heterosexual acts). This created an opening for CSOs to lobby for the repeal of both sections. What was gained was an express commitment of the government not to ‘proactively enforce’ the remaining section.

Vietnam opened up its family law code to a number of revisions, including a government initiated proposal for a limited registration system for same-sex couples. Civil society groups actively supported this reform, which gained high visibility, but failed to be enacted because of conservative elements in the national legislative assembly. Maybe, like the Thai example described above, the lobbying and debates in 2013 and 2014 have given the idea of such a reform credibility and a greater possibility of future enactment.

ARE ASEAN AND AICHR OPEN TO CSOs?

The central decision making body in \textit{ASEAN} is the twice yearly meeting of heads of governments. These are closed meetings, and decisions are constrained by two \textit{ASEAN} rules – the requirement of a consensus, and the principle of non-interference in the internal or domestic affairs of each member state. Those two constraints also exist in the United Nations system, but not as strongly. We have noted how references to ‘sexual orientation’ were eliminated in the final \textit{Declaration and Programme of Action} agreed to at the Beijing Women’s Conference, though more states spoke in favor of inclusion in the closed-door drafting committee than spoke

\textsuperscript{310} Douglas Sanders, 2011.
against. An open debate on the floor of the full conference was blocked for a lack of consensus.

But in the UN system bodies such as the Human Rights Council and the Economic and Social Council have open meeting, contentious debates and divided votes, with NGO representatives present. That does not happen in ASEAN. Yet one can trace an initiative like the 2015 Kuala Lumpur Declaration on a People-Oriented, People-Centered ASEAN of April, 2015 back to two previous resolutions, meaning that the subject was open to comment, even if the meetings themselves were closed and individual states were not required to be public in their positions on any parts of the declaration. The same was true of the 2015 declaration of support for the Global Movement of Moderates.

There is a system of affiliation to ASEAN, which is quite restrictive in defining what groups can gain official recognition, and very limited in the consequences of accreditation. CSO/NGO involvement, instead, is mainly through ad hoc consultations and three specific annual forums.

Ad hoc consultation was most obvious in the period of the drafting of the ASEAN Charter, when the Eminent Persons’ Group held eight public meetings in which NGOs participated. After the report of the Eminent Persons’ Group, a High Level Task Force began drafting, a process that allowed very limited consultation with civil society. In the end, little of the CSOs input can be seen in the wording of the Charter.

12. PUBLIC EVENTS

Most governments in Southeast Asia are routinely referred to as authoritarian, with restrictions on parades and demonstrations. There are varied patterns of ‘public’ events around SOGIE issues.

PARADES AND DEMONSTRATIONS

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311 External criticism may have been influential in ASEAN using both ‘people-oriented’ and ‘people-centered’, after abandoning the second phrase: see Kelly Gerard, 96.
312 The system is discussed in some detail in Kelly Gerard, 82-87. Regulations were first enacted in 1979, and revised in 2006 and 2012.
313 Kelly Gerard, 87-100.
314 Kelly Gerard, 94.
The first ‘pride parade’ in Asia was held in the Philippines marking the 25th anniversary of the Stonewall riots in New York, which are credited with launching the ‘gay liberation’ movement in the West. The small event in the Philippines in 1994 was organized by the Metropolitan Community Church, a denomination first established in the United States, and ProGay, a leftist student group at the Polytechnical University. The parade was held in Quezon City, a liberal jurisdiction within Metro Manila (and home to the large Diliman campus of the University of the Philippines). After a pause the following year, the parade became an annual event.

The second pride parade in Southeast Asia was held in Bangkok in 1999, organized by drag performers and commercial venues (bars, restaurants and saunas), not by local civil society organizations or an activist leadership. It had no police permit and was shut down, but only after it had almost completed its circuit in the busy Silom/Suriwong areas, home to department stores, offices and numerous straight and gay bars. Organizers chose Halloween, a non-political date, for the event. This served commercial interests in having an event in advance of the mid-winter high season. From the beginning there were parties and events in addition to the parade, evolving into a day of booths and events called “Pink in the Park” held in nearby Lumpini Park. The beach and bar tourist town of Pattaya immediately copied the Bangkok innovation, and the next year saw a parade and events in Phuket, another holiday resort area. In both Pattaya and Phuket it was bar owners and managers who led the way.

Bar owners and civil society activists in Bangkok did not work well together, and the parade and associated pride events faded away after a few years. While there are still pride events in Pattaya, it seems that the only parade in recent years has been in Phuket. Currently public pride parades in Asia are held in Hong Kong, India, Japan, the Philippines, Taiwan and Thailand.

NON-PARADES

There are a number of examples in the region of what can be called ‘non-parades’, events which are held in public spaces, usually without police permits, often evading restrictions on parades or demonstrations.
Singapore pioneered a static event, in which individuals, all wearing pink, gathered in the one park where public free speech was allowed without the requirement of a permit. The country liked the label of being the “Red Dot” – a tiny spot on maps colored red, as British colonies had been traditionally identified by patriotic mapmakers. The protest gathering was a “Pink Dot.” A tradition developed of thousands coming together wearing pink. At dusk, everyone held candles or flashlights or mobile phones that showed as much pink as possible. This resulted in a dramatic photo opportunity from a nearby high rise hotel, showing the illuminated thousands in the park, with the lights of the central business district in the distance. Parades are still not possible in Singapore, but the Pink Dot has entertainment and speakers. An Economist review of Singapore could not avoid commenting on Pink Dot:

In a jubilant annual rally to campaign for lesbian, gay, bisexual and transgender (LGBT) rights, on June 13th [2015] a crowd estimated at 28,000 showed its amused contempt for the illiberal social conservatism the PAP [the governing People’s Action Party] has enforced.\(^{315}\)

Pink Dots have since taken place, using the same name, in Okinawa and Hong Kong.

A bicycle rally is now held annually in Hanoi, with flags and matching t-shirts. While it traverses public streets, it is not a “parade” and has no permit. Rainbow ‘walks’ have taken place in Ho Chi Minh City and Bangkok, with flags, and sometimes rainbow umbrellas.

In other places, where parades and near-parades cannot be held, indoor events are now common. “Proud to be me,” with speakers and performances, was held twice within the US Embassy compound in Vientiane, Laos, then after a pause, in facilities of the European Union. Celebrations of the International Day against Homophobia and Transphobia are now annual events in three or more cities in Myanmar, held in hotel conference rooms.

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\(^{315}\) The Singapore Exception, Special Report, The Economist, July 18, 2015, 4
LGBTI film festivals are increasing in number, now occurring in Cambodia, Hong Kong, India, Indonesia, Japan, Myanmar, Taiwan and Thailand.

CONFERENCES AND WORKSHOPS

The annual “Seksualiti Merdeka” indoor festival in Malaysia was banned in 2011. The courts refused to review the decision of the police because charges were never laid. It has not been held since that time. IndigNation is held every year, usually in August, indoors in central areas of Singapore, with speakers, performances, films and forums. It began as a protest against the government’s refusal to allow the annual Nation gay circuit parties to continue.

Conferences, workshops – ILGA in Surabaya – but ILGA in Philippines and Thailand. Sharing Experiences in Bangkok. Events hosted by national institutions or academic bodies.

13. CRIMINAL LAWS

LEGAL HISTORY

In the nineteenth century and early twentieth century major legal and social change came to Asia, either directly as a result of colonialism, or, in the case of Siam, Japan and China, by a local defensive copying of western patterns to stave off direct colonization by Western powers.

In the Middle Ages European states had had uniform laws against male-male sexual activity. They were religious in origin, based on Jewish religious prohibitions that had carried through into early Christianity and into religiously based criminal laws throughout Europe. They continued as well into Islam, with the Quran’s retelling of the story of Lot or Lut. No clear explicit parallel traditions, condemning same-sex sexual acts, are found in Hinduism, Buddhism or Confucianism.

Beginning around 1800, the spread of the Napoleonic Penal Code meant that half of Europe decriminalized male homosexual sexual activity. While the reform may be seen as part of the ‘European enlightenment’, we
have no historical account of the genesis of this major decriminalization of homosexual acts. The reform was only one item in a comprehensive new criminal law code. No one took credit for the specific reform. Reform occurred “in the closet.” Perhaps it was a reform that ‘dared not speak its name.’

As a result of the Napoleonic Penal Code, half of Europe no longer had a criminal prohibition. Britain not only retained its old prohibition, but in a penal code enacted for India in 1860 prohibited “carnal intercourse against the order of nature…”. This became the famous Article 377 of the Indian Penal Code, still in place in India, Pakistan, Bangladesh, Malaysia and, with variations, in most other former British colonies in Asia, Africa, the Caribbean and the South Pacific.

Criminal prohibitions of same-sex sexual acts in national criminal laws exist in ASEAN but only in countries that were former British colonies. Where such prohibitions exist, the wording of the laws dates back to the colonial period. There is no other link than the single fact of a British colonial history.

Confucian Vietnam has no prohibition. Confucian Singapore has a prohibition. Muslim Malaysia and Brunei have prohibitions. Muslim Indonesia has no prohibition. Buddhist Cambodia, Laos and Thailand have no prohibitions. Buddhist Myanmar has s. 377. The Catholic Philippines has no prohibition.

Independent Japan and Thailand borrowed western criminal code provisions which included prohibitions, but later dropped the sections (which had no history of enforcement). China drafted a prohibition, without borrowing from the West, but let it lapse.

A spurt of moralistic enforcement and homophobia in the Netherlands in the 1930s carried over into the Dutch East Indies, now Indonesia, establishing a higher age of consent for homosexual acts. This led to the arrest of the famous gay German artist Walter Spies, who was long established in Bali. The charges against him were for acts with underage males. The prosecution was a very exceptional story.

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316 Sanders, 2009.
317 Sanders, 2015.
We have no accounts of routine proactive enforcement of such criminal laws anywhere in ASEAN. We have accounts of bar raids and entrapment in Singapore, but not as ongoing routine actions of police. Those raids and the entrapment have ended. We have a few accounts of abusive police actions against transgender sex workers, plying their trade in public areas. But prosecutions using the criminal law prohibition are almost non-existent in South and Southeast Asia.

What is clear is that the existence of the law allows police a wide discretion or power to threaten individuals and businesses. Given the range of possible charges that can be used by police and prosecutors, this policing role is often not much different – if different at all – in jurisdictions with a sodomy law, and those that only have lesser offences, such as public indecency, vagrancy, lewd behavior, or the like. The Philippines has an offence of ‘grave scandal’ in Article 200 of the Revised Penal Code. When gay bars were occasionally raided by the police in Thailand in previous decades, the charges were for licensing infractions. The bars did not have a “dancing” permit, as if that was the real issue. The real issue was payoffs from the bars to local police stations. Those raids in Thailand have not been occurring for a decade. Current police concerns are underage patrons, unlicensed operations and undocumented foreign workers.

Police actions occurred in various places at different times:

There are laws that have reportedly been used by unscrupulous law enforcers to extort from and harass LGBT people. These include the “grave scandal” prohibition in Article 200 of the Revised Penal Code, as well as RA 9208 (Anti-Trafficking in Persons Act of 2003). In Metro Manila, venues like bathhouses are frequented by men who have sex with men (MSM). When raids happen, the MSM who are at these venues are threatened with being charged with “grave scandal” of the said law. Many MSM pay the extortion demanded by law enforcers and officers for fear of being “outed” to peers and family members (IGLHRC, 2011). 319
More important than simply the anti-homosexual legal provisions was the social and cultural impact of the colonial period. Bare breasts got covered up. Temple murals with somewhat bawdy pictures of daily life in Thai villages were painted over. The ‘civilizing mission’ of the various colonial powers required repression of many traditions.

Dr. Ruth Vanita comments for India:

**Notwithstanding some scholars’ discomfort with ascribing to colonialism the modern erasure of earlier homoeroticisms (and other eroticisms), evidence so far available indicates overwhelmingly that a major transition did indeed occur at that historical moment.**

Chinese nationalists saw their country’s defeats in the Opium Wars, and the ceding of foreign concessions, as signs of the weakness of their people and their culture. Hence modernization was necessary, and modernizing meant copying the West. Copying the West, in the period, included copying anti-homosexual attitudes and laws, and the new Western sexology that saw sex and gender variation in pathological terms.

What laws in ASEAN states deal expressly with sexual orientation issues? Rape and sexual assault in the Philippines includes same-sex cases. The Family Code in the country mentions homosexuality as a ground for annulling marriages, along with alcoholism and drug addiction.

Sodomy laws exist in Aceh (and certain other local jurisdictions in Indonesia), Brunei, Malaysia, Myanmar and Singapore. Enforcement of these laws varies from jurisdiction to jurisdiction, as does the impact of these laws on human rights defenders, organizations, lobbying and individual lives.

**THE CASE OF ANWAR IBRAHIM**

Anwar Ibrahim was charged and imprisoned under Prime Minister Mahathir. He was acquitted of 377 on appeal and released after serving his time for corruption during Badawi. Charged again under Najib.

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320 Ruth Vanita, Queering India, Routledge, 2002, 4.
Abdullah’s impressive electoral performance in 2004 provided him with the confidence and legitimacy to resolve the Anwar issue which had soured US-Malaysia relations. With Anwar’s release in 2004, the Anwar issue was not a major factor in Abdullah’s relationship with the US.\textsuperscript{321}

POLICE ACTIONS

Self-preservation dictated a habit of closeted silence among Singaporean gay men, imposed more rigorously every time a fresh report appeared in the city-state’s newspapers that homosexual men had been arrested and sentenced to imprisonment, or subjected, even, to flogging. …the government went about its task in the 1980s and early 1990s of trying to eliminate homosexual behavior in public. Until 1994, the police regularly sent decoys into parks and back alleys to entrap men cruising for sex. The names, occupations, and even faces of those charged were splashed on the local newspapers. The Sunday night gay disco – it moved from place to place through the years – was frequently raided. In one well-recorded instance in May 1993, many partygoers who could not produce identification were hauled off to spend the night in a police lockup and had to call their families to the police station to bail them out. … Cruising and even mixing with other gay men in a known gay bar was an activity fraught with danger.\textsuperscript{322}

Police raids on gay bars and bathhouses in Bangkok occurred occasionally, generally assumed to represent some friction between the police and the venue owners over regular payments. Customers were never detained or harassed. An extraordinary closure of half the gay bars in Bangkok for a number in 2001 was unprecedented and short lived. It was a reaction by police, it seems, to a television expose of the sex shows in a certain bar, a crackdown that vanished after six weeks, without ever being noticed in Thai media. It was a defensive move by police, not a moralistic crackdown. It was not a part of the well-publicized “social order” campaign that began in the fall of 2001, which focused on the enforcement of closing hours, underage patrons and drugs. That campaign did not pick out gay venues for special surveillance.\textsuperscript{323}

\textsuperscript{321} Khadijah Khalid, 540.
\textsuperscript{322} Alex Au, Speaking of Bangkok, in Peter Jackson, Queer Bangkok, HK, 2011, 182 at 182-3.
\textsuperscript{323} Sanders, 2007.
Gay bars tend to come and go in most of the ASEAN region, often the subject of some harassment by police. Bangkok had a striking expansion of the number of venues in the 1980s and 1990s, and another in the 2000s. At present there is a very stable situation, with established bars, saunas and massage parlors continuing in business, with no current pattern of police raids. In contrast bars with male dancers in greater Manila were blocked from the central area of Malate a decade or more ago, and are now scattered in other parts of the urban area. They get raided, and come and go. Police entrapment more or less ceased after 1994 in Singapore. From the mid-1990s on, more and more pubs, karaoke bars and saunas opened in Singapore to serve gay men.

A recent report talks of police raids on bathhouses in the Philippines where police threaten to charge individuals with “grave scandal” under Article 200 of the Penal Code, or under the anti-trafficking law. Customers then pay the police to avoid charges.

Due to the frequency of these raids, in March 2013, Ging Cristobal of the International Gay and Lesbian Human Rights Commission (IGLHRC), Ang Ladlad’s Atty Raymond Alikpala and ProGay Philippines’ Oscar Atadero partnered with the Philippine National Police (PNP) Human Rights Affairs Office (HRAO) to convene a gender and sexuality training programme to sensitize police officers when engaging with LGBT people. The engagement was planned in collaboration with Police Chief superintendent Nestor Fajura, chief of the PNP HRAO. The training series include six three-day gender and sexuality workshops with human rights regional officers, police precinct officers, and Women’s and Children’s Desk officers in provinces all over the Philippines. With the partnership, the PNP HRAO also approved a module to be included in work orientation training for new police officers.

IGLHRC and Ang Ladlad trained PNP HRAO staff and LGBT activists to conduct the gender and sexuality workshops so they can facilitate future sessions on their own. To ensure the effort had local relevance, speakers were invited from local LGBT groups in the provinces where the trainings were conducted. In 2014, the initiative
is ongoing and still in the process of developing the monitoring and success indicators with the PNP-HRAO.\textsuperscript{324}

To what extent are there aggressive actions by police against gay men cruising in parks or other public areas, or responding to prostitution by gay men or transgender individuals, also in public areas? To what extent are individuals caught in these activities subject to violence, to demands for sexual services or bribes?

Very little field work has been done to document these patterns. A pioneering report from Karnataka in India exposed serious police abuses. The Blue Diamond Society in Nepal also exposed serious police abuses against transgender street sex workers. The documentation in Karnataka and Nepal seems to have resulted in newer patterns of police restraint. Occasional stories were published about police arrests of transgender street sex workers in Pattaya in Thailand, but such stories have not recently been repeated in mainstream media. No fieldwork on day to day realities in Pattaya seems to have occurred. An interview with a gender-normative ‘money boy’ who cruised for customers at a known gay site near the Grand Palace in Bangkok, casually mentioned that he was once charged by the police “for night-time loitering.” He reported no violence, and noted that sometimes police were customers.\textsuperscript{325}

Some documentation has occurred recently in Myanmar. First there were complaints about police brutality against transgender individuals hanging around outside a prominent hotel in Yangon. A complaint was registered with the national human rights commission, but no follow-up information is available. Field work by two foreign academics has documented abusive police actions against individuals hanging around particular places at night, without clearly identifying elements of cross-dressing or prostitution as involved. Any charges are likely to be for a loitering offence.\textsuperscript{326}

In 2012 police in Surabaya, East Java, arrested 43 men for “damaging the morale of the nation” for congregating and cruising in an area called ‘Pattaya’ which, for a long time, had been Surabaya’s “most famous gay

\textsuperscript{324} UNDP, USAID, Being LGBT in Asia: The Philippines Country Report, 2014, 43.
\textsuperscript{325} Tewit Phantrachaya, Interview with a 21-year-old money boy, BK Magazine, March 5, 2015.
space”. Such public cruising areas, often in parks, are often tolerated or ignored by police, but risky or closely monitored in other jurisdictions.

HATE CRIME LAWS

Many jurisdictions in the West have criminal law provisions which allow higher penalties for crimes motivated by hatred. These laws deal with race, sex and religion, and now, increasingly with crimes motivated by hatred of gays, lesbians or transgendered individuals. In October 2014 two legislators in the Philippines announced plans to propose hate crimes provisions. This was in the wake of the brutal killing of transgender Woman, Jennifer Laude, allegedly at the hands of a US serviceman. Earlier in 2014 the Philippine National Police expressed support for a House of Representatives measure seeking the creation of a special desk in all police stations across the country in order to tackle crimes against LGBT people. The proposal copied the strategy of having ‘Women’s Desks’ in all police stations to ensure proper responses to abuses committed against women and children.

THE REPEAL 377A CAMPAIGN

A prosecution in Singapore made it clear that the “carnal knowledge against the order of nature” prohibition in Article 377 covered heterosexual anal intercourse. Few had realized that such a prosecution was possible. The government, as part of a package of revisions to the criminal code, decided to repeal 377. 377A would remain. It prohibited acts of “gross indecency” between men. 377A had a history quite separate from 377. It had been enacted in Britain in 1885 as a last minute amendment by a maverick legislator to legislation dealing with heterosexual prostitution. It was introduced in Malaya and Singapore in the 1930s, where the Indian Penal Code provisions were already in place. It was never enacted for India.

Activists in Singapore seized on the government’s decision to repeal 377 as an opening for a campaign to repeal 377A as well. Evangelical Christians called for the retention of both 337 and 377A, and the expansion

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327 Stephen McNally, Jeffrey Grierson, Irwan Martua Hidayana, Belonging, Community and identity: Gay men in Indonesia, in Bennett, Davies, 2015, 203 at 214.
328 Filipino lawmakers plan to curb hate crimes targeting LGBT members, GayAsiaNews, October 29, 2014.
329 Philippine police backs special desk for crimes against LGBTI people, GayAsiaNews, April 20, 2014.
of the criminal law to cover lesbian sexual acts. The government, never willing to be seen as responding to activist pressures, held its ground. The campaign to repeal 377A

...was the first time that the [LGBT] movement amassed vocal and public support from its grassroots base of gays and lesbians as well as non-gay allies. Further, it remains the movement event with the most extensive local media coverage, giving voice to campaign leaders and their supporters.\(^{330}\)

A petition with 2,519 signatures was submitted to Parliament calling for the repeal of 377A. It argued that 377A infringed on the rights of homosexual and bisexual men to equal treatment and protection before the law, as set out in Article 12(1) of the Constitution.

For two consecutive days, October 22-23, 2007, Section 377A dominated parliamentary debates during the second reading of the Penal Code amendment bill even though it was not officially part of the bill. Seventeen of the twenty-one MPs who stood up to debate on the bill considered Section 377A.\(^{331}\)

The Prime Minister gave a fascinating speech, in which he said that gays and lesbians were respected and responsible members of Singapore society, and were, indeed, often close family relatives. He said the government did not want to make life more difficult for them than it already was. He pledged that there would be no “proactive” enforcement of 377A. Retaining the provision, with a promise of non-enforcement was, he conceded a “messy” outcome, but it reflected, he said, the realities of Singaporean society, which he and government spokespeople always described as ‘conservative’ in its social views.

While it is commonplace for jurisdictions with an anti-sodomy law to have no policy of active enforcement, Singapore seems to remain the only jurisdiction in the world where the policy is official, and endorsed expressly by the government. Singapore, which prides itself on its non-corrupt rule-of-law standards, was, paradoxically, announcing an anti rule-of-law policy.

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\(^{330}\) Chua, 109.
\(^{331}\) Chua, 114.
377A would be ignored. It was also denying the independent authority of prosecutors to enforce existing law. Messy.

THE JUDICIAL CHALLENGE TO 377A

In 2009 the Delhi High Court ruled that section 377 of the *Indian Penal Code* violated the constitutional rights of Indian citizens, and had to be “read down” to apply only to situations where one party was under age.

A distinctive feature of the Indian litigation was the argument that the law inhibited programs of prevention and treatment relating to HIV/AIDS. Similar litigation in the West always focused on ‘equality’ rights arguments, not health issues. The legal challenge had been handled by a Delhi based NGO focused on HIV issues. The national governments HIV/AIDS control body, supported the challenge to 377, even in the period in which the Attorney General opposed the challenge.

The government chose not to appeal the decision of the Delhi High Court, while making no policy statement about LGBT rights. Conservative religious figures took up the cause, and an appeal took place before the Indian Supreme Court. The victory at the trial level in India gave hope to activists in Singapore that a constitutional challenge to 377A could succeed, in spite of no history of judicial activism in their country. An opportunity occurred to make the arguments. Police used 377A to charge an individual for sexual activity in a public washroom. Using 377A in the particular case went contrary to the government’s stated policy of limiting the use of the section. A constitutional challenge to 377A began. The prosecutors then dropped the 377A charge, substituting a different section that focused on the ‘public’ nature of the sexual activity. A second constitutional challenge began, brought by a gay couple who had never been charged under 337A.

A trial level decision ruled that the individuals who were behind these two challenges had no ‘standing’ to bring a constitutional challenge, for they were not directly affected by the section. The Indian courts had allowed the constitutional challenge to proceed, in spite of the fact that the plaintiff was a health NGO, and no one had been charged. To the surprise of many observers, the Singapore appeals court reversed the trial level decision, and allowed the constitutional challenge to proceed. In December, 2013, the Indian Supreme Court overruled the Delhi High Court decision, reinstating
377 as written. This was seen as a blow to the chances for a favorable ruling in Singapore.

One of the trial level decisions in Singapore discussed the question as to whether 377A was fatally flawed on equality grounds, since it applied only to males. Was this not a clear example of discrimination on the basis of sex? The judge responded by invoking Confucian values. The filial obligation of a son is to sire at least one son.

The final appeal decision, handed down in 2014, refused to be drawn into any discussion of the purpose or effect of 377A. Parliament, the court said, had the right to enact laws based on its assessment of social morality, and it could draw the parameters of a prohibition as it saw fit. It was a remarkable rejection of any substantive review of legislation in a constitutional challenge based on provisions on human rights.

**FREEDOM OF ASSEMBLY**

The ILGA Asia regional conference in Surabaya in 2010.

**The Surabaya Police in East Java has decided not to issue a permit for a regional conference of the International Lesbian, Gay, Bisexual, Transgender and Intersex Association (ILGA) slated to be held from Wednesday to Friday.** Adj. Sr. Comr. Sri Selyo Rahayu told tempointeraktif.com that the provincial police refused to issue a permit for the event and the city police had followed suit. Rahayu said there were also indications the conference could be “vulnerable” should it go ahead. Earlier, the local branches of the Indonesian Ulema Council (MUI), the highest Muslim authority, and the Muhammadiyah, the country’s second-largest Muslim organization, had objected to the conference.  

A gay rights parade in Chiang Mai was blocked by “Red Shirt” political activists, who physically confined the marchers in a small park. Police looked on and did not intervene. Generally Thailand has been the easy place in ASEAN to hold SOGIE related events. Two regional conferences of ILGA Asia have been held in the country, one in Chiang Mai, and in 2013, one in Bangkok. The world conference of ILGA is scheduled to be held in Bangkok in November, 2016.

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Events are sometimes held in the cultural centers run by different embassies. Film festivals, for example, often use a Goethe Centre or an Alliance Francais premise. The large Q Film Festival in Indonesia is now in its 13th year, and has largely relied on embassy premises. Hanoi Pride has been held in a Goethe Centre. Proud to be Me has twice been held in the US embassy compound in Vientiane and once in premises of the European Union. Sekualiti Merdeka in Kuala Lumpur was effectively closed by a police investigation, though it had been held on two occasions.

Pride in Philippines starts in 1994.
Parades only in Thai and Phil.
Pink Dot – park gets closed for elections and death of LKY.
Bicycle rallies and rainbow walk in Vietnam – no permits

Since 2004, the LGBT community and its allies have gathered in Phnom Penh in mid-May to celebrate Pride Week. The theme of this year’s event was “I am what I am.”

PROSTITUTION

Prostitution is criminalized in the region, though the details of the criminal provisions vary.

Thailand has very open patterns of ‘host’ bars and massage parlors, facilitating commercial sexual activity both heterosexual and homosexual. As well there are gay saunas. These businesses pay the police in what seem to be stable patterns of ‘protection.’ Raids may occur for breaches of closing hours or underage staff or customers. In an editorial, the Bangkok Post notes that “prostitution is illegal and tolerated.”

Bars with erotic male dancers can be found in Metro Manila and other cities in the Philippines. They have been largely driven out of central Manila itself, and are scattered in the various component cities. Customers are often women, who come in small groups, for a night out, not seeking a sexual companion. Korean women tourists often visit as well, also in small groups. Karaoke parlors and barber shops may serve as fronts for gay and

Dominique Mosbergen, In Cambodia some families still try to ‘cure’ LGBT sons and daughters, The World Post, October 14, 2015.
Support sex worker rights (editorial), Bangkok Post, August 18, 2015, 10.
straight prostitution in various places, such as Vietnam. Local gay men can make contacts with cell phone apps, a pattern which seems to undercut the need for bars and saunas, and is quite impossible to police.

In general, at the moment, there seem no police campaigns against gay venues in the region. Probably only Brunei has no commercial venues. Myanmar, with a criminal prohibition, has a large gay disco in Yangon that has functioned for a number of years apparently without police problems, and a big monthly Fab party that often moves its venue. Malaysia, where political condemnation of homosexuality is high and two criminal laws still apply, has a few bars, saunas and restaurants.

In 2015 Amnesty International “initiated a consultation to develop a policy to protect the human rights of sex workers”, referring to sex workers as “one of the most vulnerable groups of people in the world…” Reform proposals in the West have tended to be either (a) criminalize the men buying sex, not the individuals selling sexual services, or (b) legalize prostitution, and provide it with labor law protections. Amnesty International seemed to be looking towards the second alternative, well established in the Netherlands and Germany (and a couple of counties in Nevada). The bar and massage parlor patterns in Thailand provide a safer organization of prostitution than street solicitation. Stories of police abuse against transgender street prostitutes have occurred in South Asia, Myanmar and perhaps other parts of ASEAN. No law reform seems likely in ASEAN states in the immediate future.

THE INDONESIAN PORNOGRAPHY LAW

There is a uniform national criminal law in Indonesia, as in the other ASEAN states. Indonesia did not inherit an anti-sodomy law from its period as a colony of the Netherlands. There was extensive controversy about the enactment of the national Pornography law in 2008, but that has dissipated, with no SOGI related enforcement. Depictions of oral sex, anal sex and homosexual sex are prohibited as showing deviate acts. Such depictions are not found in legally available print media or DVDs in any part of ASEAN.

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335 Amnesty vows global campaign to protect sex workers’ rights, The Nation (Bangkok), August 16, 2015, 2; Siriporn Skrobanek, The Sex trade: exploitation or choice?, Bangkok Post, August 7, 2015, 11.
The draft law became a heated political issue in 2006, opposed by women’s groups and civil liberties advocates as a form of creeping Islamisation, mainly directed at controlling women. The 2006 draft legislation included the notion of pornoaksi – defined as an act of sexual exploitation, abuse or erotica in public – which women understood as an intention to police their bodies and their freedom of movement. Non-Muslim Indonesians in Bali, Papua and Kalimantan also saw the proposed law as an attack on freedom of cultural expression, as it intended to make illegal the exposure of women’s bodies and certain kinds of physical movement. There were noisy street demonstrations by women opposing the bill, countered by mass demonstrations in Jakarta and other centres organized by Islamic groups that included the Hizbut Tahrir and the Front Pembela Islam (Islamic Defenders Front; FPI), the new Islamist party, PKS, as well as the more “mainstream” Islamic groups such as mass organizations Nahdlatul Ulama, Muhammadiyah and MUI. The bill was withdrawn, and a revised version with no mention of pornoaksi was eventually passed into law in October 2008. Again, mass demonstrations in support of the draft bill, in a range of Indonesian cities, preceded its passage through the parliament. The discussion of the bill served as a lightning rod for a public debate on sexual morality and appropriate femininity, but since its passage, it seems to have slipped into oblivion. There have apparently been only three prosecutions under the law in West Java, which has been at the forefront of actions in the name of a politicized Islam.\(^{336}\)

... the highly contested Anti-Pornography Bill [was] tabled in 2006 and passed with significant revisions in October, 2008. The initial highly conservative draft proposed severe restrictions on women’s mobility, compulsory veiling and criminalization of sex outside marriage, including all GLBTI sexualities. Opposition to the Bill’s attack on the sexual rights and equality of women, GLBTI-identified people, and ethnic and religious minorities was so widespread that the final law was significantly altered, and legally (but unsuccessfully) contested in Indonesia’s Constitutional Court in 2010.\(^{337}\)

\(^{336}\) Kathryn Robinson, Masculinity, sexuality and Islam, in Bennett, Davies, 2015, 51 at 61.

\(^{337}\) Introduction, in Bennett, Davies, 2015, 1 at 6-7.
Support for an anti-pornography law originated in the legislative branch, but had support from the president.

…shortly after taking office Yudhoyono, together with some of his ministers and his parliamentary vehicle PD [Democrat Party], ensured that the drafting of the anti-pornography bill was included in the parliament’s national legislative program for 2005-09. The parliamentary committee assigned to draft and negotiate with the executive government on this bill was to be headed by Balkan Kaplale, a PD legislator. Once passed, the Anti-pornography Law became the ultimate national policy regulating public morality, in particular as it applied to women and sexual minorities. The stated objectives of the law included ‘upholding belief in God’ and ‘providing guidance and education on the public’s morality and behaviour’. … Yudhoyono actually had no qualms about speaking our publicly to defend the Anti-pornography Law. … Yudhoyono’s moral politics found fertile ground in a national climate where religion was actively politicized in the struggle for power. Religious politics had two disturbing faces: the emergence of laws and policies seeking to enforce public religiosity and morality based on religious beliefs, and the rise of religiously motivated violence and persecution. As Hwang has points out, such religiously based legislation was the work not merely of the religious political parties, but also of secular-nationalist parties that had shifted their positions on controversial bills and moral issues. Hwang contents that the secular-nationalist parties, including Yudhoyono’s PD, opportunistically used Islamic identity and moral issues to win votes.

Cases of religiously motivated discrimination and violence against women committed or tacitly condoned by the state apparatus occurred with alarming frequency during Yudhoyono’s decade in office. The Islamic Defenders Front (Front Pembela Islam, FPI), for example, repeatedly threatened and harassed women and gender activists, especially those involved in lesbian, gay, bisexual and transgender (LGBT) conferences and film festivals, or other public forums that the FPI deemed morally reprehensible, without suffering any consequences.\(^{338}\)

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14. SYARIAH LAW

INDONESIA

In spite of its size, geography and ethnic pluralism, Indonesia was a highly centralized state during the long periods of rule by Sukarno and Suharto. After Suharto was forced to resign in 1998, in the turmoil of the Asian Financial Crisis, a major reform was a decentralization of legislative powers and resource and tax revenues to local governments. Indonesia moved from being one of the most fiscally centralized countries in the world to one of the most decentralized. As well, the settlement of the long-standing insurgency in Aceh, at the northern tip of Sumatra, established a system of autonomy or self-government for the province. Aceh is the most conservative Muslim area in all of Indonesia, often called the ‘Verandah of Mecca,” partly for being the closest part of Indonesia to Saudi Arabia and, also, it is said, the place where Islam first entered the country. The autonomy law allowed Aceh to enforce some extent of Shariah law.

Decentralization prompted a multiplication of local government units in Indonesia:

...over the period 1998-2012 the number of provinces rose from 27 to 34, the number of districts (kabupaten) from 249 to 399, the number of municipalities (kota) from 65 to 98, the number of subdistricts (kelurahan) from 67,925 to 79,075. ...subnational expenditure now makes up about half of consolidated government expenditures ... the use of these funds is mostly unrestricted. Over 90 per cent of subnational government revenues comes from central government transfers...  

Decentralization has been a success.

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339 Max Lane, Decentralization and its Discontents, ISEAS, 2014; Hal Hill, Regional Dynamics in a Decentralized Indonesia, ISEAS, 2014. The key legislative enactments on decentralization are the law on regional government, 22/1999 and the law on fiscal balance between central government and the regions, 33/2004. For Aceh the key law is the law on Governing of Aceh, 11/2006, superceding the special autonomy law 18/2001. For more detail seeBlane Lewis, Twelve years of fiscal decentralization, in Hal Hall, ISEAS, 2014, 135 at 136-7. The secession of Timor Leste occurred in 1999, after a referendum overwhelmingly chose independence. No other such referenda have been authorized.

…the Indonesian nation-state has survived a traumatic episode in its history, despite ‘Yugoslav’–type predictions of territorial disintegration. In fact it is probably stronger now than at any point in its history; ‘the really astonishing feature of decentralization 13 years after it was launched is how stable centre-periphery relations have become.’

Decentralization, in general, empowered local rather than provincial government entities. This “fragmentation … pre-empted centrifugal ambitions” by empowering small government units that had no realistic hope of secession. The existing Javanese and Sundanese governors and administrators, appointed by Jakarta, were sent back home. To succeed, the new, locally elected politicians had to reflect local roots and cultures. These factors countered secessionist tendencies. Political parties are required to have a nation-wide network of branches (except for parties running for elections in Aceh), again inhibiting secessionist organizing by blocking local or ethnic parties. Independent candidates were also blocked. Candidates for top elected positions, such as governors, were required to name a deputy and thus have a joint campaign. Overwhelmingly the deputy would be chosen to represent a potential voting consistency other than that of the lead candidate. So Jokowi’s deputy in his election as governor of Jakarta was an ethnic Chinese. This new system, with its particular rules and safeguards, seemed to work, garnering public support. Local violence, which had peaked around Suharto’s fall, dropped sharply after 2001.

Decentralization, however, exposed women and minorities (religious and sexual) to local controls and prejudices. There were numerous stories of local governments banning alcohol or enacting other laws described as based on Shariah. Many were aimed at restrictions on women, mandating head covering and other aspects of dress.

According to the independent National Commission on Violence Against Women (Komnas Perempuan), 282 of Indonesia’s 491 provincial districts have by-laws inspired by Islamic law, a 55 per cent increase since 2009. Most of these by-laws focus on Muslim women (wearing the veil, segregation of the sexes, etc.), but 31 apply

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342 Marcus Mietzner, The rise of local identities and the survival of the nation-state, in Hal Hall, 2014, 45 at 54-5 and 60.
to religious minorities, including restrictions on religious practices by the Ahmadiyya and Shiites.\textsuperscript{343}

The Home Ministry has identified 139 bylaws that it believes violates the rights of women. … The activists allied with the Women’s Movement for a Diverse Indonesia, said that many regulations had limited women’s movement, freedom and access to economic welfare. … Tangerang by laws on prostitution meanwhile had caused the arrest of women for prostitution simply because they walked home alone from work at night.\textsuperscript{344}

…from 2005 until now [August, 2015] 443 bylaws linked to Islamic rules had been issued across the archipelago since the fall of former president Soeharto. … Home Minister Tjahjo Kumolo said recently that his ministry had annulled 139 divisive bylaws and was evaluating 216 others. “That’s not including the unreported ones. There are many bylaws that remain unreported to the central government. I emphasize here bylaws are not binding unless they are approved by the Home Ministry,” he said.\textsuperscript{345}

None of the discriminatory laws against women or homosexuals were ever repealed. Almost exclusively the local bylaws repealed by the Home Ministry related to local taxes.\textsuperscript{346}

In October, 2006, the LGBT NGO \textit{Arus Pelangi (Rainbow Stream)}, with other organizations, launched a national campaign, identifying 52 regions with anti-homosexual or sexist laws. The exact number was unclear, for many local laws had not been reported to the national government. The government of Susilo Bambang Yudhoyono was unwilling to challenge the laws.

\textbf{Mr. Yudhoyono is afraid of being smeared as anti-Islamic by political opponents and “believes it is better to say nothing”, said former president Abdurrahman Wahid, known for his commitment to pluralistic, democratic values. Mr. Wahid – and many legal experts –}

\textsuperscript{343} Gwendael Njoto-Feillard, Religious Pluralism and tolerance in Jokowi’s Indonesia, ISEAS Perspective #10, February 25, 2015, 5.
\textsuperscript{344} Women call for end to discrimination in bylaws, Jakarta Post, August 19, 2015.
\textsuperscript{345} Local politics, not thorough learning, triggers Islamization, Jakarta Post, August 10, 2015.
\textsuperscript{346} Melani Budianta, Kamala Chandrakiran, Andy Yentriyani, Yudhoyono’s politics and the harmful implications for gender equality, in Aspinall, Mietzner, Tomsa, 2015, 199 at 207.
say the Islamic-based laws are clearly illegal under Indonesia’s constitution.  

Others, however, see the local laws as the result of the new system of local autonomy which has given Indonesia some of the characteristics of a federal state. Arus Pelangi has had meetings with some national officials, but reported no progress in countering the local by-laws.  

The government has repeatedly cited regional autonomy as the reason it refuses to intervene in regional policy matters, including when local governments flout rulings by the Supreme court, as with the closure of churches in Bogor and Bekasi, or issue bylaws that contradict national ones, as in the adoption of a separatist flag as the provincial standard in Aceh.  

The 2014 UNDP report on LGBT issues in Indonesia listed five such laws then in place which made some reference to homosexuality:  

1. **Provincial Ordinance on the Eradication of Immoral Behavior (No. 13/2002) in South Sumatra.** This classifies homosexual acts and anal sex performed by men (without specification whether insertive or receptive) as immoral behavior, along with acts such as prostitution, adultery, gambling and the consumption of alcoholic drinks.  

2. **City Ordinance on the Eradication of Prostitution (No. 2/2004) in Palembang, capital of South Sumatra Province.** It is similar to the Provincial Ordinance, but uses the term “prostitution” instead of “immoral behavior.”  

3. **District Ordinance on Social Order (No 10/2007) in Banjar, South Kalimantan Province.** It mentions “abnormal” homosexual and heterosexual acts (in addition to “normal” ones) in its definition of “prostitute.” No explanation is given for “normal” or “abnormal” acts. It also prohibits the formation of organizations “leading to immoral acts” that are “unacceptable to the culture of

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347 Robin McDowell, AP, Hardliners chip away at secular tradition, Bangkok Post, March 5, 2007, 10.  
348 Ary Hermawan, Sexual minorities protest bylaws, Jakarta Post, October 3, 2006; Doug Ireland, Indonesia: Gays fight sharia law, Gay City News (New York), October 18, 2006; Robin McDowell, AP, Hardliners chip away at secular tradition, Bangkok Post, March 5, 2007, 10.  
[local] society.” These are later explained by giving examples of lesbian and gay organizations “and the like.”


5. City Ordinance on the Prevention, Eradication and Prosecution of Social Ills (No. 9/2010) in Padang Panjang, West Sumatra. The section with definition of terms explicitly mentions “homosexual and lesbian” relationships and later prohibits such relationships and prohibits persons from “offering themselves for homosexual and lesbian relationships either with or without payment.”

The first four ordinances are vague when it comes to the punishment of such immoral behaviors. They generally mention “existing laws”, referring to national legislation. The fifth one provides for imprisonment for up to three months or a fine of up to Rp 10,000,000 (then around US$835). There have been no news stories on the enforcement of these local laws.

The Constitution is generally understood as establishing a secular state (though it mandates support for Panacilla, a theistic nationalist ideological statement). Former President Susilo Yudhoyono confirmed the secular character of the state:

**Indonesia is not a Muslim country and any efforts to turn it into one must be resisted. … Secularity is final, and this is an important legacy that we have inherited from Sukarno and the other founders of the republic.**

It is possible that the “Shariah” local laws are in conflict with the secular nature of the Indonesian constitution. A recent decision of the Constitutional Court upheld a provision in the national marriage law that

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350 UNDP, Being LGBT in Asia: Indonesia Country Report, 2014, 22-23. A Press Release dated 12 July 2013 by the Forum LGBTIQ Indonesia also includes “Perda Kabupaten Sawahlunto/Sijunjung No. 19/2006 on Prevention and Control of Immoral Acts that stated ‘adultery as sexual relations outside of marriage that are performed by men and women or same-sex based on consensual love.” The Aceh law described below had not been enacted at the time of the report.

351 Ezra Sihte, Keep Indonesia secular, Yudhoyono urges, Jakarta Globe, May 7, 2014. Nevertheless, Yudhoyono issued a decree forbidding the Ahmadiyya religious community, a minority Islamic grouping, from proselytizing, punishable by five years in prison for blasphemy. See With God on whose side?, The Economist, August 8, 2015, 22.
effectively denies state recognition of any inter-faith marriages. A marriage is only lawful “when entered in accordance with the laws of the respective religions and beliefs of the parties.” A secular principle would have struck down the provision.

More recently, a national Islamic body has raised the issue of what laws should exist in the country as a whole relating to homosexuality. At the beginning of March, 2015, the Indonesian Ulema Council, MUI, issued a fatwa against homosexuality calling for “a host of punishments” for homosexual crimes, ranging from caning to the death penalty.

Hasamudden AP, the head of the MUI’s fatwa commission said “Sodomy, homosexuals, gays and lesbians in Islamic law are forbidden and it is a vile act that is punishable by the death penalty.”

While the Council is a government created body, the fatwa is not a law.

Yudhoyono was committed to social stability. He drew six of the nine parliamentary parties into his cabinet, trying to balance or accommodate differing forces.

...Yudhoyono sought to manage inter-constituency relations by appeasing both sides in a conflict with concessions, rather than by ruling on the basis of constitutionality. In the controversy over the Islamic sect Ahmadiyah, which began in the mid-2000s and stretched to the very end of his presidency, Yudhoyono felt trapped between conservative Muslims on the one side and liberal human rights defenders on the other. In Yudhoyono’s eyes, this was not a case that could be decided based on the Constitution alone (which guarantees freedom of religion). Instead, presidential action needed to give both groups enough so that they would not disturb the peace – irrespective of which party had the stronger legal position.

As a result, Yudhoyono rejected calls to ban the sect, but prohibited sect members from proselytizing the faith. While this response was unprincipled

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352 Kennial Caroline Lala, Yustinus Paat, Indonesian Court Hears Interfaith Marriage Petition, Jakarta Globe, September 5, 2014; Indonesian Govt Stands with FPI Against Interfaith Marriages, Jakarta Globe, October 15, 2014.

it was apparently successful in reducing or ending conflict. The lesson to be
drawn is that Yudhoyono would not act against the local ‘shariah’ laws, even
when they were seen as unconstitutional (either as breaching the secular
nature of the state, or as encroaching on national criminal law), if there was
no disorder. He had no interest in defending Indonesia’s reputation for
tolerance, either on issues of sectarian difference or on women’s rights. He
was prepared to compromise principle and leave the local laws in place. His
period as president “was the most stable period of governance in Indonesian
democratic politics…” with significant economic growth and the
neutralization of a number of disputes.354

ACEH

Aceh is a province of Indonesia at the northern tip of the island of
Sumatra, across the Malacca Straits from Malaysia and Thailand. The
population is over 4.7 million people. 51% are Acehnese and 16% Javanese,
with small populations of other ethnic groups. Aceh is 98.19% Muslim. It
is known as the most conservative Muslim area in Indonesia. While famous
for its oil and gas production, it remains one of the poorest regions in
Indonesia. According to official statistics, twenty per cent of the population
is under the poverty line, twice the national average.355

An Islamic Sultanate was established in Aceh in 1511. It is thought
to be the place where the spread of Islam into Indonesia began – the
‘Verandah of Mecca’, welcoming Islam into what became Indonesia. In the
early 17th century the Sultanate was the most wealthy, powerful and
cultivated state in the Malacca Straights region. For a period it supplied half
of the world’s pepper. It had a long history of resistance to Dutch
colonialism, and sided with independence forces after WW II.

For centuries the sultanate of Aceh, which sits at the entrance to the
Malacca Strait, benefited both economically and culturally from its
contact with the Muslim traders whose ships sailed past its shores.
“Mecca’s verandah”, as it was called, became a major trading centre
in the 17th century and one of the most devoutly Islamic states in the
region. It fought off several great powers until, at last, it fell under
Dutch rule in 1903 after a fierce 30-year war. Then, starting in the

354 Ibid, 119.
355 Time to Face the Past: Justice for past abuses in Indonesia’s Aceh province, Amnesty
International, April 2013, 14.
early 1950s, the Acehnese fought a ten-year rebellion against the new Indonesia of which they found themselves a part, and rose intermittently against President Suharto’s soldiers in the years after that.\textsuperscript{356}

The long history of struggle between Aceh and the Dutch, and Aceh and the Indonesian state is remarkable, and explains the present situation, a peaceful resolution of difference, that had little chance of being achieved and can still be regarded as requiring high respect and careful management.

- 1948, President Sukarno promised Aceh would rule itself, but then amalgamated it with the Batak peoples of northern Sumatra in a single province.
- 1953-59, an Aceh rebellion resulted in Sukarno granting “Special Region” status to Aceh and separating it from the Batak area.
- 1976, Aceh independence was proclaimed. The Indonesian military moved to crush the armed independence movement of the Free Aceh Movement, or GAM. Over the next 29 years 15,000 people died in the fighting.
- 1989-90 saw a resurgence of the insurgency. Indonesia deployed 12,000 troops in Aceh.
- 1998, President Habibie granted “special autonomy” allowing Aceh to control matters of Islamic law, education and customary law. Sharia based regulations start to emerge. Habibie had been responsible for the general decentralization of authority and revenues in Indonesia as a whole (moving away from the high centralization of previous governments).
- 2001, a law on special autonomy was enacted for Aceh.
- 2003, President Megawati resumed military actions in Aceh to suppress the armed insurgency. The army was largely successful in driving the insurgency underground.
- 2004, the December Tsunami devastated the area, killing 165,000 Acehnese. GAM declared a unilateral cease-fire. The disaster is credited with making a negotiated settlement possible.\textsuperscript{357}
- 2005, GAM and Indonesia agreed to negotiations brokered by former Finland President Martti Ahtisaari.

\textsuperscript{356} Survey Indonesia, The Economist, July 8, 2000, 11-12.
\textsuperscript{357} “The presence of foreign militaries and [other] aid workers in Aceh following the tsunami made the resumption of hostilities difficult.” Zachary Abuza, Aceh, Mindanao hold lessons for the south, Bangkok Post, June 1, 2013, 9.
- 2005, a peace treaty was signed between GAM and Indonesia.
- 2006, a law was enacted granting Aceh “self-government.” GAM became a legal political party and contested elections for the Aceh provincial government, winning majorities in each of the two elections held so far.\(^{358}\)
- The Indonesian government instituted a trust fund for the reintegration of former combatants, administered by the autonomous government.

Resolving the Aceh conflict was a great achievement of the Yudohono presidency, with a decisive active role played by Vice-President Jusuf Kalla and mediation by former Finland president Martti Ahtisaari.

In 2007 there was considerable publicity about an incident in Aceh.

In 2007, Hartoyo’s plight became infamous after it was made public that he was tortured by police and civilians who caught him living with his male partner in Aceh, the province in northern Indonesia ruled by repressive Sharia (Islamic) law since 2003. “The perpetrators dragged me, beat me, verbally abused me, then called the police on us”, he said. According to testimony given to the Asian Center for Human Rights, the men were further harassed in custody and sexually abused by police officers. Denied access to a bathroom for many hours, Hartoyo’s partner was then forced at gun point to urinate on his head.\(^{359}\)

By 2009, a pattern of Sharia law was well in place in Aceh. One account identified 800 Sharia enforcement officers. Most were men. But on Friday mid-day, when all men are required to pray at a mosque, the patrol would be taken over by women, who can pray at home.

A widely distributed booklet, A Brief Look at Sharia Islam in Aceh – the cover shows a man being whipped – outlines the rules. If you’re caught gambling: six to 12 lashes. Improperly mingling with the opposite sex: three to nine lashes. Drinking alcohol: 40 lashes.

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\(^{358}\) Mushahid Ali, In Aceh, a former separatist now guardian of state, The Nation (Bangkok), December 14, 2013, 10A.

Skipping prayer on three consecutive Fridays: three lashes. The whip, according to the booklet, must be made of rattan a quarter to a third of an inch thick. At the Banda Aceh Sharia Patrol station, two whips were on display, each as long as a cane and as snappy as a flyswatter. There was a photo album filled with images of the whippings; more than a hundred have taken place since 2005. The man who administers them wears a maroon robe, white gloves, and a face-covering hood. The crowds are enormous.\textsuperscript{360}

Faradila, head of a female Sharia enforcement team, supported the amputation of hands and stoning as appropriate punishments for theft and adultery.\textsuperscript{361}

On September 14, 2009, the Aceh legislative council added to existing Sharia law with provisions that allowed stoning to death for adultery and 100 lashes for homosexual acts.

The code, a set of local bylaws that were passed to replace parts of the Criminal Code with aspects of Islamic law for the province’s Muslims, imposes harsh punishments, including stoning to death and lashings, for offenses like adultery and premarital and homosexual sex. The bylaws also mandate corporal punishment for rapists, child molesters, those who drink alcohol and gamblers, and strictly regulates people’s interactions with members of the opposite sex who are not family members.

After the code was ratified by the legislative council, national and international human rights groups spoke out against the regulations, calling them draconian and a violation of basic rights. Aceh’s governor, Irwandi Yusuf, has also refused to sign off on the Qanun Jinyat [the Code in question].\textsuperscript{362}

The law never came into force. It had been enacted by an outgoing legislative council, and the new council said that it was “generally against the regulations” and was “eager to revise” the provisions.”\textsuperscript{363}

\textsuperscript{360} Finkel, 2009, 89 and 92.
\textsuperscript{361} Ibid.
\textsuperscript{363} Ibid.
A two-day workshop in November, 2009, organized by human rights and women’s rights non-governmental organizations in the province, drew around 50 district prosecutors, district court judges, lawyers, police officers and Shariah enforcement officers.

The recommendations from the workshop said the code should be reassessed because it was not in line with the social, economic or cultural aspects of the people of Aceh. They also said there was too much room for interpretation in the bylaws. “Aceh’s people are not ready for stoning. Besides it is inhuman, humiliating and could possibly create a backlash in society,” [conference head] Khairani said. …“it would be impossible for offenders to pay [compensation] in thousands of grams of gold, which is stipulated in the Qanun,” Khairani said. The code stipulates a maximum of 60 lashes and a fine of 60 grams of pure gold, or 60 months in jail, for sexual harassment.364

Indonesian government representatives attended a hearing of CEDAW, the UN committee responsible for the implementation of the Convention on the Elimination of All Forms of Discrimination against Women in 2012. A member of the CEDAW committee from Switzerland raised the Aceh law, saying it represented “grave violations of the rights of women to life, liberty and security” and asked if the central government intended to review and strike down the provisions. The government representative simply said the Aceh law was not yet “in place…”365 Indeed it never came into force. It was never signed by the Governor, with the result that Jakarta did not have to take any action, positive or negative. Shari’a offences, enacted earlier, continued to apply.

While the clothing requirements were mainly enforced against women for tight pants and no headscarves, 65 young male ‘punks’ were rounded up in 2011 at a music concert. Their spiky Mohawks were shaved off and all body piercing, dog collars and other ‘offensive’ clothing removed.366 A complaint was filed with the national human rights commission. The concert had obtained a permit by claiming to be a charity event for orphans.

364 Ibid.
366 AP, Hard-line Indonesian police round up punk rockers, Jakarta Post, December 14, 2011.
In May, 2013, Banda Aceh Deputy Mayor Illiza Sa’aduddin Djamal called for a by-law that would criminalize same-sex relations of both men and women. The penalty would be up to 100 lashes with a rattan cane.\textsuperscript{367}

Eight gamblers received five lashes each in September, 2014, on a specially built stage, in front of a Mosque. At least 1,000 people witnessed the caning, many taking pictures on cell phones.\textsuperscript{368} A photograph of the incident became a standard item for subsequent news stories on shariah law in Aceh.

On September 26, 2014, a law condemning anal intercourse by males and the rubbing of body parts by females (and other offences) was enacted in Aceh, after two years of debate and drafting. The members of the 81 seat provincial parliament voted unanimously in favor. The law provided for caning, up to 100 lashes, or a payment in gold, or imprisonment. Adultery also merits 100 lashes. Showing affection in public between the sexes is also forbidden. The law came into effect a year after its passage.\textsuperscript{369}

The law applies to Muslims and non-Muslims. If an offence appears in both the national criminal code and the Aceh law, non-Muslim individuals can choose to be tried either in a secular criminal court or an Aceh shariah court. Since homosexual acts are not covered by the national criminal law, non-Muslims charged with such activity would have no choice but to be tried in an Aceh shariah court.

There was considerable controversy over applying shariah law to non-Muslims, but it was said that the 2006 law on self-government permitted such application. Aceh is the only jurisdiction in Southeast Asia which applies shariah law to non-Muslims.\textsuperscript{370} The new law could be overturned by the home affairs ministry in the central government, which has a supervisory jurisdiction. There was no immediate action from Jakarta, and, as of writing, no stories of any judicial challenge to the new law.

\footnotesize{\textsuperscript{367} Camella Pasandaran, Nurdin Hasan, Banda Aceh Deputy Major Pushes for Bylaw Criminalizing Same-Sex Relationships, Jakarta Globe, May 7, 2013.  
\textsuperscript{368} Nurdin Hasan, Eight Gamblers Publicly Caned in Banda Aceh, Jakarta Globe, September 19, 2014.  
\textsuperscript{370} Sylvia Tan, Indonesia’s Aceh lawmakers approve caning for gay sex, GayStarNews, September 28, 2014; Bangkok Post, Aceh enacts harsh laws against gays, September 28, 2014, 6; Hotii Simanjuntak, Ina Parina, Aceh fully enforces sharia, JKARTA Post, February 7, 2014,}
University of Indonesia law professor Jimly Asshidqie suggested that people who object to the law should file for a review by the Constitutional Court. “The Constitutional Court can decide whether the Qanun Jinayat law violates the constitution,” he said.371

A heterosexual couple were publicly caned for sexual activity in April, 2015, after Friday prayers in front of a mosque. In May, 2015, North Aceh ruled that girls and boys must have segregated classes in schools, that the Koran must be read every evening and that unmarried men and women cannot ride together on motorbikes.372 In June an 11pm curfew was imposed on women in the capital, Banda Aceh.373 In June three heterosexual couples were caned in a public square for spending time alone.374 Two women were arrested in September for sitting together and hugging in a public space. It is said they confessed to being lesbian. They will undergo ‘rehabilitation’ rather than being charged with a crime.375

BRUNEI

Brunei is governed as a Malay Muslim Sultinate, an absolute monarchy. A 36 member legislative council is completely appointed by the Sultan. The population is around 400,000. The constitution names Islam as the official religion, but proves that all other religions may be practiced by individuals professing them. There are no other human rights provisions in the constitution. Seventy percent of the population is composed of Malay Muslims. In addition there are indigenous groups, Chinese and foreign migrants.

As a former British colony or protectorate, Brunei inherited the offence of “carnal intercourse against the order of nature” the same provision found in the criminal laws of all former British colonies in South Asia and Southeast Asia. The penalty is imprisonment up to ten years and a

372 Reuters, Indonesian regency separates sexes in schools, next up motorbikes, May 4, 2015; AFP, North Aceh bans unmarried couples from motorbike rides, May 4, 2015. In 2013 North Aceh had ruled that women passengers on motorbikes must ride sidesaddle.
373 AP, Mayor orders curfew for women in Aceh’s capital, Jakarta Post, June 9, 2015; DPA, Aceh mayor bans women from working after 11pm, The Nation (Bangkok), June 10, 2015, 4A..
374 AFP, in pictures: Aceh province canes unwed couples, Jakarta Post, June 12, 2015.
375 AP, ‘Lesbians’ face Islamic ‘rehabilitation’, Bangkok Post, October 4, 2015, 8; Two alleged lesbians arrested in Aceh, Indonesia under sharia laws, GayStarNews, October 3, 2015.
possible fine. We have no accounts of prosecutions under the section, but little information circulates about Brunei. Like Singapore and Malaysia, Brunei has signed a minimum number of UN human rights treaties (only the treaties on women, children and people with disabilities).

As in Malaysia there is a shariah legal system, in parallel with the British derived secular legal system. In October, 2013, the Sultan announced plans for a full shariah criminal law that, he said, would be introduced in three stages. The first set of provisions dealt with failing to perform friday prayers, propagating a religion other than Islam, cross dressing and failing to fast during Ramadan. Those parts of the new law came into force on May 1st 2014.

There was international controversy over the proposed third phase laws which provided for the death penalty for rape, adultery, sodomy and extramarital sexual relations. Individuals found guilty could be stoned to death. Brunei had not executed anyone since 1957, a kind of de facto moratorium on the death penalty.

It seems the Sultan was having a religious turn, after a life of some extravagance. He had become a great admirer of Nik Aziz, a key figure in Malaysia’s leading Islamist party PAS (Parti Islam se-Malaysia). Nik Aziz was the chief minister in the Malaysian state of Kelantan from 1990 to 2013. He was the driving force behind the campaign to introduce hudud punishments (such as amputation and stoning) in Kelantan.

“Nik Aziz is like the Pope to the Sultan of Brunei,” said a Malaysian businessman with links to the inner circle of the Brunei royal family. A Muslim intellectual with ties to Brunei echoed his words. “It is true, the Sultan has long looked up to Nik Aziz.”

The United Nations quickly condemned the provisions proposed for Aceh. Celebrities in the United States called for a boycott of the Beverly Hills Hotel and other enterprises owned by the Sultan or the Brunei Government. Members of the LGBT Equality Caucus of the US Congress urged President Obama to drop both Brunei and Malaysia from the negotiations for the Trans Pacific Partnership trade initiative, on the basis

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376 High-living sultan becomes a holy terror, Sunday Morning Post (South China Morning Post), May 4, 2014, 13.
of their anti-homosexual criminal laws. The International Commission of Jurists wrote an open letter to the Sultan, and intervened with a brief when the Committee on the Elimination of Discrimination against Women conducted its periodic review of Brunei’s compliance with the women’s treaty. The Economist was one of the print publications to cover the story.

The first of three stages towards full sharia, launched in May 2014, has enforced fasting during Ramadan and brought a crackdown on Christmas and new year celebration. The second stage due this year [2015] but seemingly delayed, will be more severe.377

Quietly, it seems, phase two and phase three have been dropped.

In March, 2015, a civil servant was fined 1,000 Brunei dollars for cross dressing, enforcing part of the shariah code already in force.378

MALAYSIA

Islamic punishments

The conservative Islamic political party PAS has formed governments at the state level in Malaysia.

…during their administration of Kelantan and Terengganu, PAS passed the “Syariah Criminal Code (II) Bill” and the “Syariah Criminal Offences (Hudud and Qisas) Bill” in 1993 and 2002 respectively. These bills would have enforced the Hudud punishments for various crimes including stoning to death for adultery by a married person, crucifixion for armed robbery when accompanied by killing, and amputation of the right hand for a first offence of theft and of the leg for a second offence. Also a Muslim accused of apostasy and who does not repent in three days may be killed. However, as the punishments exceed those constitutionally allowed for state laws, the bills have never been implemented.379

In 2015 PAS announced its intention to propose a private members bill in the national parliament to allow the state of Kelantan to enforce

377 All pray and no work, The Economist, August 15, 2015, 19.
379 Julian Lee, 60.
Hudud punishments. This threatened the unity of the national opposition coalition, and led to a contest for leadership within PAS. The proposed bill is, however, consistent with the long term goal of PAS to establish an ‘Islamic state’ in Malaysia. It also has the effect of challenging the Islamic credentials of UMNO, the United Malays National Organization that leads the governing coalition. That challenge is seen by many observers as a long-standing part of Malaysian politics, which forces UMNO to adopt more and more Islamist policies, for fear of losing Muslim support to PAS. One author refers to “the so-called Islamization race between UMNO and PAS.”

Support for the decriminalization of homosexual acts by UMNO would play into PAS’s hands, by showing a departure from strict Islam. Support for decriminalization is also impossible for the opposition coalition, in order to keep PAS in the coalition. The Kelantan bill did not, apparently, deal with homosexual acts, for the national Penal Code already covered such offences and specified the penalties for conviction.

The issue of hudud punishments split the opposition coalition in 2015. The Chinese party in the coalition, the Democratic Action Party, could not support PAS on the issue (nor could the liberal mainly Muslim party headed by Anwar Ibrahim before his imprisonment).

Cross-dressing

Section 74(2) of the constitution in Malaysia gives state governments the authority to legislate on matters pertaining to the religion of Islam. Under this authority, states enact Shariah laws dealing with a range of offences, as well as issues of family law and inheritance. The state of Negeri Sembilan, like other states, had a Shariah law that prohibited any Islamic male from wearing women’s clothing or posing as a woman in a public place. There had been some history in Malaysia of police raids on transvestite beauty pageants, with Muslim males charged in Shariah courts and non-Muslims charged in regular courts with some minor nuisance offence.

Three individual male-bodied cross-dressers challenged the Shariah law in Negeri Sembilan state on constitutional grounds. They had been

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380 Kamaruzzaman Bustamam-Ahmad, Islamic Law in Southeast Asia, Silkworm, 2009, 17 and 19. Former Prime Minister Mahathir attempted to pre-empt PAS’s call to make Malaysia an Islamic State, by claiming in 2001 that it already was an Islamic State, though founding Prime Minister Tunkul Abdul Rahman maintained that the intent of the constitution was that the state was secular.
repeatedly detained, arrested and prosecuted by the religious authorities of the state for cross-dressing. A religious authority supplied an affidavit saying that cross-dressing by males is prohibited by Islam. That evidence was not contested. For the defense, a psychiatrist and two psychologists gave evidence on the classification of “gender identity disorder” or “GID” in the DSM-IV, the standard authoritative classification of mental disorders issued by the American Psychiatric Association. The evidence established that the three individuals had been diagnosed as having GID, and that the condition was neither a matter of personal choice nor amenable to treatment. As a result “they feel natural” in expressing themselves as women. The medical evidence was supplemented by that of a Malaysian sociologist who had published on the Mak Nyah, the collective term for male-to-female transgendered individuals in Malaysia. There was no challenge to any of this evidence. Amicus curiae briefs, supporting the challenge, were filed by the Malaysian Bar Council and the International Commission of Jurists.

The unanimous decision of the Court of Appeal was delivered on November 7th, 2014. It ruled that Shariah laws, like any other legislation, were subject to the rights provisions in the national constitution. It found the application of the Shariah law to individuals with GID violated a number of provisions of the constitution. It ruled that the protection of the “life and liberty” of the person includes “the right to live with dignity” which the particular law denied to individuals with GID. The court cited the recent decision of the Supreme Court in India, National Legal Services v Union of India, which held that the prohibition of discrimination on grounds of “sex” in the Indian Constitution covered as well “gender identity.” Parallel decisions in Pakistan and Bangladesh have occurred, but were not noted in the decision. The judgment quotes from a Malaysian government report to the UN General Assembly Special Session on HIV/AIDS in 2010 which reported 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 criticizes the trial judge’s comments equating the petitioners with homosexuals. The judgment separates sharply the categories of sexual orientation and gender identity, saying “[t]he present case has absolutely nothing to do with homosexuality.”

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381 The classification has been renamed “Gender dysphoria” but nothing turns on the difference in terminology.

382 Muhamad Juzaili Bin Mohd Khamis v Negeri Sembilan.
The decision is currently under appeal to the Federal Court, the highest court in Malaysia.

The joint statement of twelve UN specialized agencies in September, 2015, calling for the ending of violence and discrimination against LGBTI people, specifically condemns laws criminalizing cross-dressing.\textsuperscript{383} Such laws are also opposed in the \textit{Yogyakarta Principles}.

\textbf{FATWAS}

Malaysia made headlines around the world in late 2008 when the national Fatwa Council of Malaysia, which composes \textit{fatwas} that may be adopted and enforced by individual states, announced first that it was \textit{haram} (forbidden) for Muslim women to behave like tomboys, and second, that it was against Islam to practice yoga while chanting mantras. While the BBC was able to make light of the “tomboy fatwa”, describing it as a \textit{fatwa} against women wearing trousers, what is apparent is that there is a willingness on the part of Islamic bodies of the Malaysian State to seek to control the minutiae of people’s lives.\textsuperscript{384}

In April, 2015, the government’s Islamic Development Department, known by the acronym JAKIM, issued guidelines seeking the segregation of the sexes at rock concerts and similar entertainment events.\textsuperscript{385}

\section*{15 \textbf{DISCRIMINATION}}

\textbf{DISCRIMINATION IN EMPLOYMENT}

How common is discrimination in employment? Most of the time we only have particular stories.\textsuperscript{386}

\begin{footnotesize}
\textsuperscript{383} Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, September, 2015. The statement was endorsed by the \textit{OHCHR}, the \textit{International Labor Organization}, \textit{UNDP}, \textit{UNESCO}, \textit{UN Fund for Population Activities}, \textit{UN High Commission for Refugees}, \textit{UNICEF}, \textit{UN Office for Drugs and Crime}, \textit{UN Women}, the \textit{World Food Program}, the \textit{World Health Organization} and \textit{UN AIDS}.

\textsuperscript{384} Julien Lee, 132.

\textsuperscript{385} Gender segregation in concerts a guideline, New Straits Times (Kuala Lumpur), April 21, 2015, 3.
\end{footnotesize}
One of the earliest gay activists in Thailand, Dr Seri Wongmonta, lost his academic position at Thammasat University, a leading Thai educational institution, after coming out as gay sometime in the 1980s. He became the lone public spokesperson in Thailand speaking as a homosexual in the period. In September, 1994, Beth Lim and Bangie Castronuevo, a lesbian couple, lost their jobs at the Balay Rehabilitation Centre in the Philippines. The case was given international publicity by the International Gay and Lesbian Human Rights Commission. The couple talked about the case at the 1996 pride march. Another case alleged discrimination on the part of Miriam College in Manila against a gay male librarian whose same-sex marriage had received local publicity. His contract was not renewed. His claim of discrimination was rejected by a labor tribunal. In 2010, a senior academic on the brink of retirement and chair of the Department of Modern Indian Languages at Aligarh University in India, was fired from his job and evicted from campus housing after being outed as gay. Members of the press actually broke into his accommodation when he was with a partner, in what was clearly a set-up. A court ordered his reinstatement as an interim measure, shocked at the breach of privacy and ruling that his sexual preference was irrelevant to his employment. His death prevented a final determination. In 2015 a transwoman teaching in the Faculty of Social Work at Thammasat University in Bangkok was refused a permanent position for ‘inappropriate’ activities on social media. An internal appeal supported the University. She has initiated an appeal to the Administrative Court.

Employment discrimination is a serious problem for transgender individuals. Transwomen and openly gay men work in beauty parlors in the region. In Thailand transwomen or kathoey often work as clerks or

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386 The International Labour Organisation in 2014 published a study of discrimination in the workplace against LGBT individuals in Thailand under the title “Promoting Rights, Diversity and Equality in the World of Work.”

387 Much more recently, he had one of the lead roles in the Thai film comedy, Saving Private Tootsie. He is a manager of the international transvestite beauty pageant held each year by Tiffany Show in Pattaya. He involved kathoey from Pattaya in Red Shirt political demonstrations in 2013.

388 Siras v Aligarh Muslim University, in International Commission of Jurists, Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook, 2011, 87. A film is being made of the story. The court ruling occurred in the period in which the criminal prohibition of same-sex acts had been declared unconstitutional.


390 See Jitsiree Thongnoi, Trapped beneath the transgender glass ceiling, Bangkok Post Spectrum, June 7, 2015, 6.
waitresses. Cabaret performances give some positive public images, but only a limited number of jobs. Trans street prostitution is often explained as one of the limited job alternatives available. There seem no serious studies of employment patterns.

An individual can challenge employment discrimination (a) under employment laws or collective agreements which limit dismissal to situations where there is a legitimate job-related reason for a firing,\(^\text{391}\) (b) where the employer is a branch of government, and bound by constitutional prohibitions of discrimination, or (c) under laws which prohibit discrimination in the public and private sectors.

**GOVERNMENT ACTIONS**

Two decisions of the European Court of Human Rights in 1999 ruled that the ban on homosexuals serving in the armed forces in the United Kingdom violated individual rights under the *European Convention on Human Rights*.\(^\text{392}\) In July, 2003, Singapore Prime Minister Goh Chok Tong told Time Magazine that his government had begun to hire gays and lesbians. Goh said “We are born this way and they are born that way, but they are like you and me.” While this announcement was somewhat surprising, no government in the region seems to have an explicit or actual ban. Singapore assigns gay conscripts in compulsory military service to desk jobs. The Philippines bars gay males from the army or police, but the rules for other government agencies are more open.

Policies that promote the rights of LGBT people include the Civil Service Commission’s (CSC) Office Memorandum 29-2010 that forbids discrimination against LGBT people who are applying for civil service examinations (Ocampo, 2011). The CSC also has the Revised Policies on Merit Promotion Plan that inhibits discrimination in the selection of employees based on various criteria including

\(^{391}\) A general anti-discrimination labor law provision in Indonesia has not been used to challenge discrimination on LGBT grounds. See UNDP, *Being LGBT in Asia: Indonesia Country Report*, 2014, 9.

\(^{392}\) *Lustig-Prean v U.K.*, and *Smith and Grady v U.K.*. The ban was subsequently lifted by the U.K. government. The pioneering decision in *Dudgeon v U.K.* in 1981 had ruled that a criminal prohibition of same-sex acts was an unjustified interference with the right to privacy, and this rationale continued to be applied in the two 1999 decisions, rather than an analysis of non-discrimination. Paradoxically the 1999 ‘privacy’ rulings allowed the individuals to be open about their homosexuality, without fear of a job loss.
gender (Ocampo, 2011). However such policies remain few, or are not widely known.\textsuperscript{393}

[[[The World Post story on the Philippines says that the ban on openly gay men and women serving in the military was lifted in 2009. Maybe that was just for the police.]]]

Last year activists celebrated a big win when Vietnam accepted the UN Human rights Council’s recommendation to enact anti-discrimination laws to guarantee the equality of all citizens, regardless of their sexual orientation and gender identity.\textsuperscript{394}

**ANTI-DISCRIMINATION LEGISLATION**

There are a number of judicial decisions where allegations of discrimination on LGBTI grounds have been considered. The cases rely on constitutional or legislative provisions. Discrimination on the basis of ‘sex’ is prohibited by the treaty establishing the European Union. An EU Directive in October, 2000, authorized by the Treaty of Amsterdam, requires all EU member states to prohibit employment discrimination on grounds of sexual orientation.\textsuperscript{395} Many other Western countries have laws that prohibit discrimination in employment on grounds of sexual orientation and sometimes gender identity as well. In the United States national law prohibits discrimination in employment on grounds of ‘sex’, but not, expressly, on grounds of ‘sexual orientation’ or ‘gender identity’ or ‘gender expression.’

The pattern in Asia is to have provisions on equality and non-discrimination in national constitutions, applicable to government actions, with no reference to ‘sexual orientation.’ General non-discrimination laws applicable to the private sector are rare. The only countries in Asia with such general laws are Taiwan and Timor Leste, and both prohibit discrimination on grounds of sexual orientation. Japan has a law ‘promoting’ gender equality, but it does not prohibit discrimination. A proposal for a general non-discrimination law in South Korea that would


\textsuperscript{394} Dominique Mosbergen, Vietnam has been praised as a leader in LGBT rights: activists beg to differ, The World Post, October 18, 2015.

\textsuperscript{395} Parallel directives on race and sex apply more broadly, for example to accommodation or publicly available services. A move towards a ‘single directive’ which would treat sexual orientation discrimination on an equal basis has been debated, but remains stalled.
have included ‘sexual orientation’ was defeated. Even a non-discrimination law for the capital Seoul was abandoned. For both, the opposition focused on sexual orientation inclusion. The new Gender Equality Act in Thailand is discussed below.

Activists in the Philippines, for over a decade, have lobbied for a national anti-discrimination law covering sexual orientation. Quezon City, part of Metro Manila, passed an anti-discrimination ordinance in 2003 covering sexual orientation. Quezon City seems a special place. It is home to the large main campus of the University of the Philippines, and was the site of the first ‘pride’ parade in Asia in 1994. As of mid-2015 there are 8 cities or provinces in the Philippines with anti-discrimination laws covering sexual orientation, with Quezon City having expanded its ordinance to make it more comprehensive.

Like similar laws in other parts of the Southeast Asian country, Vigan’s Anti-Discrimination law bans discrimination in employment, education, access to goods and services, accommodation, access to public places, facilities, meeting places, and access to commercial establishments. However, the city went one step further by banning discrimination in political participation, wrongful portrayal and inciting others to commit acts of discrimination.

On February 11, 2015, an anti-discrimination law passed the committee level at the House of Representatives. This will allow debate on the bill in the lower house. The Catholic Bishops’ Conference of the Philippines indicated support for the bill, saying the Church rejects second-class treatment for LGBT individuals. The Bishops reiterated their opposition to same-sex sexual acts, same-sex marriage, any view that gender is a ‘choice’, and any restrictions on Church decisions in its various institutions including the priesthood and schools.

397 The focus on gaining an anti-discrimination law became the central demand in terms of civil society activism on LGBTI issues in the country. This has not occurred, as a priority or strategy, elsewhere in the region. But the campaign for a national anti-discrimination law has proven elusive. Anti-Discrimination bills have languished in the Philippine Congress for over 12 years.
In Indonesia the Broadcast Commission in its 2012 Guidelines for Broadcast Practice and Standard for Broadcast Programs, prohibits programs that stigmatize “people of certain sexual orientation and gender identity.”

In the Philippines and Thailand there have been incidents where transgender individuals were barred from entering bars or discos. The National Human Rights Commission in the Philippines has twice ruled that such venues can set their own dress requirements. In Thailand an incident involving a disco in the Novotel Siam Square hotel was given strong publicity, and a call for a boycott of the Accor Hotel chain. The hotel said the refusal was contrary to hotel policies, and made a public apology. In February, 2015, a transwoman was refused entry into a bar in the RCA entertainment area of Bangkok. She has filed a complaint with the National Human Rights Commission.

Two administrative court decisions in Thailand, against the government of Chiang Mai province, have barred discrimination against transgendered individuals in festivals organized by the province.

In the private sector, transnational companies may or may not extend diversity or non-discrimination policies to their operations in ASEAN countries. An appeal to IBM’s international head-quarters resulted in its operations in the Philippines dropping a bar on cross dressing, and allowing transwomen to access female toilets.

EXPANDING THE MEANING OF DISCRIMINATION ON THE BASIS OF ‘SEX’

There are a number of decisions in which discrimination on grounds of sexual orientation, gender expression or sex reassignment are considered as possibly covered by prohibitions of discrimination on the basis of ‘sex.’ The number of US decisions on these issues reflects the fact that the US does not have national laws prohibiting discrimination on the basis of ‘sexual orientation’ or ‘gender identity’ but does prohibit discrimination on the basis of ‘sex.’

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401 Melalin Mahavongtrakul, Calling last orders on transgender discrimination, Bangkok Post Life, February 26, 2015, 4; Darren Yee, Trans model files human rights complaint after she is barred from Bangkok club, GayStarNews, February 10, 2015.
In 1989, in the case of *Price Waterhouse v Hopkins*, the US Supreme Court held ‘sexual stereotyping’ was a form of discrimination on the basis of sex. A highly successful senior employee had been denied a partnership on the basis that she was too masculine. She had been told to wear make-up and jewelry and ‘take a course at charm school.’ She won her case. The US Supreme Court has also held that same-sex sexual harassment, like sexual harassment in general, is a form of discrimination on the basis of ‘sex.’

In 1993, in the case of *Baehr v Lewin*, the Supreme Court of Hawaii ruled that the denial of legal marriage to same-sex couples was discrimination on the basis of sex, and directed a trial on the question whether there was a compelling state interest to justify such discrimination. The ruling did not say that discrimination on the basis of sexual orientation was a form of discrimination on the basis of sex. Instead it relied on the analysis that denying Jane the right to marry Sally turned on identifying Jane as a female, for no prohibition would occur if Jane was John and male.

In 1994, in the case of *Toonen v Australia*, the UN Human Rights Committee ruled that discrimination on the basis of sexual orientation was included within the prohibition of discrimination on the basis of ‘sex’ in the *International Covenant on Civil and Political Rights*. The ruling found the local anti-gay ‘sodomy’ law to violate the covenant both on grounds of privacy and as discrimination on the basis of ‘sex.’

In *Grant v South-West Trains*, the European Court of Justice ruled that discrimination on grounds of ‘sexual orientation’ was not included within discrimination on grounds of ‘sex.’

In 1996, in the case of *P v S and Cornwall County Council*, the European Court of Justice ruled that discrimination on the basis of sex reassignment was discrimination on the basis of sex, and, for that reason, was contrary to European Union law. Since then, all members of the EU are required to prohibit discrimination on the basis of ‘gender identity’ or sex reassignment.

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403 The decision of the European Court of Human Rights in *Dudgeon v U.K.*, referred to earlier in this report, had ruled against an anti-gay sodomy law, but on grounds that it was in conflict with rights to personal privacy, not on grounds of discrimination.
In 2000, in the case of Lawrence v State, the Texas Court of Appeals ruled that a sodomy law constituted discrimination on the basis of sex. 404

In 2007, the UN Committee on the Elimination of Discrimination against Women, CEDAW, in its 39th session, raised issues of sexual orientation discrimination with representatives of the governments of Brazil, Honduras, New Zealand and the Republic of Korea in the course of reviewing those countries’ periodic reports. The Committee asked about the protection of same-sex couples in the law in Brazil, New Zealand and Korea. It queried why New Zealand, which has a civil union law for same-sex couples, excluded such couples from the marriage law. It criticized Singapore for retaining a criminal law against sodomy between men. 405

In 2008, in the case of Schroer v Billington, the US District Court for the District of Washington held that discrimination on the basis of sex reassignment was a form of discrimination on the basis of “sex” and also constituted “sexual stereotyping”, both of which brought it under the prohibition of discrimination on the basis of “sex.” 406

In the Federal District Court decision on California’s Proposition 8 (banning same-sex marriage), Judge Walker held that the ban was on the ground of ‘sexual orientation’ and ‘gender.’ He was using ‘gender’ to mean ‘sex.’ 407

In 2009, the UN Committee on Economic Social and Cultural Rights issued a “General Comment” on the meaning of discrimination on the basis of ‘sex.’ The Comment included within “sex”

...the social construction of gender stereotypes, prejudices and expected roles, which have created obstacles to the equal fulfillment of economic, social and cultural rights. 408

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404 This ground was not canvassed by the Supreme Court in the subsequent appeal of the decision. William Eskridge, Dishonorable Passions, Viking, 2008, 315-317.
406 444 F. 3rd 1104.
407 “His ruling effectively said that the reason that Jane cannot marry Jill is because Jane is a woman, an inarguably immutable characteristic.” Jo Becker, Forcing the Spring, Penguin, 2014, 225. Because the State of California did not appeal the trial decision, the US Supreme Court ruled that the trial decision resolved the issue of the constitutionality of the banning of same-sex marriage in the state.
In 2011, in the case of *Glenn v Brumby*, the US Court of Appeals, Eleventh Circuit, held that discrimination against a transgender employee was discrimination on the basis of sex, whether it was described as discrimination on the basis of sex or gender.

In 2012, in the case of *Macy v Holder*, the US Equal Employment Opportunity Commission ruled that discrimination against transgendered individuals was barred by the prohibition of discrimination on the basis of ‘sex.’ Rulings of the EEOC are binding for most federal government workers, and are often persuasive in litigation about employment rights in the private sector.

In 2014, the US Department of Education confirmed its position that discrimination on the basis of ‘sex’ included discrimination on grounds of sexual orientation, gender identity or failure to conform to stereotypical notions of masculinity or femininity:

The Education Department has reached the conclusion that Title IX extends to transgender students after numerous courts have concluded anti-transgender discrimination amounts to gender discrimination under existing law. For example, that was the determination of the 11th US Circuit Court of Appeals in the case of Glenn v. Brumby, which was filed by a transgender worker who lost her job at the Georgia State Legislature. The U.S. Equal Employment Opportunity Commission in its decision in Macy v. Holder and the Department of Health & Human Services in its interpretation of the Affordable Care Act have reached similar conclusions that transgender discrimination is the same as gender discrimination.409

In 2013 or 2014, the Supreme Court of India in *National Legal Services v Union of India* held that the prohibition of discrimination on grounds of “sex” in the *Constitution of India* covered “gender identity,” which mandated recognition of the Hijra as having equality rights. The decision was relied on by the Court of Appeal in Malaysia in *Muhamad*

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Juzaili Bin Mohd Khamis v Negeri Sembilan in 2014 for transgender Mak Nyah (a decision reversed by the Federal Court on procedural grounds).

In 2015, the US Equal Employment Opportunity Commission in the case of Baldwin v Foxx, ruled that discrimination on the basis of ‘sexual orientation’ was a form of discrimination on the basis of ‘sex’ and in conflict with national law for that reason.410

In the current case of Jamal v Saks, the US Attorney General intervened arguing that discrimination on the basis of “gender identity is discrimination because of sex” contrary to federal civil rights law. Lawyers for Saks Department Store have conceded the point.411

These rulings in transgender and sexual orientation cases are potentially important in Asia, where constitutions regularly bar discrimination on the basis of ‘sex’, but constitutions and legislation are almost always silent on discrimination on grounds of sexual orientation, gender identity or gender expression. The rulings support a broad interpretation of the new Gender Equality Act in Thailand, to which we now turn.

THE GENDER EQUALITY ACT IN THAILAND

The 1997 Constitution of the Kingdom of Thailand marked a break from earlier documents. It had a fuller catalogue of rights, and new constitutionally based institutions as checks and balances on political power (including an independent electoral commission, an anti-corruption body, a national human rights commission and an ombudsman).412 Section 30 provided:

411 Chris Geldner, As Justice Department Weighs In, Saks Backs Down on Claims In Trans Discrimination Case, Buzzfeed, January 27, 2015. The defendant, Saks department store, subsequently dropped its argument that the discrimination was not on the basis of “sex”.
412 Prime Minister Banharn Silpa-archa, openly criticized the draft and tried to abort the process by calling a fresh election. The King refused his request for a dissolution of parliament and an election. The heads of the armed forces made a public statement supporting the draft (though it ended a military presence in the Senate). Observers assumed that the military support was prompted by the King. The Asian financial crisis of 1997-98, which began with the floating of the Thai baht on July 2nd, did not derail the project.
All persons are equal before the law and shall enjoy equal protection under the law.

Women and men shall enjoy equal rights.
Unjust discrimination against a person on the grounds of the difference in origin, race, language, sex, age and physical or health conditions, personal status, economic or social standing, religious belief, education or constitutionally political view, shall not be permitted.

Article 80 of the 1997 Constitution committed the state to promoting equal rights between men and women.

There was a need to have implementing legislation for a number of the provisions in the 1997 Constitution. In 2005 the government contracted with Assistant Professor Matalak Orunarote, Faculty of Law, Thammasat University, to look into the laws in other countries and draft a non-discrimination law dealing with discrimination on the basis of sex, or ‘phet’, the Thai word used in section 30.

A military coup in 2006 led to a new constitutional drafting assembly and new public hearings on proposals in 2007. Naiyana Supapung, of the National Human Rights Commission, supported lobbying by the Sexual Diversity Network. She had argued from 1997 that the constitution did protect lesbians and gays, though it was not explicit.

The attempt in 2007 to get the constitutional drafting assembly to include additional language floundered, in part, on how to word a provision. There was a proposal to add “sexual diversities” to the list in section 30. Some members of the constitutional drafting assembly found the phrase unfamiliar, and the amendment was rejected. A bit later, in a second attempt, the words for “sexual identity” were successfully added to the draft. But then a procedural motion opposed the reopening of the issue, and the fresh amendment was defeated.

It was said at the time that there was support for the position of the Sexual Diversity Network and that an ‘intentions’ document would be drafted which would explain that the existing “phet” wording applied to diverse sexualities.
The CDA issued a document, “Intentions of the Constitution of the Kingdom of Thailand,” dealing with clause 3 of Article 30, the provision on equality that had been the subject of the “diverse sexualities” and “sexual identity” amendments. The key term in the document is *phet*, a Thai word that is used variously to mean “sex”, “gender”, and “sexuality”, terms that are not clearly differentiated in standard Thai. In the list of prohibited grounds of discrimination in Article 30 (3) *phet* is included, and in this context is normally translated into English as “sex.” The “intentions” document is concerned with the meaning of *phet* in the context of Article 30 (3).

The state has the responsibility to eliminate obstacles and to promote the conditions in which individuals are able to use their rights and freedoms in the same way as other individuals, without discrimination, which accords with the fundamental principle of human dignity.

Differences in *phet*, in addition to meaning the differences between men and women, also denote the differences between individuals in sexual identity or gender or sexual diversity, which may be different from the *phet* in which the person was born. Consequently, the above are not specifically provided for in section 30 because the word *phet* already denotes the above meanings and the individuals within the above categories should not be discriminated against. [Translation by Professor Peter Jackson]

This interpretation of Article 30 (3) supported what Naiyana Suphapung had said the article meant in her speeches beginning in 2001. Now there was a formal statement of the reasoning. LGBT were protected by Article 30 (3) because the meaning of the Thai term *phet* cannot be interpreted as simply meaning physical sex. It is much broader.

In 1994, in *Toonen v Australia*, the UN Human Rights Committee, interpreting the wording of the *International Covenant on Civil and Political Rights*, which Thailand has signed, ruled that discrimination on the basis of “sexual orientation” is a form of discrimination on the basis of “sex.” Sexual orientation discrimination is, in that way, covered by the equality/non-discrimination clause in the *Covenant*. The members of the CDA
possibly knew this, for one of the documents they had from the Sexual Diversity Network was a description of provisions in international law and other national constitutions (written by the present author). That document began by describing the ruling in the Toonen case, noting that it was binding on Thailand. In the document setting out the “intentions” of the CDA in its decisions on Article 30 (3) the same analysis is adopted, and stated expansively. The wording would clearly cover transgendered individuals as well as homosexuals.

The members of the CDA who spoke at the July 13th meeting at Thammasat University had repeatedly said that the end result of the CDA debates had been a victory for the Sexual Diversity Network – less than what had been sought (for the two proposed changes in wording had not been adopted) – but a victory nonetheless. The reaction of the activists present at that meeting was some skepticism or uncertainty over that claim. With the official “understanding” we saw, for the first time, what the supportive CDA members meant. The “understanding” brings LGBT within Article 30 (3) of the Thai constitution.413

A 2010 decision of the Administrative Court relied on the Intentions document to rule that discrimination against transgender kathoey by the Province of Chiang Mai was barred by the Constitution. Chiang Mai had attempted to restrict kathoey participation in their Flower Festival.

The court noted that the challenged law directly limited the rights of persons wearing certain kinds of dress to participate in the parade. In the Court’s view, this had a broad impact and denied the equal rights of “persons who have sexual diversity”. The challenged provision was therefore likely to be unlawful.414

The ‘likelihood’ of the provision being unlawful justified issuing a pre-trial restraining order against Chiang Mai, prohibiting the government from


excluding transgender participants from the parade. No further judicial ruling was necessary.

By 2008 Assistant Professor Matalak Orunarote had a draft equality bill, based on the provisions on “phet” in the constitutions of 1997 and 2007. She spoke at a workshop organized by the National Human Rights Commission:

**Khun Matalak said a new sexual equality act would allow people to choose their own social sex – discrimination would not be allowed unless shown to be necessary. General society sees sex as anatomy, but there is a lot of debate over this in the context of the new constitution – for example an effeminate star or singer may be able to sue for refusal of a job. She gets very upset when people suggest that having an antidiscrimination law will encourage people to be kathoey. Even at universities that allow kathoey to dress as women, they are not allowed to do so for the graduation ceremony, so some choose not to attend it.**

Her Thai language draft law had already passed an administrative stage of checking the exact language used. It included within “phet” a “phet” that differs from the “phet” at birth, and is specified or asserted by the individual or society. The 2008 draft provided for an adjudicative committee to consider cases alleging discrimination (as does the 2015 law).

There was a long delay, during which there was lobbying over wording. Two versions circulated. One was described as the LGBT version, and tried to add various categories to the proposed legislation. The second was described as the draft of the Department of Women’s Affairs and Family Development. It was this second draft that the new military government sent to the Council of State in 2015 for its technical approval, and which was subsequently enacted. It came into force in September, 2015. It deals with discrimination in the public and private spheres “because the person is a man or a woman, or has expressions that differ from their birth sex.” The Thai words for “birth sex” were “phet doi kamnoet” or “phet” at birth. This wording, like the 2008 draft, comes from the “Intentions”

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415 Notes from a discussion with Khun Matalak at the 2008 workshop.
416 Translation by Timo Ojanen with assistance from Isnai Kraisem.
The act has mechanisms for the investigation and adjudication of possibly discriminatory acts.

A *National Workshop on the Gender Equality Act*, was held in Bangkok August 31\textsuperscript{st} to September 2\textsuperscript{nd}, 2015, co-sponsored by the Department of Women’s Affairs and Family development under the *Ministry of Social Development and Human Security*, together with *Rainbow Sky Association of Thailand* (concerned with LGBT health and rights) and the *UN Development Program’s* project ‘Being LGBTI in Asia.’

Kantapong Rangsrisawang, Director of the Legal Division, Department of Women’s Affairs and Family Development, referred to the new law as “very progressive.”\textsuperscript{417} He said he was surprised that the military government had approved it, and praised General Prayut, the coup leader, for supporting it. At the workshop a *Memorandum of Understanding on the Implementation of the Gender Equality Act* was signed by the Department, *Rainbow Sky Association*, the *Lawyers Council of Thailand* and the *Association of Women Lawyers of Thailand*.

A Bangkok Post story indicated both the broad interpretation activists were giving to the new law and some concern over a limitation provision.

The act gives the government a legal platform to protect the rights of LGBTI (lesbian, gay, bisexual, transgender and intersex) citizens, according to activists. … The passing of the bill is an advance for equal rights, and it shows society has responded kindly to LGBTI communities and accepts them, [Anjana Suvarnananda, founder of Angaree Foundation] said. … Coordinator of the Thai Transgender Alliance, Jetsada Taesombat, said the Gender Equality Act was important not just for Thailand but for the region. “We are close to complete Asean integration, and Thailand must be open to so many ethnicities and especially genders.”\textsuperscript{418}

Khun Anjana, however, was concerned with section 17, which limited the application of the law (a) to protect the rights of others, (b) to respect

\textsuperscript{417} The Workshop was sponsored by the Department of Women’s Affairs and Family Development in the Ministry of Social Development and Human Security, Rainbow Sky Association of Thailand, UN Development Program Being LGBT in Asia initiative, ASEAN SOGIE Caucus, Women Lawyers Association of Thailand, and other organizations.

\textsuperscript{418} Taam Yingcharoen, “Gender Act loophole ‘denies equality’”, Bangkok Post, September 7, 2015, 3.
religion, and (c) to defer to issues of security. Equality laws in various countries typically have exemption provisions for religious organizations. The Buddhist Sangha excludes women, as does the priesthood in the Roman Catholic Church. Section 17 may be too broadly worded, but some limitations are a necessary compromise on equality principles in our time. Jetsada Taesombat was not concerned with section 17, saying that individuals could rely on the constitutional provision (that has no similar limitation wording).

The continuing search for proper terminology resulted in the addition of “phet saphap” to article 34 of the 2015 draft constitution, so that discrimination would be prohibited both on grounds of “phet” and “phet saphap.” The second term is one of the neologisms coined to mean “gender” (reproducing, it seems, the distinction between “sex” and “gender” in proper contemporary English usage). There was some controversy, and “phet saphap” was dropped. The draft constitution was rejected by the National Reform Council on September 6th, and a new drafting body was established. As well, the Department of Women’s Affairs and Family Development in the Ministry of Social Development and Human Security is now using “phetwiti” to mean sexual orientation. These new formulations may become standard usage.419

It is not controversial to say that “phet” is sometimes translated as “sex” and sometimes translated as “gender.” Thai like some other languages does not have a separate term for “gender.” Khmer, for example, had only one word, phet (the same as in Thai), but has now borrowed “gender” and uses it as a Khmer word.

‘Sex’ and ‘gender’ in English were not clearly differentiated in the past. In the last decades feminists have successfully sought the recognition of different meanings for ‘sex’ and ‘gender’, to differentiate the matter of physical or biological ‘sex’ from socially constructed patterns of behavior understood as ‘gender.’ But English usage still often uses ‘gender’ for ‘sex’, and ‘sex’ for ‘gender.’ The organization UN Women has a goal of “Gender equality and the empowerment of women.” This is not intended to mean “equality” between different socially constructed patterns of behavior associated in different cultures with men and with women. It means equality

419 Information from Dr. Cheera Thongkrajai, Social.Gender Development Officer, Department of Women’s Affairs and Family Development, personal conversation, September 4, 2015.
on the basis of physical ‘sex’ and perhaps also a reduction of social differences understood as particular ‘gender’ patterns.

The discussions at the National Workshop on the Gender Equality Act frequently used the phrase ‘diverse sexualities’ which would be understood to include lesbian, gay and bisexual sexual orientations (as well as differences in gender identity and expression). While it is clear that “phet” can cover physical ‘sex’ and socially constructed ‘gender’, does it also include ‘sexual orientation’? In English we are now (supposed to) have a clear distinction between ‘gender’ and ‘sexual orientation’ – so that some degree of male effeminacy is not necessarily assumed to signal a homosexual sexual orientation. This means that in proper English usage “gender” does not include “sexual orientation”, a separate categorization or descriptive term. But usage is not always precise.

Thai usage is best explained by seeing “phet” as something of an equivalent to ‘sexuality,’ an English umbrella term in current usage that includes sex, gender, gender expression, gender identity and sexual orientation.

DISCRIMINATION IN THE FAMILY

Jean Chong, founder of Sayoni in Singapore, talks of problems within families:

“There’s so much abuse that’s being underreported, especially within the family,” she says. “There are cases of so-called ‘corrective’ rape, or kids becoming homeless after being kicked out. One girl told me she was raped by her brother’s friend but when she told her parents, they said she had ‘deserved it’ because she was a lesbian.”

Dede Oetomo, one of the founders of Gaya Nusantara in Indonesia, called the country “very heteronormative”. He said “the greatest challenge is still the immediate family.”

Family patterns are difficult to access, and at present we simply have anecdotal accounts which tell of different patterns and levels of abuse,

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421 Dominique Mosbergen, ‘We were treated like animals’: The story of Indonesia’s LGBT activists, The World Post, October 11, 2015.
tension, tolerance or acceptance. There seem to be significant differences between Confucian influenced areas (such as Singapore, Vietnam and within Chinese minorities) and other parts of ASEAN. The emergence of PFLAG (Parents and Friends of Lesbians and Gays) in Vietnam has been striking and has given us a set of stories of initial rejection by parents, attempts at ‘cures,’ banishment and later reconciliation and active support. PFLAG mothers speak at various public events in the country, telling their very emotional and personal stories.

Thai society, in comparison to Confucian influenced cultures, does not have the same reverence for ancestors, the concern with maintaining patrilineal lineages or the strong necessity of marriage. Anecdotal accounts from Thailand often tell of family acceptance of same sex partners, but with no open acknowledgement of the sexual nature of the relationship. Thai culture avoids controversy, anger and criticism. It is often said that ‘unpleasant’ or ‘difficult’ matters are simply not talked about. Thai families give some sphere of privacy to children, even when they live within the natal family. Marriages are not arranged by parents. Strongly pressing a son or daughter to marry seems rare. In 2015 a Thai language book was published of letters that lesbian daughters wished they had been able to write to their mothers, explaining their lives, but had never been able to compose before. Writing the letters, it seems, helped the daughters to come to terms with unresolved and undiscussed issues in their relationship with parents.

16 THE LEGAL RECOGNITION OF RELATIONSHIPS

THE ISSUES

LGBTI human rights defenders have been involved in campaigns to secure equal legal recognition of relationships, including custody and access to children, rights of immigration sponsorship, hospital visitation rights and social security rights. These campaigns have been notable in Vietnam, Thailand and Taiwan. Problems from lack of recognition are illustrated in a recent incident in Thailand:
…a Thai government official whose partner almost died following a motorcycle accident, after she was denied the right to make medical decisions on her partner’s behalf. … Following the accident, she said, “doctors informed me that only relatives bear the right to authorize all forms of medical assistance. What was I do? I am merely a life partner, non-existent in the eyes of others,” the official is quoted as saying. She said she had to contact her partner’s relatives, who lived in a different province, and had to pay for their air travel so they’d be able to reach the hospital swiftly. Later, when confronted with the medical bills, the official said she was barred from using her state benefits to help cover the fees. “The Ministry of Finance’s regulations denies this benefit for same-sex couples,’ she was told.422

A major concern is a lack of security in relation to the custody of children on the death of the birth mother, who had now been living in a same-sex relationship.

VIETNAM

In 2012, the government of Vietnam began the process of drafting a new law on marriage and family. Under consideration were eight different matters, including heterosexual cohabitation, same-sex relationships, surrogacy, and separation.423 In July, 2012, the Minister of Justice said it was time to consider a legal framework for same-sex couples – giving very practical reasons for such a reform:

The Justice Ministry now says a legal framework is necessary because the courts do not know how to handle disputes between same-sex couples living together. The new law would provide rights such as owning property, inheriting and adopting children.

“I think, as far as human rights are concerned, it’s time for us to look at the reality,” Justice Minister Ha Hung Cuong said Tuesday [July 24th 2012] in an online chat broadcast on national television and radio. “The number of homosexuals has mounted to hundreds of thousands. It’s not

423 Anna Leach, Vote on same-sex marriage in Vietnam likely to be delayed until 2014, GayStarNews, February 20, 2013.
a small figure. They live together without registering marriage. They may own property. We of course, have to handle these issues legally.\textsuperscript{424}

In May the [Justice] Ministry sent out a consultative letter to concerned agencies to seek their opinions on same sex relationships. The letter described same-sex marriage as being inevitable according to human rights principles. However, it also said that “given the sensitivity of homosexuality and unforeseen consequences of same sex marriage on cultural and traditional family values, it is too early for Vietnam to legalise same sex marriage.”

The representatives from the ministry of justice expressed their desire to have a dialogue with LGBT communities in Hanoi and Ho Chi Minh City, organize meetings between LGBT and with experts from Vietnam and other countries, and educate the public on same-sex relationships.\textsuperscript{425}

The Committee of Social Affairs of the National Assembly, as part of their consideration of possible revisions to the law on marriage and family, invited LGBT activists to make a presentation on same-sex marriage on October 8\textsuperscript{th}, 2012.

Professor Kees Waaldijk, who holds a chair in sexual orientation law at the University of Leiden in the Netherlands and Professor M V Lee Badgett, an economist at the University of Massachusetts, Amherst, in the United States, were invited to Hanoi in December, 2012, to discuss international patterns on the recognition of relationships and the extension of marriage. Both had written widely on issues of recognizing same-sex relationships.\textsuperscript{426} They spoke at conferences organized jointly by the government and the UN Development Programme.

\textsuperscript{424} Margie Mason, AP, Unlikely Vietnam considers same-sex marriage, Jakarta Post, July 30, 2012, 2. Of course the numbers of homosexuals would not have increased. What has changed is their visibility and an evolving public recognition of the realities of sex and gender diversity.


In April, 2013, the Deputy Minister of Health spoke out. Thanh Nien News reported his statement that “gay people have the same rights as everyone else to love, be loved and marry.” A bit earlier, the Ministry of Justice announced that fines would no longer be imposed on same-sex couples who held marriage events.427

The government’s proposals on legislative reform were made public in mid-2013. They included extending the rights and obligations of marriage in relation to property and children to cohabiting heterosexual couples and, in a separate section, to cohabiting same-sex couples.

On October 17th, representatives of more than 30 social organizations and many individual LGBT and their allies, attended a seminar in Hanoi to release three documents which had been sent to the deputies in the National Assembly.

The documents include a letter of social organizations, a letter of the Parents, Families and Friends of Lesbians and Gays (PFLAG) Vietnam and a petition gathering 8,300 signatures of people who support same-sex marriage.428

Hundreds gathered in a Hanoi park to watch the symbolic marriage of two same-sex couples. Lots of rainbow flags and baloons. 60,000 ‘likes’ on Facebook.429

Included in a number of revisions to the Constitution in December, 2013, was the rewriting of the section on the right to marry. Instead of the wording that ‘men and women’ had the right to marry (phrasing that had been interpreted to restrict marriage to opposite sex couples), new wording said that ‘men, women’ had the right to marry. A possible obstacle to legal same-sex marriage was deliberately removed, without, it seems, any particular discussion or attention. It did not, itself, extend marriage.

On June 19, 2014, the National Assembly rejected a number of the reforms proposed by the government. Legal recognition of same-sex cohabitation was dropped. Recognition of heterosexual cohabitation was limited to issues relating to children (dropping recognition for resolving

428 8,300 signatures for same-sex marriage in Vietnam, Tuoi Tre News, October 18, 2013.
429 Andrew Potts, Hundred rally in Hanoi for same-sex marriage, GayStarNews, October 29, 2013.
issues relating to property). Surrogacy was strictly limited to a non-commercial arrangement with a blood relative (such as a sister or a cousin). The provision that banned same-sex ‘marriage’ events was dropped, and new wording merely stated that “the state does not recognize same sex marriage.”

On June 20, the Vietnam government, at the UN Human Rights Council in Geneva, accepted a recommendation by Chile in the Universal Periodic Review process that Vietnam should enact a law which guarantees the equality of all citizens, regardless of their sexual orientation or gender identity. A statement in the Council session by the International Lesbian and Gay Association, delivered by a representative of the Vietnam NGO iSEE, urged the government to go forward with that commitment, while noting the rejection of relationship recognition in the National Assembly the day before.

In September, 2014, Vietnam as a member of the Human Rights Council voted “yes” to pass a resolution on SOGIE. The resolution was passed successfully.

THAILAND

In 2012 long-time Thai gay activist Natee Theerarojanapong and his partner of 20 years applied for a marriage license in Chiang Mai. As expected, the license was refused. He took the issue to the National Human Rights Commission of Thailand, asking them to initiate proceedings in the Constitutional Court. Dr. Tairjing Siripanich, the Commissioner who handles LGBT issues, accepted the complaint, and supported the cause.430

Rather than go to court, the issue was taken up by the Committee on Legal Affairs, Justice and Human Rights of the Thai parliament working with the Rights and Liberties Protection Department within the Ministry of Justice. The Committee named three representatives of LGBT organizations to assist in its work. Five seminars or hearings were held by the Committee in different parts of the country. The last took place at the Thai parliament in Bangkok on April 19th, 2013. The Committee member charged with drafting was Wirat Kalayasiri, perhaps the leading legal figure among

Democrat Party members of parliament, and head of the party’s working group on legal affairs.\(^{431}\)

The result was draft legislation extending the rights and obligations of marriage to same-sex couples through a registration system of ‘civil unions’ for same sex couples. All the rights and obligations of marriage would apply to same-sex couples who registered, “mutatis mutandis”, a familiar Latin legal phrase meaning roughly ‘as appropriate.’ The age of eligibility to register a civil union would be 20 (the voting age) rather than 17, the age for heterosexual marriage.

Political party leaders did not endorse, oppose or even comment on the civil unions proposal. Getting it into the legislative process, in the absence of government or party support, would require the backing of 20 individual members of parliament or 10,000 signatures (on a citizens’ initiative). The dissolution of the legislature and the calling of the February, 2014, election stopped the process. The May 22\(^{nd}\), 2014, military coup changed the situation again, and a new legislative body was established to function for the period until democratic elections would again be held. The new legislature has been very active, approving numerous bills.

The Rights and Liberties Protection Department, which had been involved in the drafting process of the civil unions bill, referred the draft to various government agencies for comments, a required step. It seems that the process of considering those comments and doing some redrafting has not been completed. As of February, 2015, the Rights and Liberties Protection Department had not sent the bill back to the legislature for consideration. It is possible that the Ministry of Justice is prioritizing other bills. But perhaps it is civil society criticisms that have prompted the Rights and Liberties Protection Department to pause.

Certain LGBTI organizations criticized the parliamentary bill, calling for an alternative ‘citizen’s draft’. The Law Reform Commission of Thailand became involved in this second process. The Commission had been created to assist citizens group who wanted to propose ‘citizen’s initiative’ bills. FOR SOGI (The Foundation for SOGI Rights and Justice), which brings together activists from different parts of the country, backed 8

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\(^{431}\) In April, 2014, he was the party’s spokesperson on a constitutional court challenge to interim prime minister Yingluck Shinawatra: Rival parties dare judges to axe PM, Bangkok Post, April 15, 2014, 1.
principles for a citizens draft. The age of eligibility had to be the same for registration as for marriage. Registration must be open to any two individuals, regardless of sex, sexual orientation or gender identity. The inequalities between husband and wife in the existing marriage law had to be avoided. Registration had to recognize rights to adoption, custody and access for children. Divorce (or the ending of the civil union) should be available on a ‘no fault’ basis.

The Law Reform Commission of Thailand took those principles as basic instructions, and began a drafting process. A joint LRC-civil society drafting committee has functioned since early in 2014. That process has not yet produced a final draft bill. Quite a number of issues have had to be considered, in consultation with various government departments and agencies. Input has been sought from experts and academics. There are issues in relation to social security, and it has to be determined how best to word a civil unions law so as to provide access to social security rights. Inheritance is another issue. There are also issues relating to residency rights for foreign partners. Chulasak Kaewkan from the Law Reform Commission, speaking in February, 2015, emphasized how complicated the drafting process was, hoping for understanding as to why a final draft was not yet available. There are no plans to submit the citizens draft to a non-elected national legislative assembly, so a delay at the moment is not a problem.

Meanwhile Thailand continues to have a reputation as an LGBTI friendly country. Same-sex couples, as well as heterosexual couples, are invited during February (in honor of Valentine’s Day), to enter the country using the ‘premium’ immigration lane. The government’s tourist authority promotes gay tourism with a special campaign “Go Thai, Be Free.” Promotional videos show happy same-sex couples enjoying their holidays in the Kingdom.

PHILIPPINES

President Benigno Simeon Aquino III, expressly said that while he believes LGBT people should not be discriminated against, he does not support same-sex marriage. While Aquino eventually claimed

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432 Thailand welcomes same-sex couples, fridae.asia, February 5, 2013.
433 See the website gothaibefree.com.
that adults should be able to do as they want, as long as they do not harm others, he nonetheless stressed that he has mixed feelings allowing LGBT people to adopt.\textsuperscript{434}

The Department of Social Welfare and Development allows adoption by a single LGBT person, though not by two persons of the same sex who identify as a domestic couple.

Activists in the Philippines have given priority to pushing for an anti-discrimination law, rather than advocating for marriage.

**JAPAN**

Japan asks any Japanese citizen who is getting married abroad to obtain, in advance, a certificate from the Japanese government indicating basic information about both parties, including marital status, age, sex and nationality. In March, 2009, Japan began issuing such documents in cases where the foreign marriage was to be a legal same-sex marriage. In part, the certificate is designed to facilitate the future residence of the foreign spouse in Japan with the Japanese national.\textsuperscript{435}

It has recently been made clear that the presentation of ambassadors to the Emperor can include a heterosexual or same-sex partner – an elite recognition.

In 2007 media covered the same-sex wedding of Kanako Otsuji, the first open lesbian to be elected to public office in Japan. The couple wore white dresses and carried roses.\textsuperscript{436} In March, 2013, a lesbian rights activist married her partner at Tokyo Disneyland. The event was widely publicized, with photographs of the couple together with Mickey and Minnie.\textsuperscript{437} Two celebrity actresses, Akane Sugimori and Ayaka Ichinose, held a wedding and banquet in April, 2015.\textsuperscript{438}

\textsuperscript{434} Being LGBT in Asia: The Philippines Country Report, 40.
\textsuperscript{435} Japan OKs same-sex marriages abroad, Wockner International News No.780, April 6, 2009.
\textsuperscript{437} Anna Leach, Tokyo Disneyland hosts lesbian wedding, GayStarNews, March 5, 2012.
\textsuperscript{438} Japan actresses announce country’s first celebrity gay wedding, GayStarNews, December 22, 2014.
In March, 2015, the council in Shibuya, a district within Tokyo, voted to issue “partnership” certificates to same-sex couples. Officials said they will encourage hospitals and landlords to accept the certificates and grant equal treatment. Two other districts within Tokyo, Setagaya and Toshima, are considering similar measures, as is the city of Yokohama, Japan’s second largest city. It is worth remembering that the first registration systems in North America were put in place by local governments, primarily to identify the same-sex partners of city employees who would be entitled to ‘spousal benefits,’ such as health insurance or survivor pension benefits (rights the cities had already extended to same-sex partners). Equally, very modest local partnership laws in Japan could break the ice on legal recognition.

**OPENING MARRIAGE**

Marriage is now open to any couple in many countries – Argentina, Belgium, Brazil, Canada, Denmark, Finland, France, Iceland, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Portugal, Slovenia, South Africa, Spain, Sweden, the United Kingdom, the United States and Uruguay.

**RIGHTS IN RELATION TO CHILDREN**

Indonesia does not permit adoptions by individuals, and specifically prohibits adoption by homosexual couples.

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15. **TRANSGENDER ISSUES**

**GENDER IDENTITY AND SEXUAL ORIENTATION**

There is a difficult relationship between gender variance and sexual orientation. This is clear in the common linking of male homosexuality with effeminacy and female homosexuality with masculinity (and seeing the masculine male partner and the feminine female partner as not homosexual). It is the ‘gender variant’ partner who is visible and stigmatized, while the ‘gender normative’ partner is not visible and not stigmatized. This

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439 KYODO, Same-sex couples to be recognized by Tokyo’s Shibuya ward, Bangkok Post, February 26, 2015, 4; Same-sex unions in Japan: Summer of Love, The Economist, March 21, 2015, 21; AFP, Shibuya avows gay unions, Bangkok Post, April 1, 2015, 6
terminology is unsatisfactory, but basically it is the only set of terms available to us at the present time. To say that a masculine male who has sex with other males is ‘gender normative’ suggests that there is a single ‘normal’ pattern of gender expression for males, which is true only in social or cultural terms. The lack of stigma for such a male however suggests in so many societies that these masculine males are heterosexual (or bisexual), devaluing or denying same-sex desire. The gay man or the homosexual man actually disappears, unless made visible by effeminacy.

The emergence of ‘gender normative’ gay men and ‘gender normative’ lesbian women transforms perceptions and categorizations. This emergence has happened in many societies and is the basis, in many ways, for claims to equal rights. We know that effeminacy and masculinity are ‘gender’ and do not necessarily have an association with (how do we say it) non-normative or variant sexual orientations. Gender variance comes to be recognized as part of heterosexual life as well as of homosexual life. As well, we understand, intellectually, that some kind of gulf or separation between heterosexual life and homosexual life is a kind of fiction, that most straight and many gay and lesbian individuals accept, as making life simpler, easier to understand.

So long as there is a conflation of sex and gender, effeminate men and masculine women block a societal view of natural patterns of variance in both gender and sexual orientation. The visibility of kathoey in Thailand, waria in Indonesia and bakla in the Philippines, in this way, hides or denies the identification of the non-visible partners as lesbians and gay men. Neil Garcia writes of a

…conflict between the bakla or “gender-transitive” and the more masculine or “gender-intransitive” of genitally male homosexuals.441

Unless there is a separation of the concepts of sexual orientation and gender identity/expression, there is a kind of “conflict,” Garcia is saying, between categories (for only one hybrid category is recognized). Transgender kathoey dominate the public image of the dual characteristics of gender/orientation variance in Thailand. Effeminate nat kadow spirit mediums dominate the public image of gender/orientation variance in Myanmar. These images do not align either with claims of discrimination or

441 Garcia (2009), xvi.
with claims of equal human rights. The conflict must be resolved by
separating the categories, and understanding the human rights issues faced
by LGB, on the one hand, and T on the other. The issues are not the same.
The conflation of the categories is problematic for both sets of people.

‘Transgender’ is an umbrella term. It came into general usage in the
West in the 1990s to include

(a) gender variant individuals (with varying degrees of effeminacy in
males and masculinity in females),
(b) transvestites or cross-dressers, and
(c) transsexuals (who seek to live in the other sex, through self-
presentation and some degree of body modification).

Current usage refers to the categories of ‘gender identity’ and ‘gender
expression,’ words now often used in the formulation of anti-discrimination
laws in the West. Fully inclusive language on sexuality issues for an anti
discrimination law would now include grounds of sex, sexual orientation,
gender identity, gender expression and intersex status.

‘Gender identity’ is used to include ‘transsexuals’, that is, males
identifying as females (and seeking to live as females), and females
identifying as males (and seeking to live as males).442 ‘Gender expression’
is used to include gender variant individuals, including those who are drawn
to some extent of cross-dressing. For example, it would include kathoey,
lady boys and toms in Thailand, bakla in the Philippines, waria in Indonesia,
and mak nyah in Malaysia. Some in these identity categories may be
transsexuals, who seek a permanent shift to the other sex.

There is no direct correlation between ‘sexual orientation,’ on the one
hand, and gender identity or gender expression, on the other. The great
German Sexologist Dr. Magnus Hirschfeld said:

One has to extend the sentence, ‘not all homosexuals are effeminate’
to include ‘and not all effeminate men are homosexual.’443

442 This is one of many instances of “gender” being used to mean “sex”, not as socially constructed
patterns of behavior associated with a particular sex. The “gender identity” of a male-bodied individual
who identifies as a woman, is a female identity, not a male identity. It does not address issues of
effeminate or masculine behavior.
443 Elena Mancini, Magnus Hirschfeld and the Quest for Sexual Freedom, Palgrave Macmillan, 2010,
65.
Most transvestites are heterosexual. Additionally, it is widely recognized that the usual goal of transsexuals, who seek bodily change, is to enter into what they consider a heterosexual relationship. A male-to-female transsexual usually, but not always, seeks a relationship, as a female, with a male.\footnote{444}

**MEDICAL CLASSIFICATIONS**

There are international medical classifications associated with identifying transsexuals, basically for assessing whether sex reassignment surgery may be an appropriate medical treatment.

The current *American Psychiatric Association Diagnostic and Statistic Manual of Mental Disorders, DSM-V*, speaks of ‘gender dysphoria’, a change from the earlier classification of ‘gender identity disorder.’ “Dysphoria” is defined by the Oxford English Dictionary as “a state of unease or general dissatisfaction”. The World Health Organization’s *ICD-10*, speaks of ‘transsexualism’.

The provisions of the *DSM-V* and the *ICD-10* represent an international medical consensus on the legitimate need for a medical response to the condition of ‘gender dysphoria’ or ‘transsexualism.’ The Malaysian Court of Appeal decision on the Shariah law prohibition on cross-dressing in the state of Negeri Sembilan (discussed earlier), uses the classifications of “Gender Identity Disorder” and “Transsexualism,” accepting them as valid medical classifications for a condition that is not the result of personal decisions and not amenable to treatment.

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 relatively easy now for a transition from male to female. It remains difficult to construct a successful penis for a female to male individual. In either case, XX or XY chromosomes will not change. Individuals who complete

\footnote{444} The self identity of male or female partners of transgender individuals is a separate question. It is common for them to identify as heterosexual, but, in many cases this seems to be the avoidance of stigma associated with homosexuality. Megan Sinnott suggests that ‘tom’ lesbians in Thailand regard their ‘dee’ partners as heterosexual, who may leave them for a heterosexual man. Sexual relations between two trans individuals (that is two male-to-female or two female-to-male individuals) seems rare, and sometimes highly stigmatized within the trans communities as a violation of a ‘trans’ identity.
sex reassignment surgery will take compensatory hormone medication on a permanent basis.

Established medical standards for the approval of sex reassignment surgery involve (a) a diagnosis of the condition by two psychologists or psychiatrists, (b) counseling, (c) hormonal therapy, and (d) two years living in the desired sex. The appropriate treatment for the individual patient may, or may not, include genital surgery. Many individuals come to clinics in Thailand with a clear history of living in the desired sex and established use of hormones. In these cases genital surgery is performed without additional conditions.

The European Court of Human Rights, in the case of *L v Lithuania* in 2007, recognized the right of an individual who had been diagnosed as a ‘transsexual’ to have the government medical system provide sex reassignment surgery, a treatment that had been agreed upon in the particular case by a medical team, but halted after objections by a national politician. That year a panel of judges in Brazil ordered the public health system to provide sex reassignment surgery without charge, implementing a constitutional provision guaranteeing medical care as a basic right. In 2003, in *van Kuck v Germany*, the European Court of Human Rights had held that German courts had violated the *European Convention on Human Rights* by interpreting a health insurance contract as not covering the costs of gender reassignment. The court’s decision recognized sex reassignment surgery as a legitimate medical treatment (not simply some kind of cosmetic surgery that would not have a medical justification). The Thai government’s health care program does not cover the costs of the procedure for Thai citizens, even after a proper medical diagnosis (a violation of international human rights standards).

The availability of genital surgery varies in the ASEAN region. Reassignment surgery is banned in Malaysia and Vietnam (except for cases of intersexuality, a quite separate matter). Such surgery requires specialized medical personnel, and it seems that it is unavailable in the health care systems in Myanmar and Singapore. Availability in the remaining ASEAN countries is unknown. Many individuals go to Thailand, where there are hospitals and clinics that are known for their competence and costs are reasonable.

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Many individuals do not seek counseling or genital surgery and self-administer hormones to induce bodily change. Hormones are easily available in parts of the region, often in the form of birth-control pills used by transwomen. Availability however varies, and in the Philippines it proved very difficult to access medicines for transwomen and transmen under the former restrictions on access to contraception. With the reproductive health law now in place, access may be easier. Medical advice would avoid some of problems by suggesting proper dosages.

**PRECONDITIONS FOR GENITAL SURGERY**

We seem to lack information on pre-conditions imposed in particular ASEAN countries on sex reassignment surgery. In 2009 the European Court of Human Rights ruled in *Schlumpf v Switzerland* that a requirement, in all cases, of a two-year waiting period before surgery was a violation of the European human rights convention. Ms. Schlumpf had been living successfully in the desired sex for a number of years and there was no reason to require a waiting period.

**DOCUMENT CHANGE**

Personal identity documents, such as driver’s licenses, national identity cards and passports, all indicate the “sex” of the individual and have photographs from which it is easy to determine whether the individual is male or female. Men who are living as women and women who are living as men want to have personal identity documents which match their appearance. This gives them some ‘privacy,’ as guaranteed in international human rights law.

At the moment, document change is possible in Indonesia and Singapore. Genital surgery is probably required in both countries. The law on Civil Administration in Indonesia allows changes in birth certificates and other legal documents based on ‘extraordinary events’. One must convince a judge that the transition qualifies.

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446 Philippine transgender men fight for equality with very own posterboy, GayAsiaNews, July 1, 2014.
447 Information from King Oey, Arus Pelangi, Jakarta.
The first cases dealing with transsexual human rights issues were brought by individuals who had completed genital surgery and wanted their personal documentation to reflect their postoperative sexual characteristics. They wanted to maintain privacy about their personal histories, and wished to avoid the embarrassment and questioning that regularly occurred when personal documents had to be produced. In 2002, after some earlier inconsistent rulings, the European Court of Human Rights recognized these claims as valid in the leading decision Goodwin v U.K.

In 2004, after the United Kingdom Gender Recognition Act was enacted, only Albania, Andorra and Ireland in Europe had not recognized the postoperative sex of transsexuals. Recognition has occurred in many other jurisdictions, including, in Asia, China, Hong Kong, Indonesia, Japan, South Korea, Singapore and Taiwan. In the Muslim world, the change is recognized in Egypt, Indonesia, Iran and Turkey, but not Malaysia. The highest court in South Korea upheld a claim for changed documents in 2006, whereas an equivalent court in the Philippines rejected such a claim in 2007, beginning its judgment with a quotation from the Book of Genesis.

The problems with the older pattern requiring genital surgery is greatest for female to male (FTM) transsexuals, for there is no equivalence between the medical skills available for constructing a vagina and for constructing a penis. Phalloplasty, as it is termed, is highly unreliable and would typically require multiple surgical interventions at high cost. A decision against phalloplasty may be the best decision even for the most committed FTM transsexual. A requirement of genital surgery would deny most FTMs access to altered documentation, no matter how fully they have taken up living as men. The important Australian Family Court decision in Re Kevin, (2001) Family L. R. 158, recognized the marriage of an FTM who had not had genital surgery. The Yogyakarta Principles state that no one should “be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity.”

Modern reforms began with the 2004 Gender Recognition Act in the United Kingdom which allows the legal recognition of an acquired gender when the person (1) has been diagnosed with “gender dysphoria”, (2) has lived in the acquired gender for two years, and (3) intends to continue to live in the acquired gender until death. Genital surgery was not required. Genital surgery is also not required in Spain since 2007 and Argentina since
2008. In each case, however, a diagnosis of gender dysphoria must have been made.

A second condition for full legal recognition of the new sex may be confirmation that the individual is now sterile (the usual result of genital surgery). The requirement was dropped by Sweden in 2012 after an international campaign. The Norwegian government’s Equality Ombud ruled against a sterilization requirement in September, 2014. The German Constitutional Court has ruled against such a requirement.

In 2008 there was international publicity about an FTM in the state of Oregon in the United States, who had undergone breast reduction and hormonal therapy and been legally recognized as male. He married a female. The wife was unable to conceive. The husband was not sterile. He stopped hormonal therapy and through alternative insemination became pregnant. There was much international media coverage at the time about the ‘pregnant man’ but almost no attention to his second pregnancy or subsequent examples of such pregnancies.

On 10 March, 2015, the European Court of Human Rights in a unanimous decision in YY v Turkey ruled that a requirement that sex reassignment surgery result in sterility was a breach of individual rights of privacy and family life. The judges said that transsexual people have a right to establish their own individual gender, as this is an “essential part of the right of self-determination.”

A third condition sometimes imposed is that the person be unmarried. This requirement was rejected by courts in Austria and Germany in 2006 and 2008. The United Kingdom’s Gender Recognition Act required that the individual be unmarried. The Yogyakarta Principles state that no “status such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person’s gender identity.”

No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy as a requirement for legal recognition of their gender identity. No status,

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448 This requirement was dropped when marriage was opened to same-sex couples, but the spouse must consent to the change, to avoid the requirement of a divorce.
such as marriage or parenthood, may be invoked as such to prevent
the legal recognition of a person’s gender identity.\(^{449}\)


> It eliminates requirements for an applicant to take hormones and
undergo surgery, including irreversible sterilization. However each
request for a gender change must be accompanied by a medical
expert statement affirming the person’s permanent conviction to
belong to another gender.\(^{450}\)

The fullest recognition of the newer approaches has been in Denmark:

> Sept 1, 2014, the Danish gender recognition law – the first in Europe
based on the self-determination of the individual – has come into
effect. The new law abolishes any requirements for medical
intervention, such as a psychiatric diagnosis, sterilisation or hormonal
treatment. Instead, a simple administrative procedure allows
applicants to receive a new gendered social security number and
matching personal documents, such as a passport, driving license and
birth certification in accordance with the new gender.\(^{451}\)

There is a required six month waiting period, and a confirmation by the
applicant, before the new documents will be issued.

The newer reforms in the West have allowed document change
moving away from requirements of (a) a medical diagnosis of ‘gender
dysphoria’, (b) genital surgery, and (c) sterility. In the name of individual
‘self-determination’ individuals who are living in their desired sex can get
their documents changed. Some reformed laws still require a diagnosis of
‘gender dysphoria’ while others respect the wishes of the individual, without
the need for any medical confirmation. These reforms have been underway
in Argentina, Denmark, Ireland, Italy, Netherlands, Sweden, the United

\(^{449}\) Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation
\(^{450}\) Eirp[ec: Progress for Transgender Rights, Human Rights Watch press release, Berlin, June 24,
2014.
\(^{451}\) Statement of Transgender Europe, September 1, 2014.
Kingdom and Malta, and are likely to become dominant in the West and in Latin America. Argentinawas the breakthrough with its 2012 law:

The law provides all people with the right to recognition of their gender identity, including the ability to “request that the recorded sex be amended, along with changes in first name and image, whenever they do not agree with the self-perceived gender identity”. Furthermore the law clearly states that “[i]n no case will it be needed to prove that a surgical procedure for total or partial genital reassignment, hormonal therapies or any other psychological or medical treatment has taken place” for a change in the legal sex/gender to be effected; at the same time it empowers “[a]ll persons … with the aim of ensuring the holistic enjoyment of their health” and allows “access [to] total and partial surgical interventions and/or comprehensive hormonal treatments to adjust their bodies, including their genitalia, to their self-perceived gender identity, without requiring any judicial or administrative authorization.”

In July, 2015, very Catholic Poland allowed document change, requiring only a medical diagnosis, a reform it found easier than introducing registered partnerships. The law was, however, vetoed by the President. Such reforms, as of yet, are unheard of in Asia outside of Taiwan. In December, 2013, the Ministry of Health and Welfare in Taiwan authorized document change without any psychiatric evaluation or surgery.

2012 Argentina led the way.

…there are a number of jurisdictions, particularly important in Europe and western Europe which are moving towards a model of self-declaration, and that really is now the gold standard. … We saw that in Argentina but it’s rapidly happening now in Europe. Ireland has adopted self declaration, Denmark has adopted self declaration,

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452 Jane Fae, Italy becomes fifth country in the world to allow trans people to change gender without a doctor, GayStarNews, July 23, 2015. 
453 Commissioner for Human Rights, Council of Europe, 39. 
455 Derek Yu, Taiwan to allow legal gender changes without transitioning, GayStarNews, December 9, 2013. It is not known if the Ministry of the Interior has followed through on the implementation of the decision by the Ministry of Health and Welfare.
Sweden and Norway will do that from 2016, Belgium has committed to self declaration. Malta has adopted self declaration.

MARRIAGE

Document change will generally mean that the individual can marry in the sex now designated on his or her documents (a right recognized in the Goodwin decision of the European Court of Human Rights). Hong Kong changed the identity card after surgery but refused to change the birth certificate, with the result that marriage in the new sex was not possible. That was successfully challenged in the courts. Singapore also refuses to change the birth certificate, but allows marriage based on the sex indicated on the changed national identity card. The Supreme Court in the Philippines rejected a document change that would allow marriage in 2007, beginning its judgment with a quotation from the book of Genesis in the Christian Bible. The important Australian Family Court decision in Re Kevin recognized the marriage of a female-to-male transsexual who had not had genital surgery. marriage without surgery is usually limited to countries which allow same-sex marriage.

DISCRIMINATION

In 1996 in P v. S and Cornwall County Council, 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 under domestic law 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 constitution approved in Bolivia in January, 2009, was the first in the world to ban discrimination on grounds of gender identity, as well as 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

456 Peter Dunne testifying before the Women and Equalities Committee, United Kingdom Parliament, on the Gender Recognition Act, quoted in Michelle O-Toole, 6 reasons why the UK’s gender laws are failing transgender people, Pink News, October 15, 2015.
subway and railroad system could access whichever restroom was “consistent with their gender expression.”

DISTINCT TRANSGENDER IDENTITIES

In the ASEAN 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 these third sex groupings are the hijra and related groups in India, Nepal, Pakistan and Bangladesh. These groups have no equivalents in the contemporary West or 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 parlors, or work selling cosmetics in department stores. In the Philippines, they are often called ‘parloristas.’ In South Asia and Southeast Asia they are frequently associated with sex work, being barred from most jobs.

There have been extensive accounts of police violence against hijra in India and metis in Nepal, including rape while in custody. The first available documentation seems to have been the report entitled Human Rights Violations against the Transgender Community, published by the People’s Union for Civil Liberties, Karnataka, India, in 2003.

Two reforms have been taking place. Governments have recognized groups like the hijra as socially and economically marginalized. Affirmative action policies have been extended to hijra in parts of India to give access to education, health services, and employment. Some programs have also been tried by social welfare departments in Malaysia and Indonesia. Secondly, governments in India and Nepal have begun to recognize the distinct sex/gender character of ‘third sex’ identities, by changes in identity documents and voter registration cards.

No equivalent groupings appear to exist for masculine women, although there are recognizable “toms” (for tomboy) and “butches” in various countries, such as Thailand and India.

VIOLENCE AGAINST TRANSGENDER
Last October [2014], a transgender woman named Jennifer Laude was found dead inside a hotel room in Olongapo City, Philippines. Motel staff found her naked body on the floor of the bathroom, her head leaning on the rim of the toilet bowl. U.S. Marine Joseph Scott Pemberton admitted in August to strangling the woman. The 19-year-old said in court that he was “repulsed” and “feared he would be raped” after discovering the Laude was transgender. That fear, he said, prompted him to “subdue” her in self-defense. ... Just a few weeks after Laude’s death, Mary Jo Anonuevo, a 55-year-old transgender woman, was found dead in a bar she owned in Lucena City, Philippines. Anonuevo had been stabbed 33 times. The Philippines has one of the worst records of violence against the trans community. The murders of 29 transgender people have been documented in the Philippines since 2008, according to the TVT project, which monitors and analyzes cases of transphobia worldwide. This is the highest number in the Southeast Asia region, and the second highest in Asia...  

16. INTERSEXUALS

Intersexuality refers to a wide range of natural bodily variations 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. According to experts, between 0.05% and 1.7% of the population is born with intersex traits – the upper estimate is similar to the number of red haired people. ... Being intersex relates to biological sex characteristics, and is distinct from a person’s sexual orientation or gender identity. An intersex person may be straight, gay, lesbian, bisexual or asexual, and may identify as female, male, both or neither.  

When an intersex child is born with ambiguous genitalia, some confusion and embarrassment usually overwhelms the parents. Doctors, at

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least in the past, routinely recommended ‘normalizing’ surgery, to bring the child’s physical appearance into line with a male or female standard. This usually meant a ‘female’ outcome. 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, in the 1990s, argued that almost all of these ‘normalizing’ operations were cosmetic in nature. They were not medically necessary, but, instead, a response to social concerns. In addition they involved guesswork, for doctors could not know how the individual would identify in terms of sex or gender identity on maturity. Many intersexuals have rejected the sex assigned at birth, but face the fact that irreversible genital surgery has taken place. Medical treatment, activists argue, should be deferred until the child is able to give a fully informed consent to any course of treatment. In other words, it is up to the individual to determine whether to be male, female or intersexual.

There are negative consequences to ‘normalising’ treatment on new-borns:

These often irreversible procedures can cause permanent infertility, pain, incontinence, loss of sexual sensation, and lifelong mental suffering, including depression.460

In essence, as a result of surgeries or other sex-altering medical interventions, intersex people are denied their right to physical integrity as well as their ability to develop their own gender identity, as an a priori choice is made for them.461

Basic issues relate to the right to physical integrity, appropriate medical treatment, personal documentation and non-discrimination.

**APPROPRIATE MEDICAL TREATMENT**

In response to the activism around intersex issues challenging the patterns of normalizing surgery on infants, a fifty-person panel of experts in pediatric endocrinology from both Europe and North America, together with

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460 Office of the UN High Commissioner for Human Rights, Free & Equal program, September, 2015, 1.
461 Commissioner for Human Rights, Council of Europe, 14.
patient-centered activists, studied the issues involved. The result was the August 2006 “Consensus Statement on Management of Intersex Disorders.” The Consensus Statement supports patient’s rights and the need for informed consent. Its terminology of DSD – Disorders of Sexual Development is unfortunate, and is sometimes replaced by Differences in Sexual Development.

The 2006 Yogyakarta Principles require 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.”

In his report to the UN Human Rights Council (UNHRC) in 2013, Juan E. Mendes, the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, issued a strongly worded statement condemning non-consensual surgical intervention on intersex people as a form of torture. … The UN Committee on the Elimination of Discrimination against Women (CEDAW) has also expressed concern about intersex women as “victims of abuses and mistreatment by health service providers”.

Activism around intersex rights began calling ‘normalizing’ surgery a form of ‘torture’ and describing it as ‘intersex genital mutilation’, copying language from the campaigns against ‘female genital mutilation.’

In a recent ground-breaking UN interagency statement issued by the WHO in 2014, several UN institutions addressed the fact that “in some countries, people belonging to certain population groups, including … intersex persons, continue to be sterilized without their full, free and informed consent”. It noted that such sterilization practices violate fundamental human rights, including the right to health, the right to information, the right to privacy, the right to decide on the number and spacing of children, the right to found a family and the right to be free from discrimination; as well as the right to be free from torture and other cruel, inhuman and degrading treatment of punishment.

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462 Commissioner for Human Rights, Council of Europe, 31.
463 Commissioner for Human Rights, Council of Europe, 25.
In February 2015, the UN Committee on the Rights of the Child expressed concern about “[c]ases of medically unnecessary surgical and other procedures on intersex children, which often entail irreversible consequences and can cause severe physical and psychological suffering, without their informed consent, and the lack of redress and compensation in such cases”. The committee urged the state party concerned to “ensure that no-one is subjected to unnecessary medical or surgical treatment during infancy or childhood, guarantee bodily integrity, autonomy and self-determination to children concerned, and provide families with intersex children with adequate counseling and support”.464

In 2015, the Committee against Torture in concluding observations on the periodic report of Switzerland under the torture convention, called for the ending unnecessary genital surgeries on infants, referencing the concerns of the Committee on the Rights of the Child.


Member states should end medically unnecessary “normalizing” treatment of intersex persons, including irreversible genital surgery and sterilization, when it is enforced or administered without the free and fully informed consent of the person concerned. Sex assignment treatment should be available to intersex individuals at an age when they can express their free and fully informed consent. Intersex persons’ right not to undergo sex assignment treatment must be respected.465

The individuals must have access to their own medical records.

In 2015, Malta adopted the **Gender Identity, Gender Expression and Sex Characteristics Act** – the first law to prohibit surgery and treatment on the sex characteristics of minors without informed consent. It also prohibits discrimination on the basis of sex characteristics. The law in Malta reads, in part:

464 Commissioner for Human Rights, Council of Europe, 34.
465 Commissioner for Human Rights, Council of Europe, 9.
14 (1) It shall be unlawful for medical practitioners or other professionals to conduct any sex assignment treatment and/or surgical intervention on the sex characteristics of a minor which can be deferred until the person to be treated can provide informed consent.

As part of the “Free and Equal” campaign on LGBTI rights, the Office of the UN High Commissioner for Human Rights issued a Fact Sheet on Intersex in September, 2015, an excellent two-page explanation and overview. It sets an agenda for State actions:

- Prohibit medically unnecessary surgery and procedures on the sex characteristics of intersex children, protect their physical integrity and respect their autonomy.
- Ensure that intersex people and their families receive adequate counseling and support, including from peers.

PERSONAL DOCUMENTATION

Documents, such as birth certificates, identity papers, passports and other official personal documentation should provide for the possibility of not assigning a specific male or female gender marker, or, at least, make a correction quite easy. The UN calls “for facilitated procedures to amend sex markers on the birth certificates and official documents of intersex people.”

In 2013, Germany permitted parents to select male, female or “indeterminate” when filling out their newborn’s birth certificate, the first European country to do so.\(^{466}\) Germany is the only country in Europe whose national identity cards do not identify individuals as male or female.

When it comes to passports, the International civil Aviation Organisation (ICAO) has allowed for sex to be registered as “F”, “M” or “X” (i.e. “unspecified”) since 1945. However, following EU harmonized rules regarding the passports’ information page, the sex entry included on the passports of all EU-28 member states has remained limited to “F” and “M” alone.

\(^{466}\) George Dvorsky, Germany is the first European country to recognize a third gender, August 21, 2013, accessed at io9.com, May 31, 2015.
This contrasts with countries such as Australia, Malaysia, Nepal, New Zealand and South Africa that already allow for “X” as another sex entry on passports, while the Indian passport application form allows for three gender categories: “Female”, “Male” and “Others”. Of note, the Australian Passports Office’s Sex and Gender Diverse Passports Applicants: Revised Policy, provides flexibility as it makes it clear that “[b]irth or citizenship certificates do not need to be amended for sex and gender diverse applicants to be issued a passport in their preferred gender. A letter from a medical practitioner certifying that … they are intersex and do not identify with the sex assigned to them at birth, is acceptable.” Furthermore, the Australian Government’s Guidelines on the recognition of sex and gender standardize the evidence required for a person to establish or change their sex/gender in personal records held by Australian Government departments and agencies. When sex is recorded, the guidelines require that “individuals [are] given the option to select M (male), F (female) or X (Indeterminate/Intersex/Unspecified).”

NON-DISCRIMINATION

In 2013, Australia adopted the Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act – the first law to include intersex status as a stand-alone prohibited ground of discrimination.468

Laws in a number of European countries explicitly or implicitly extend anti-discrimination laws to intersex people.469

VISIBILITY

ILGA, whose acronym stands for the International Lesbian and Gay Association, expanded its mandate to include bisexuals, transgendered individuals and persons of intersex status. It established an ‘Intersex Secretariat.’ It began organizing International Intersex Forums in 2013. In 2014, for the first time, an intersex group marched in the Sydney Mardi Gras parade (which had 10,000 entrants and 144 entries).

467 Commissioner for Human Rights, Council of Europe, 40.
469 Commissioner for Human Rights, Council of Europe, 44-45.
INTERSEX IN ASEAN?

There seems no information in ASEAN as to whether the international standards established in 2006 are followed by doctors and medical institutions in the region. We know that intersex individuals have been able to have their personal documents corrected in Vietnam, Malaysia and the Philippines, though post-operative transsexuals cannot get document change in those countries. Four Asian intersex activists, including one from Thailand, participated in the February, 2015, Asia Pacific Regional Dialogue, held in Bangkok by the UN Development Programme, with funding from the US and Sweden. The Regional Dialogue closed Phase One of the program Being LGBT in Asia (described earlier in this report). For Phase Two the acronym has been changed to LGBTI.

There was considerable publicity about the case of Alter(ina) Hofan in Indonesia who was born with Klinefelter’s syndrome and was classified as female on documents. After surgery the documents were corrected to indicate he was male. He married a female, only to be accused by the mother-in-law of not being a man. There was considerable sensationalist coverage of the case in Indonesian media. Activists in India will recall extensive publicity about the sex of Pinky, an athlete who had won gold in the Asian Games.

The joint statement of twelve UN specialized agencies in September, 2015, calling for the ending of violence and discrimination against LGBTI people, specifically condemns “unnecessary surgery and treatment on intersex children without their consent.”

17. NATIONAL HUMAN RIGHTS INSTITUTIONS (NHRIs)

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470 Saskia Wieringa, Gender variance in Asia, 14:2 Gender, Technology and Development, 2010, 143-172.
471 Ending violence and discrimination against lesbian, gay, bisexual, transgender and intersex people, September, 2015. The statement was endorsed by the OHCHR, the International Labor Organization, UNDP, UNESCO, UN Fund for Population Activities, UN High Commission for Refugees, UNICEF, UN Office for Drugs and Crime, UN Women, the World Food Program, the World Health Organization and UN AIDS.
National institutions for the promotion and protection of human rights have become a fairly well understood set of institutions over the last twenty years. The *Paris Principles*, approved by the *UN General Assembly* in 1993, established a particular model – an expert, independent, advisory body that bases its work on international human rights standards. Five *ASEAN* states have such bodies: Indonesia, Malaysia, Myanmar, Philippines and Thailand. There are presently around one hundred such institutions worldwide. Like governments, individual national institutions vary dramatically over time. Kyong-Whan Ahn, a former chair of the commission in South Korea, speaking in Bangkok in August, 2015, referred to the Korean Commission as having had its glory years in its founding period, 2001-2007, when virtually all of its recommendations were adopted by government. The blanket ban on LGBTI websites, for example, was lifted, following a commission ruling. But shifts in government resulted in changes in its structure and members, ending its excellent performance and the pattern of governmental deference. Accreditation by the *International Coordinating Committee* was ‘deferred’ 3 times because of concerns with the commission’s independence, transparency and diversity. Similarly, the commission in Thailand, first established under the progressive constitution of 1997, faced a forced reorganization after the 2006 military coup, which was protested by CSOs and international human rights NGOs. The *ICC* in 2015 downgraded the Thai commission to B status, from full recognition.

In 199, the Malaysian parliament established the Human Rights Commission of Malaysia (SUHAKAM)… As in Indonesia where the Komnas HAM was established to assuage international criticism regarding Suharto’s atrocities, the government’s purpose in setting up SUHAKAM was to counter the international furore over the jailing of Anwar. Predictably, the ambit of the rights that SUHAKAM has discretion over is limited, pertaining only to those listed in the constitution – the self-same rights which the executive can derogate from on the basis of national security.472

Suharto established Komnas HAM in 1993.

The 1987 Constitution in the Philippines established the Commission on Human Rights of the Philippines.

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472 Tan Hsien-Li, 117.
It is mandated to investigate all rights abuses, provide legal measures for the rights and legal protections for the poor, carry out a programme of research, education, and information for the public, recommend to Congress effective policies for rights protections, and monitor Philippines’ adherence to its international obligations.473

In December, 2013, the UNDP, International Development Law Organization and the Asia Pacific Forum of National Human Rights Institutions, issued a Regional Report: The Capacity of national Human Rights Institutions to Address Human Rights in Relation to Sexual Orientation, Gender Identity and HIV. The report documents progressive initiatives and good practices of NHRIs in Bangladesh, India, Indonesia, Nepal, the Philippines, Sri Lanka and Timor Leste. The report provides examples of progressive initiatives undertaken by involved NHRIs to protect and promote LGBTI rights:

In 2012, the Indonesian NHRI (Komnas HAM) effectively mediated a dispute involving Indonesian Idol, a popular reality TV show, related to accusations that the judges were harassing and humiliating gay contestants to boost ratings.

In 2012, for the first time, the National Human Rights Commission of Bangladesh, made a strong statement supporting the rights of LGBTI people in its report to the UN Human Rights Council, under the UPR process.

In 2012, recognizing that elections were forthcoming, the NHRC Nepal addressed a letter to the Electoral Commission noting the security issues and harassment that transgender people experience when voting. The NHRC of Nepal further expressed its concern that the Electoral Commission provides a safe and secure environment for all voters.

In 2010, the Philippines’ Commission on Human Rights supported LGBTI political party Ang Ladland through a court case which successfully challenged the decision of the Commission on Elections’ refusal to register the party.

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473 Tan Hsien-Li, 95.
A Memorandum of Understanding (MOU) was signed between the Philippine Commission on Human Rights and Attorney Germaine Leonin of Rainbow Rights Inc., on behalf of the Filipino LGBT community.

In the MOU, both parties agreed to work together for the recognition of the Filipino LGBT community as a marginalized sector and to mainstream LGBT rights as part of the national human rights framework. The MOU calls for the awareness of and utilization of the Yogyakarta Principles, and human rights resolutions and general recommendations that protect persons with diverse sexual orientation and gender identity. It promotes the engagement of government agencies and the inclusion of LGBT rights in gender sensitivity trainings. It also supports the CHR Women’s Human Rights Center in its mandate as gender ombudsman under the Magna Carta of Women.

The parties similarly agreed to address killings or hate crimes committed against people of diverse SOGI. To give substance to the MOU, LGBT rights activists identified areas of convergence with the CHR in a consultation held on 20 September 2013. On 6 October 2013, Rainbow Rights facilitated a workshop for activists to identify provisions in the Magna Carta of Women that impact on SOGI. It is currently drafting the gender ombudsman guidelines that will be used by the CHR in activities that could include the monitoring of gender-friendly policies and practices, and facilitating access to legal remedies by victims of gender-based violence.474

In 2013 an MOU was been signed between the Indonesian LGBTIQ Forum (an alliance) with the national human rights commission, Komnas HAM. The commission is planning to publish the Yogyakarta Principles for distribution among government institutions.475

In 2006 the Asian NGO Network on National Human rights Institutions (ANNI) was formed, bringing together 31 organizations in 18 states. It publishes annual reports. Forum Asia acts as the secretariat for ANNI.

475 Information from King Oey, Arus Pelangi, Jakarta.
In September [2014] ANNI together with Burma Partnership and Equality Myanmar launched the national report on the performance of the Myanmar Human Rights Commission (MHRC) before members of the media and civil society in Yangon.\(^{476}\)

There is a South East Asia NHRI Forum – SEAN-F.

…in response to ASEAN’s adoption of human rights in its various declarations the NHRI[s in the region] have held regular meetings to foster collaboration on measures to respond to human rights issues of common concern or with transborder implications.\(^{477}\)

\textit{AICHR} has invited NHRI[s to their events.}

18. **THE COURTS**

**THE COURTS**

…Mahathir began attacking the judiciary in 1988 for ruling against the government’s favour in politically sensitive cases. This climaxed in a sham trial in which Lord President Tun Salleh Abas and five other Supreme Court judges were removed from office on allegations of abusing the judicial process. That same year, the government moved to strengthen the executive by decimating the powers of judicial review through a series of legal amendments to the constitution and the ISA.\(^{478}\)

…Indonesian courts are generally characterized by high levels of corruption, inefficiency and vulnerability to political interference, with the result that they have not, in most cases, been responsive to rights based concerns. The Supreme Court is often singled out for criticism in this respect. During the New Order period, the government interfered extensively in court matters and encouraged the development of a culture of corruption within the judiciary. …

\(^{476}\) 2014 Annual Report, Forum Asia, 32.
\(^{477}\) Alan Collins, Building a People-oriented Security Community the ASEAN Way, Routledge, 2013, at 89.
\(^{478}\) Tan Hsien-Li, 113.
…despite this general pattern, some specific courts have developed a reputation for fairness, efficiency, professionalism and a willingness to support rights-oriented causes, reflecting the broader process of democratic reform that has followed the fall of the New Order.\footnote{Andres Rosser, Insights from Indonesia’s education sector, 39(2) Asia Studies Review, 2015, 194 at 198.}

KEY CASES

ANWAR IBRAHIM

In 1972, Anwar Ibrahim, a prominent student activist, founded Angkatan Belia Islam Malaysia (Islamic Youth Movement of Malaysia). For some, he became “the standard bearer for Malay nationalism and Islamic fundamentalism”. For being a leader of student demonstrations in support of poor farmers in 1974, he was detained for the first time under the ISA for more than a year.

Despite having connections with PAS, he joined UMNO in 1982 after being invited by Mahithir Mohamad. He rose quickly within UMNO and held a succession of key portfolios. His aggressiveness in seeking power, notes Ian Stewart, made him enemies who would later play a role during his sacking and trial.

In 1993 Anwar contested and won the post of Deputy Prime Minister. Although Anwar made an unsuccessful attempt to take the Prime Ministership from Dr Mahathir in 1996, the Asian economic crisis which began in 1997 gave him a new opportunity. He was, however, sacked in September 1998. This was followed by his second detention under the ISA and eventual arrest for engaging in sodomy (a charge widely regarded as fabricated for political reasons). Between his sacking and his detention he addressed popular demonstrations against the government that were a response to the economic crisis and perceived government corruption including bail-outs of politically connected companies. The most notable demonstration that occurred at this time, and which Anwar addressed, reportedly involved over 40,000 people who converged on the National Mosque in Kuala Lumpur on 20 September 1998.

Meredith Weiss and Saliha Hassan describe the sacking of Anwar as launching the massive popular protest movement known as Reformasi (Reformation).\footnote{Julian Lee, 47-8.}
19. BUSINESS

In June, 2014, the ASEAN CSR Network launched the ASEAN CSR Vision 2020 initiative in Singapore, a three year program that will include CSR advocacy and awareness raising, training and capacity building. There is support from the ASEAN Foundation, the ASEAN-Japan Solidarity Fund, and the United Kingdom Foreign and Commonwealth Office. Also the ASEAN Intergovernmental Commission on Human Rights released the findings of their baseline study on CSR.


The Economist Magazine has launched a program, Pride and Prejudice: The Business and Economic Case for LGBT Diversity and Inclusion. The focus is on “the cost of LGBT discrimination” in business and the economy. As with racial discrimination and discrimination on the basis of sex, discrimination on LGBTI grounds reduces the pool of talent that business will tap, and marginalizes potentially productive individuals. On March 3rd, 2016, Pride and Prejudice will have “a 24 hour rolling event spanning three cities – Hong Kong, London and New York – which will challenge policymakers and industry leaders to rethink the future of the global LGBT movement and its impact on business.”

20. CONCLUSIONS AND RECOMMENDATIONS

BIBLIOGRAPHY


Alex Au, Speaking of Bangkok, in Peter Jackson, Queer Bangkok, HK, 2011, 182.


Linda Rae Bennett, Sharyn Graham Davies, Sex and Sexualities in Contemporary Indonesia, Routledge, 2015.

Evelyn Blackwood, Falling into the Lesbi World, Hawaii, 2011, published in Indonesia as Tombois and Femmes: Defying Gender Labels in Indonesia, Godown Lontar.


Commissioner for Human Rights, Council of Europe, Human Rights and Intersex People, April, 2015.

J Neil C Garcia, Philippine Gay Culture, HK, 2009


Hall Hall, Regional Dynamics in a Decentralized Indonesia, ISEAS, 2014.


Peter Jackson, Queer Bangkok, HK, 2011.


Julian Lee, Islamization and Activism in Malaysia, ISEAS, 2010.


Dominique Mosbergen, Being LGBT in Southeast Asia: Stories of Abuse, Survival and Tremendous Courage, The World Post (a partnership of the Huffington Post and Berggruen Institute), a series with an introduction and sections on the ten countries of ASEAN, published sequentially between
October 11 and October 20, 2015, see www.huffingtonpost.com/entry/lgbt-in-southeast-asia.


Douglas Sanders, 377 and the Unnatural Afterlife of British Colonialism in Asia, 2009, 4 Asian Journal of Comparative Law, 165.


Megan Sinnott, Toms and Dees, Hawaii, 2000.


Ryan Thoreson, Transnational LGBT Activism, Minnesota, 2014.


Audrey Yue, Hun Zubillaga-Pow, Queer Singapore: Illiberal Citizenship and Mediated Cultures, HK, 2012.