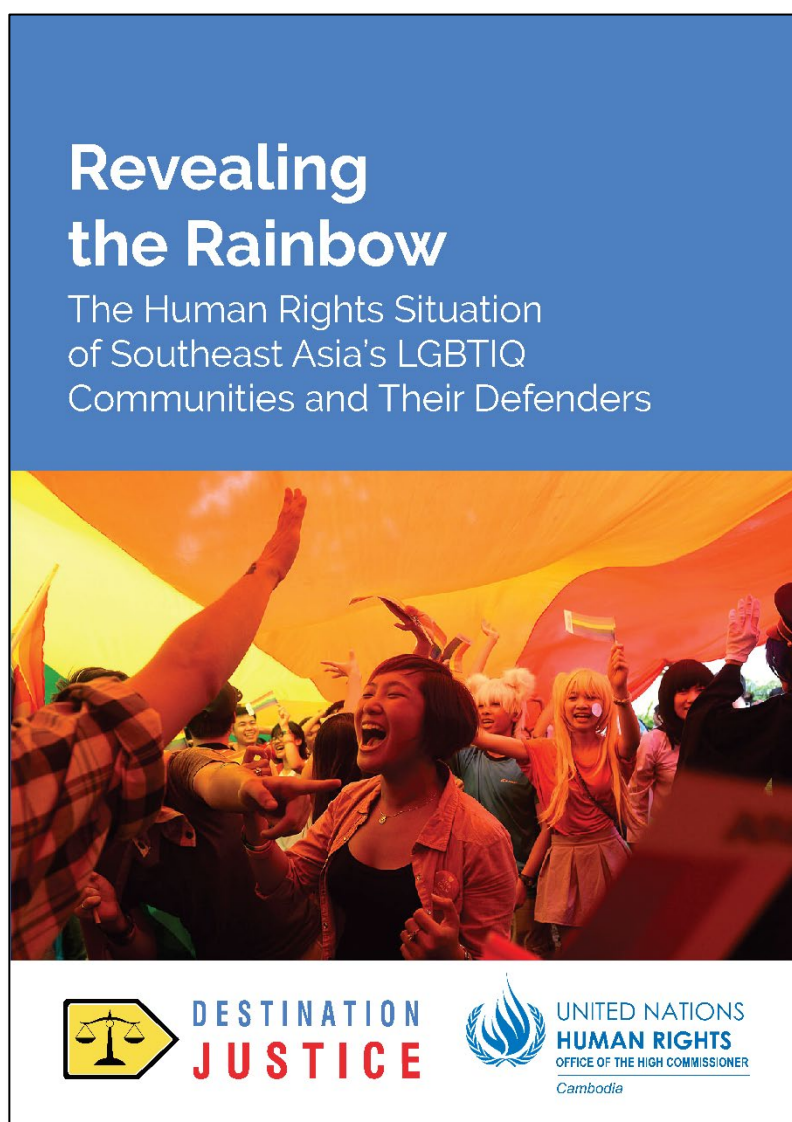


LGBTIQ Communities and Their Defenders Country Information Pack: **Brunei**

Selected Extracts From



Revealing the Rainbow (2018) is available in full at:
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Brunei: Country Profile

Human Rights of LGBTIQ Communities and HRDs: Situational Analysis

Introduction

UPR Cycles

First UPR Cycle: 8 December 2009

Second UPR Cycle: 2 May 2014

Third UPR Cycle: April/May 2019

The first and second Universal Periodic Review (UPR) cycles for the Nation of Brunei (Brunei) expressly discussed its lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) community, though not LGBTIQ human rights defenders (HRDs). However, UPR recommendations to strengthen the protection

and promotion of LGBTIQ rights in Brunei have consistently failed to enjoy Brunei's support.

Brunei is reportedly¹ one of the few Association of Southeast Asian Nation (ASEAN) States that refused to include a clause protecting LGBTIQ rights in the ASEAN Human Rights Declaration (AHRD).² Indeed, this Country Profile outlines how the LGBTIQ community in Brunei is at risk, most notably through the introduction of the Sharia Penal Code that will eventually impose even more stringent penalties on homosexual conduct, including death by stoning.³ HRDs working on LGBTIQ rights are likewise vulnerable, with limited protections for freedoms of opinion and expression in practice.

"[T]he situation for LGBT will only improve if the United Nations will focus more specifically on LGBT rights. Because, in reality, while the situation is not as bad as most would assume, we are still at risk."

**Aziq Azman,
Community Leader**

¹ Opponents to the SOGI clause are not officially known. See "ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD)", ASEAN, 2013, available at http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (last visited 26 June 2017).

² "Sexual orientation and gender identity issues excluded from draft ASEAN human rights declaration", Fridae, 14 September 2012, available at https://queeramnesty.ch/docs/Fridae_20120914_SOGI_excluded_from_draft_ASEAN_human_rights_declaration.pdf (last visited 26 June 2017); "LGBTIQ rights should be excluded", MalaysiaKini, 10 September 2012, available at <http://www.malaysiakini.com/letters/208463> (last visited 26 June 2017); "Sexual orientation and gender identity issues excluded from draft ASEAN human rights declaration", Fridae - Connecting gay Asia, 14 September 2012, available at <http://www.fridae.asia/gay-news/2012/09/14/11928.sexual-orientation-and-gender-identity-issues-excluded-from-draft-asean-human-rights-declaration> (last visited 26 June 2017).

³ Other countries, such as Malaysia, have included *sharia* law in parts of their territory. In Malaysia, some states passed *sharia* criminal codes which are only symbolic and remain unimplemented due to the Federal Constitution. See e.g. Rudolph Peters & Peri Bearman (ed.), "The Ashgate Research Companion to Islamic Law", Ashgate, 2014, p. 240, available at https://books.google.com.kh/books?id=iBR7BAAQBAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false (last visited 26 June 2017).

As indicated in the recommendations outlined at the end of this chapter, civil society organisations (CSOs) and recommending States have an opportunity, in the lead-up to Brunei's third UPR cycle in April/May 2019 (and in particular, the submission of stakeholder reports by 20 September 2018),⁴ to work towards developing improved UPR recommendations that focus on the universality and benefit to Brunei of various proposed reforms.

Past UPR Cycles for Brunei

First UPR Cycle (8 December 2009)

National Report Filed:⁵ Brunei's national report for the first UPR was published on 9 September 2009. It did not mention either the LGBTIQ community or HRDs. It did, however, state that NGOs present in Brunei had helped in "ensuring social equality."⁶

Stakeholders Submissions Made:⁷ The summary of the 4 stakeholders' submissions was published on 21 July 2009. Stakeholders mentioned the LGBTIQ community but not LGBTIQ HRDs specifically. They expressed concern over laws permitting the death penalty and corporal punishment;⁸ criminalising "carnal intercourse against the order of nature;"⁹ and restricting freedom of expression and assembly.¹⁰ They also noted the absence of any registered CSO dealing with human rights issues in Brunei.¹¹

First UPR Cycle for Brunei: Recommendations Received

In its first UPR, held in December 2009, Brunei received recommendations directly and indirectly relevant to the LGBTIQ community and LGBTIQ HRDs:

- Decriminalise same-sex relationships (Sweden, Canada, Spain) and repeal the criminalisation of "carnal intercourse" to ensure the non-discrimination of LGBT individuals (The Netherlands).
- Establish a moratorium on executions with a view to abolishing the death penalty (Portugal, Italy, Brazil, Chile) and abolish the death penalty permanently (France, Spain, Argentina, Slovakia).

⁴ "3rd UPR cycle: contributions and participation of 'other stakeholders' in the UPR", OHCHR, 22 May 2017, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx> (last visited 21 August 2017).

⁵ *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Brunei Darussalam*, U.N. Doc. A/HRC/WG.6/6/BRN/1, 9 September 2009, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/BN/A_HRC_WG6_6_BRN_1_E.pdf (last visited 26 June 2017).

⁶ First UPR cycle: *National Report*, Brunei, para. 19.

⁷ *Summary of Stakeholders' submissions prepared by the Office of the High Commissioner for Human: Brunei Darussalam*, U.N. Doc. A/HRC/WG.6/6/BRN/3, 21 July 2009, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session6/BN/A_HRC_WG6_6_BRN_3_E.pdf (last visited 26 June 2017).

⁸ First UPR cycle: *Stakeholders' Summary*, Brunei, paras. 5, 7.

⁹ First UPR cycle: *Stakeholders' Summary*, Brunei, para. 10.

¹⁰ First UPR cycle: *Stakeholders' Summary*, Brunei, paras. 19-20.

¹¹ First UPR cycle: *Stakeholders' Summary*, Brunei, para. 21.

- Prohibit corporal punishment (Germany, Italy, France, Chile).
- Establish a national human rights institution, in accordance with the Paris Principles, to provide additional protection for the human rights of its citizens (New Zealand, Malaysia, Egypt).
- Ensure full freedom of expression (Sweden, Canada, Norway, United States of America).
- Ensure that the procedures governing registration of civil society organisations are transparent, non-discriminatory, expeditious and inexpensive (Norway).
- Continue efforts in promoting and protecting human rights while taking into account Brunei's traditional and family values (Oman, Islamic Republic of Iran, Syrian Arab Republic) and not be intimidated by suggestions on social norms that are controversial, non-universal and specific to certain societies (Bangladesh).

Source: *Report of the Working Group on the Universal Periodic Review: Brunei Darussalam*, U.N. Doc. A/HRC/13/14, 4 January 2010, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/101/19/PDF/G1010119.pdf?OpenElement> (last visited 26 June 2017).

Comments Received; Response to Recommendations: During the UPR Interactive Dialogue, Brunei received specific comments from delegations concerning the criminalisation of "carnal intercourse against the order of nature" and same-sex relationships¹² and the state of the freedom of expression in the State.¹³ Recommendations concerning the decriminalisation of same-sex relationships, the prohibition of corporal punishment and the abolition of the death penalty did not enjoy the support of Brunei.¹⁴ Brunei explained that tradition and cultural factors play an important role in sexual-related issues,¹⁵ and that although capital punishment is not applied in practice, such a sanction is reserved for "the most severe and serious crimes."¹⁶

On establishing a national human rights institution (**NHRI**), Brunei noted that CSOs and non-governmental organisations (**NGOs**) are already represented in Brunei's inter-agency consultative mechanism on human rights¹⁷ and did not support the recommendation on this topic. Likewise, Brunei did not support the recommendations about freedom of expression and opinion, including freedom of the media.¹⁸

Concerning the registration of CSOs, Brunei simply explained that the legislation already in place (The Societies Order 2005) already sets the requirements for registration of any moral

¹² First UPR cycle: *Report of the Working Group*, Brunei, paras. 30, 48.

¹³ First UPR cycle: *Report of the Working Group*, Brunei, paras. 44, 48, 51, 62, 64.

¹⁴ This is standard diplomatic language commonly used by States under review to declare that they do not accept a given recommendation.

¹⁵ First UPR cycle: *Report of the Working Group*, Brunei, para. 84.

¹⁶ First UPR cycle: *Report of the Working Group*, Brunei, para. 87.

¹⁷ First UPR cycle: *Report of the Working Group*, Brunei, para. 78.

¹⁸ First UPR cycle: *Report of the Working Group*, Brunei, paras. 90.21-90.27.

entity, that failure to do so may result in a refusal, and that decisions can be appealed within 30 days from the date of the decision.¹⁹ In fact, the sole relevant recommendation Brunei formally accepted was the recommendation in respect of the promotion of traditional and family values of the State.²⁰

Second UPR Cycle (2 May 2014)

National Report Filed:²¹ Brunei's national report for the second UPR was published on 30 January 2014. It did not mention the LGBTIQ community or LGBTIQ HRDs. However, it generally noted that Brunei "works closely with NGOs in enhancing awareness on human rights related issues."²² It also stated that a Special Committee on Immoral Behaviour had been established since Brunei saw "immoral behaviour" as a social issue needing to be addressed.²³ In addition, various laws were introduced or amended, such as the Sharia Penal Code Order to deal with *sharia* crimes and the Penal Code to include "offences related to the outraging of one's modesty."²⁴ The report further emphasised the family institution as the basic core of society.²⁵

Stakeholders Submissions Made:²⁶ The summary of the 2 stakeholders' submissions was published on 29 January 2014. It did not mention either the LGBTIQ community or LGBTIQ HRDs. Stakeholders mainly expressed concerns over laws permitting corporal punishment, especially in the relation to the punishment of children.²⁷

Second UPR Cycle for Brunei: Recommendations Received

In its second UPR, held in May 2014, Brunei received recommendations directly and indirectly relevant to the LGBTIQ community and LGBTIQ HRDs:

- Repeal the criminalisation of same-sex relationships (Spain, Canada, France) and sections of the Penal Code that prevent LGBT persons from having equal rights (The Netherlands).

¹⁹ First UPR cycle: *Report of the Working Group*, Brunei, para. 91.21; *Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, U.N. Doc. A/HRC/13/14/Add.1, 19 March 2010, para. 21, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/160/29/PDF/G1416029.pdf?OpenElement> (last visited 26 June 2017).

²⁰ First UPR cycle: *Report of the Working Group*, Brunei, para. 89.10.

²¹ *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council resolution 16/21: Brunei Darussalam*, U.N. Doc. A/HRC/WG.6/19/BRN/1, 30 January 2014, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/106/65/PDF/G1410665.pdf?OpenElement> (last visited 26 June 2017).

²² Second UPR cycle: *National Report*, Brunei, para. 109.

²³ Second UPR cycle: *National Report*, Brunei, para. 8.

²⁴ Second UPR cycle: *National Report*, Brunei, para. 9.

²⁵ Second UPR cycle: *National Report*, Brunei, para. 31.

²⁶ *Summary of Stakeholders' submissions prepared by the Office of the High Commissioner for Human Rights: Brunei Darussalam*, U.N. Doc. A/HRC/WG.6/19/BRN/3, 29 January 2014, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BNIndex.aspx> (last visited 26 June 2017).

²⁷ Second UPR Cycle: *Stakeholder's Summary*, Brunei, paras. 3-5, 9-10.

- Decriminalise sexual activity between consenting adults (Czech Republic).
- Ensure that the provisions and the application of the Sharia Penal Code Order remain in strict compliance with human rights law (Italy, Ireland, Australia).
- Reconsider the use of corporal and capital punishment under the Sharia Penal Code (Australia).
- Prohibit corporal punishment (Uruguay, Costa Rica) and ratify CAT (Tunisia, Australia, Czech Republic, Djibouti, France, Sierra Leone, Sweden).
- Maintain the current *de facto* moratorium on the death penalty (The Netherlands, France, Australia, Czech Republic, Portugal, Uruguay, United Kingdom of Great Britain and Northern Ireland) and withdraw the amendments to the Penal Code that introduce the death penalty (The Netherlands).
- Ensure full freedom of expression and end media censorship (Sweden).
- Initiate reforms to bring freedom of expression and opinion in line with international standards (Tunisia, Slovenia, Canada, Italy, Belgium, United States of America).
- Establish a national human rights commission [NHRI] in conformity with the Paris Principles (Tunisia, United Kingdom of Great Britain and Northern Ireland, India, Egypt).
- Pursue social policies in line with its traditional family values (Bangladesh).

Source: *Report of the Working Group on the Universal Periodic Review: Brunei Darussalam*, U.N. Doc. A/HRC/27/11, 7 July 2014, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/075/30/PDF/G1407530.pdf?OpenElement> (last visited 26 June 2017).

Comments Received; Response to Recommendations: During the UPR Interactive Dialogue, Brunei received comments from delegations suggesting that it decriminalise same-sex sexual relations. However, Brunei maintained its position from the first UPR by refusing to amend legislation that criminalises same-sex sexual relations and provides for the death penalty and corporal punishment.²⁸

Brunei also indirectly denied the necessity to address noted deficiencies in its application of the freedom of expression²⁹ and assembly because "Itlhere is a need to balance freedom of expression with the need to protect people from being defamed. The current provisions of the legislation are sufficient to protect such freedom and maintain public order."³⁰ The

²⁸ Second UPR cycle: *Report of the Working Group*, Brunei, paras. 50, 85.

²⁹ Second UPR cycle: *Report of the Working Group*, Brunei, paras. 60, 71, 98-99.

³⁰ Second UPR cycle: *Report of the Working Group*, Brunei, paras. 113.43-113.46; *Report of the Working Group on the Universal Periodic Review: Brunei Darussalam, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, U.N. Doc. A/HRC/27/11/Add.1, 10 September 2014, para. 113.43, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/160/29/PDF/G1416029.pdf?OpenElement> (last visited 26 June 2017).

establishment of an NHRI³¹ and the request of ensuring compliance of the Sharia Penal Code Order with human rights principles³² were not considered by Brunei. Ultimately, and as with the first UPR, the only recommendation that Brunei accepted concerned the safeguarding of traditional family values.

Situation of the LGBTIQ Community and its HRDs in Brunei

Freedom of Opinion and Expression

Limitations on LGBTIQ Advocacy: LGBTIQ advocacy in the public sphere in Brunei appears to be non-existent. The few reports on the situation of LGBTIQ rights in the State — mostly from international sources — demonstrate the practical restrictions imposed on freedom of expression in Brunei. In 2015, when the Huffington Post launched its “10-part series on LGBT rights in Southeast Asia,” it noted that “Brunei was the only country in ASEAN where not a single LGBT person or advocate was willing to step forward to share their story,” even on an anonymous basis.³³

Indeed, the Brunei Project, the only independent human rights organisation active in Brunei that monitors and reports on the human rights situation including LGBTIQ rights, acts in complete secrecy. Neither the Facebook page of the group,³⁴ nor its official website³⁵ contains information identifying HRDs. One of the few platforms in which HRDs and members of the LGBTIQ community reportedly contact each other is through the application “Grindr.”³⁶

Threats Towards LGBTIQ HRDs: In 2015, the only known visible LGBTIQ HRD currently living in Brunei, Aziq Azman, posted a comment on a YouTube video boycotting a Beverly Hills Hotel owned by Sultan Hassanal Bolkiah of Brunei because of the State's anti-LGBTIQ policies. Azman criticised the application of *sharia* law and its implications for the LGBTIQ community, among other minorities.³⁷ His comment was later reproduced on a local Facebook page in Brunei, triggering hateful responses from Facebook users,³⁸ including threats of deportation, detention, and physical harm.³⁹ According to Azman, this reaction showed that “the violation

³¹ Second UPR cycle: *Report of the Working Group*, Brunei, paras. 113.85-113.87.

³² Second UPR cycle: *Report of the Working Group*, Brunei, paras. 63, 71, 113.58, 113.60, 133.65.

³³ Dominique Mosbergen, “Brunei's LGBT Community Faces Terrifying Future”, Huffington Post, 15 October 2015, available at http://www.huffingtonpost.com/entry/lgbt-brunei_us_561501f9e4b0fad1591a1167?gmeipb9- (last visited 26 June 2017).

³⁴ “The Brunei Project”, Facebook Page, available at <https://www.facebook.com/thebruneiproject/> (last visited 26 June 2017).

³⁵ “The Brunei Project”, Facebook Page.

³⁶ Dominique Mosbergen, “Brunei's LGBT Community Faces Terrifying Future”, Huffington Post, 15 October 2015.

³⁷ “Beverly Hills Hotel Boycott for Sultan's Gay Bash”, YouTube, 24 April 2014, available at <https://www.youtube.com/watch?v=ft5C9zHFLbQ> (last visited 26 June 2017).

³⁸ “Warga Daerah Belait”, Facebook Page, 4 July 2015, available at https://www.facebook.com/609796402431968/photos/a.610733409004934.1073741828.609796402431968/869064113171861/?type=1&refid=8&_ft_=qid.6168041585199672958%3Amf_story_key.231012057780306056%3AeligibleForSeeFirstBumping&_tn_=E (last visited 26 June 2017).

³⁹ Aziq Azman, “Breaking Walls”, ASEAN SOGIE CAUCUS, Activist Voices, 27 June 2016, available at <https://aseansogiecucus.org/activist->

of rights extends far beyond the scope of alternative sexualities and reaches further down into the oppression of free speech" in Brunei.⁴⁰

Right to Freely Participate in the Cultural Life of the Community

In a rare exception to the low profile of LGBTIQ activities in Brunei, in May 2016, the International Day against Homophobia, Transphobia, and Biphobia (**IDAHOT**) was marked for the first time in Brunei. The private community event, organised and funded by The Brunei Project, aimed to provide an opportunity for Brunei's isolated LGBTIQ community to network with regional LGBTIQ service providers.⁴¹

Right to Security of the Person and Prohibition of Torture

Criminalisation Under the Penal Code: Section 377 of the Penal Code of Brunei,⁴² a law established during Brunei's British colonial era, criminalises "unnatural offences", defined as a voluntary "carnal intercourse against the order of nature." The maximum penalty for such offences is up to 10 years' imprisonment and fines.

Criminalisation Under *Sharia* Law: In 2013, Sultan Hassanal Bolkiah of Brunei presented a three-phase plan introducing a new criminal code based on *sharia* law, applicable to both Muslims and non-Muslims in Brunei.⁴³ The third phase will include the introduction of harsher sanctions for homosexual conduct, such as death by stoning — the first law applying the death penalty in Brunei since 1957.⁴⁴ The move sparked a strong response from the United Nations (UN). Rupert Colville, spokesperson for the United Nations High Commissioner for Human Rights, said that "stoning people to death constitutes torture or other cruel, inhuman or degrading treatment or punishment and is thus clearly prohibited" under international law.⁴⁵

While the second and third phases of the plan have been delayed until 2017 and 2018,⁴⁶ Sultan Hassanal Bolkiah has indicated that Brunei does not intend to abandon the project and

[voices/74breakingwalls?highlight=WyJhemlxliwiYXptYW4iLCJhemlxIGF6bWFullo=](http://www.voices/74breakingwalls?highlight=WyJhemlxliwiYXptYW4iLCJhemlxIGF6bWF6bWFullo=) (last visited 18 September 2017).

⁴⁰ Aزيق Azman, "Breaking Walls", ASEAN SOGIE CAUCUS, 27 June 2016.

⁴¹ "International Day Against Homophobia, Transphobia & Biphobia Marked in Brunei for the First Time", The Brunei Project, 17 May 2016, available at http://www.thebruneiproject.com/uploads/5/2/0/8/52087579/media_release.pdf (last visited 26 June 2017).

⁴² Brunei, Laws of Brunei, Penal Code Chapter 22, 1951, last revised 1 October 2001, available at https://www.unodc.org/tldb/pdf/Brunei_Penal_Code_1951_Full_text.pdf (last visited 26 June 2017).

⁴³ Ankit Panda, "Brunei Becomes First East Asian State to Adopt Sharia Law", The Diplomat, 25 October 2013, available at <http://thediplomat.com/2013/10/brunei-becomes-first-east-asian-state-to-adopt-sharia-law/> (last visited 26 June 2017); Michelle Garcia, "Brunei Phasing In Antigay Law; Will Soon Allow Death by Stoning", The Advocate, 30 April 2014, available at <http://www.advocate.com/world/2014/04/30/brunei-phasing-antigay-law-will-soon-allow-death-stoning> (last visited 26 June 2017).

⁴⁴ "Brunei Phasing In Antigay Law; Will Soon Allow Death by Stoning", The Advocate, 30 April 2014.

⁴⁵ "UN concerned at broad application of death penalty in Brunei's revised penal code", UN News Centre, 11 April 2014, available at <http://www.un.org/apps/news/story.asp?NewsID=47552#.V8vT7Jhg600> (last visited 26 June 2017).

⁴⁶ Rasidah Hab & Rachel Thien, "Gov't targets Sharia CPC completion by June", The Brunei Times, 28 January 2016.

considers the delay to be unacceptable.⁴⁷ Phase 1 of the enforcement of the Sharia Penal Code has already led to the arrest and conviction of a Bruneian man for cross-dressing in 2015.⁴⁸ On 16 August 2016, another man was arrested for wearing women's clothes and is currently under investigation.⁴⁹ If found guilty under Section 198(1) of the new Sharia Penal Code, he faces a fine up to US\$1,000 and three months in prison.⁵⁰

Legislative Council: Although Sultan Hassanal Bolkiah exercises significant authority, Brunei has established a Legislative Council that includes representatives of Brunei's administrative districts and groups, including religious and social groups.⁵¹ It performs a limited role as a forum for public discussion to review and approve proposed legislation.⁵² It has been reported that the Legislative Council members are able to "speak their opinions freely", though with limitations.⁵³ Thus, the Legislative Council could potentially serve as an avenue through which to promote the enhancement in Brunei of the rights of the LGBTIQ community and HRDs.

Conclusion

Since its first UPR, Brunei has consistently rejected UPR recommendations to decriminalise same-sex sexual relations, repeal the death penalty and corporal punishment, strengthen fundamental freedoms of opinion and expression, and establish an NHRI. Based on its comments during the UPR Interactive Dialogue, it appears that Brunei considers that such reforms would contradict its traditional values, particularly in respect of the family unit.

Together with a new Sharia Penal Code being gradually introduced which introduce harsher penalties for homosexual conduct, these factors render the LGBTIQ community and LGBTIQ rights-focused HRDs increasingly vulnerable at present. However, the Legislative Council could serve as a potential avenue through which to improve their situation.

This article is no longer available since the abrupt closure of the newspaper "The Brunei Times" in November 2016. *For more information*, see "Brunei's second-largest daily newspaper shuts down abruptly", Reuters, 7 November 2016, available at <https://www.reuters.com/article/us-brunei-media/bruneis-second-largest-daily-newspaper-shuts-down-abruptly-idUSKBN1320YF> (last visited 18 September 2017); "Who buried The Brunei Times?", New Mandala, 9 November 2016, available at <http://www.newmandala.org/buried-brunei-times/> (last visited 18 September 2017).

⁴⁷ Rasidah Hab & Rachel Thien, "Sultan of Brunei questions delay in Syariah law enforcement", Islam In Indonesia, 1 March 2016, available at <https://islaminindonesia.com/2016/03/01/sultan-of-brunei-questions-delay-in-syariah-law-enforcement/> (last visited 18 September 2017).

⁴⁸ Fadley Faisal, "Cross-dresser fined \$1,000 by Sharia Court", Borneo Bulletin, 11 March 2015, available at <http://borneobulletin.com.bn/cross-dresser-fined-1000-Sharia-court/> (last visited 26 June 2017).

⁴⁹ James Kon, "Cross-dresser arrested during joint operation", Borneo Bulletin, 16 August 2016, available at <http://borneobulletin.com.bn/cross-dresser-arrested-joint-operation/> (last visited 26 June 2017).

⁵⁰ James Kon, "Cross-dresser arrested during joint operation", Borneo Bulletin, 16 August 2016.

⁵¹ "Freedom in the World: Brunei", Freedom House, 2015, available at <https://freedomhouse.org/report/freedom-world/2015/brunei> (last visited 21 August 2017).

⁵² "Human Rights Reports for 2014: Brunei", U.S. Department of State: Bureau of Democracy, Human Rights and Labor, 2015, pp. 1, 11, available at <https://www.state.gov/documents/organization/236638.pdf> (last visited 21 August 2017).

⁵³ "Human Rights Reports for 2014: Brunei", U.S. Department of State: Bureau of Democracy, Human Rights and Labor, 2015, p. 6.

Recommendations

In the lead-up to the third UPR review of Brunei in May 2019:

- CSOs should continue documenting violations and abuses endured by LGBTIQ persons and their defenders so as to provide recommending States and the relevant UN mechanisms with solid evidence-based information.
- CSOs and recommending States should lobby for an immediate moratorium on the introduction of harsher penalties for homosexual conduct in the Sharia Penal Code.
- CSOs and recommending States should emphasise the universality and benefit to Brunei of reforms such as the abolition of capital and corporal punishment, the decriminalisation of same-sex relationships and conduct, the strengthening of protections for freedom of opinion and expression, and the establishment of a national human rights institution.
- CSOs and recommending states should work collaboratively to develop UPR recommendations for the third cycle that emphasise the universality and benefit to Brunei of such reforms.

Brunei: LGBTIQ HRD Interview

Human Rights of LGBTIQ Communities and HRDs: Frontline Voices



**Aziq Azman,
Community Leader**

How did you become involved in lesbian, gay, bisexual, transgender, intersex, queer (LGBTIQ) rights work?

I started with environmental issues in 2009. I have also volunteered in an autism centre and in the future would love to work more on the issues faced by individuals with disabilities. To me, everything is related — not only LGBTIQ rights, but human rights as a whole.

The way I actually became involved in LGBTIQ rights work is actually a funny story and has been a very turbulent journey. It all started with a comment I posted on a YouTube video concerning Sultan Hassanah

Bolkiah: the video was all about his wealth and I felt that it was one-sided so I said a few things — not necessarily negative, but constructive criticism — to paint a more realistic picture of Brunei such as the fact that we have very little say in the infrastructure or expenditure. It is only a year later that my comment was noticed and it went viral: it was shared on social media, mainly via Facebook and WhatsApp.

I woke up one day, with calls from my concerned relatives and friends, worried about my security because I had criticised the Sultan. They asked me to take my comment down before ending up in jail. At that point, this thought occurred to me: how many people before me had been told to remove similar comments and forced to stay silent? So, instead of taking my comment down, I responded: my comment criticising the country did not mean I was against the country. I apologised for the offence I caused, but I did not apologise for the comments I made.

Following this, I was contacted by the Brunei Project and was later introduced to the ASEAN SOGIE Caucus. During a dinner, I met Professor Douglas Sanders, who had been part of the gay rights movement in the 60s. That is when I realised that I can take action. I wanted to be part of the solution, and not part of the problem. This led to the organisation of the International Day Against

Homophobia, Transphobia and Biphobia (IDAHOT) in Brunei for the first-time last year.

Do you openly identify with a diverse sexuality or gender identity?

By definition, I am a bisexual, but in Brunei it is easier to say that I am gay because people don't really understand what it means to be a bisexual. So, I just tell everyone that I am gay. I am fortunate enough to have a very supportive family — both of my parents know of my sexuality and relationships.

Do you consider yourself a human rights defender (HRD)?

Yes and no. Yes, by label, but at the same time, I disagree with the label. Being a human rights defender is not about the title, it is about ethical responsibility, about upholding the values of integrity and community that we should all strive to work towards as human beings.

What have been the biggest challenges you have faced in advocating for LGBTIQ rights?

Certain policies make it difficult, but I would say that the biggest challenge has been the people. I cannot blame them, they were raised with decades spent in a traditional mindset and culture. When they make comments or threats, they don't realise that we outspoken individuals and activists are actually fighting for the greater good. If you want, it is almost as if you are a superhero but the very people you are attempting to save are the ones standing on your cape.

How would you overcome this challenge?

Things are slightly improving now; LGBTIQ individuals are more involved in raising awareness and there are more avenues to have our voice heard, such as the United Nation's UPR process and the Legislative Council meetings of Brunei Darussalam. In general, people are aware of the possibilities but seem to disregard the fact that they indeed do have a say and can make their concerns heard through the right avenues.

I feel that this is largely in part due to their fear that even if they were to take the chance to express themselves, something which would be quite scary to some as Brunei at large is still a conservative country, the risk would not be worth it as they feel discouraged that their opinions would not create any sort of meaningful impact.

The new generation is more connected with the world: young people are able to see what goes on in other countries, see that there are other ways to live and also there are possibilities to take an active role in the social evolution of our country.

Have you ever felt personally at risk because of your work?

I felt at risk at times. The risks mostly come from the people rather than institutions. For example, when my comment on the YouTube video went viral, I received threats and insults such as that I was being "un-Islamic" and a "heretic." Thankfully, thus far it's only been talk.

But I have to admit, there has been at least one instance where the government did take action against me: in the aftermath of the

IDAHOT last year, my passport got barred by the KDN, the Brunei version of homeland security. But after some clarification, they were quick to respond that was not due to event I organised (IDAHOT), but because I held it on a government-owned property. Thankfully, they were quite understanding. I went to them and we had a very open talk where we discussed the event I organised, and I managed to clear the situation. I now feel more confident after talking with their representatives, that their main purpose was the betterment of human rights in Brunei, including the safety and security of the Bruneian people regardless of labels.

What have been the most successful strategies or techniques you have used to create positive change?

The most effective strategy I've had so far comes from engaging local individuals and supporting parties. It takes a unified effort; you can't just do it any one way. For example, while organising the IDAHOT in 2016, we engaged local individuals, such as LGBT people and allies, and outside parties, such as certain embassies who were crucial in facilitating the program. The best strategy is to have a global, unified movement with both internal and external actors. About 40 people attended the last IDAHOT — a success for its first year within Brunei.

How do you think society has changed concerning LGBTIQ rights in Brunei in the past 5-10 years?

The younger generation is part of a big change in the country. Many of them are educated abroad and experience a cultural shock there. They bring home the values

they saw abroad. It is slowly soaking into the local fabric, if you will; on a societal level, it is progressing, more people are open to the idea of LGBTIQ rights and people. However, activism still has a long way to go.

What role has the law played in impacting LGBTIQ rights in Brunei? What role do you think it should play?

So far, the laws have not played a very active role, either positively or negatively, in the LGBTIQ scope. Legally, we are being discriminated against — we do not have the same protections or rights as everyone else. However, fortunately it is mostly on paper and rarely enforced. Sadly, same-sex conduct is still criminalised, as an act against nature, a leftover from when Brunei was a protectorate of the colonies.

Another large impact was the role of the new Sharia Penal Code. The LGBT society in Brunei has gone deeper into hiding since phase 1 to protect themselves. Phases 2 and 3 of the plan to implement Sharia Penal Code have been delayed because of international pressure coming from bodies like the United Nations and lobbying of international human rights defenders and celebrities, but Phase 1 alone has caused a regression: people who had no problem about being open with their sexuality before feel the need to be less open about their sexual identities.

What is the importance of *sharia* law on life of LGBTI people now?

To clear any confusion, from the little research I've done I can gather that *sharia* law has long been a part of Brunei Law, since

at least 2008 if not earlier. What concerns most people is the introduction of the Sharia Penal Code in 2013. Thanks to the UN recommendations, not the whole of the new Sharia Penal Code has come into effect but it still raises concerns.

Although rarely enforced, there has been one case. Confusingly, the man was charged under *sharia* law but penalised under common law as penalties under *sharia* in regards to his conviction have yet, if ever, come into effect. A man was fined \$1,000 under the Sharia Penal Code Order after he pleaded guilty to cross-dressing in a public place. His charge was to be dressed like a woman and carry women's personal items in his bag. A *sharia* prosecutor was infamously quoted as saying "If this is not dealt with, it can lead to the spread of social disorder such as homosexuality, free sexual relations, drug abuse and so on."¹

I do feel that there are more cases of legal discrimination against LGBT than we are being made aware of; this case was only one among others, the main problem with this being the not-free status of our media. Our only independent newspaper, The Brunei Times, was recently shut down for a multitude of reasons. I was fortunate enough to sit in on a private discussion between their employees and a representative of Freedom House, New York.

Moreover, the media here rarely criticises the government and almost never speak about actual newsworthy concerns. In this way the LGBT question is definitely a closed

subject and we do not have much real information about the impact of the Sharia Penal Code on vulnerable groups. On the contrary, the Internet is a good tool as there have been little restriction on its use. However, in general most local blogs report on cultural issues and tend to stray from touching on social issues.

Does Brunei's government do enough to protect LGBTIQ rights? Does civil society?

The government is not being actively against us, and I praise their values for the Brunei denizens, however, the fact that there is no form of legal protection for the LGBT individuals or socio-political activists in general is an obstacle.

It extends far more to the general scope of human rights, such as freedom of expression and freedom of religion. There is now a Christmas ban due to *sharia* law, for example. Sadly, a more recent example in 2015 was the new limitations on the cultural celebration of the Chinese New Year: permits are now required. These permits are granted with certain conditions: dances are limited to certain hours outside of prayer times; venues are restricted to school halls, Chinese temples, or residences; only Chinese community members may be involved; and firecrackers cannot be used.

I think it is part of a more general crackdown on the agenda to protect the Muslim community. While there is nothing wrong with that, I feel like we are going to extreme lengths under the argument that they want

¹ "Bruneian civil servant fined \$1,000 for cross-dressing", The Brunei Times, 11 March 2015, available at <http://web.archive.org/web/2015>

0313161723/http://www.bt.com.bn/news-national/2015/03/11/bruneian-civil-servant-fined-1-000-cross-dressing (last visited 26 June 2017).

to prevent the temptation of other faiths to Muslims. If our faith is strong, the people will resist such temptations. However, I am not sure how these limitations are, if ever, enforced, but the very fact that they are on paper is disheartening.

During the 90s, the country was more open about religion and culture; now, the government seems to be increasingly xenophobic, not realising they are stripping not only basic human rights but the way of life for a significant portion of the resident population, up to 20,000 people according to the latest census! They should encourage the freedom of expression and religion for all and not deny that Brunei is a beautifully multicultural country.

How do you feel about recent activities and events in Brunei regarding LGBTIQ rights?

In general, aside from LGBT issues, it is getting better. Brunei has just appointed the Legislative Council with more members from the public, and the people of Brunei are invited to voice their concerns through the council members. More women and younger people in the Legislative Council were included, and I feel this is a big step as we are seeing people who are not at a disconnect and are more in tune with the current issues. I personally am planning on playing a more active role in local politics this year and plan to attend their meetings as a public representative and have submitted my concerns to the council members.

Concerning the IDAHOT event last year, although the reactions were mostly positive, the government has kept a watch on us. But

for the most part, the government mostly tries to stay neutral on this topic, which at least is not a negative hindrance. I am definitely planning to organise the IDAHOT again — I am assessing the security risks at the moment and preparations are soon underway. As I said, it cannot be done without strong support on multiple fronts as the LGBTIQ are a vulnerable group.

Do you think the Universal Periodic Review (UPR) recommendations have an impact on Brunei? Do you think the recommendations lead governments to change policies to strengthen human rights protections?

Sadly, the UPR recommendations have not had any major impact so far on the LGBTIQ issues we face here. They had an impact on more general issues, such as women's rights and a more transparent governance. But I feel like the situation for LGBT will only improve if the United Nations (UN) will focus more specifically on LGBT rights. Because, in reality, while the situation is not as bad as most would assume, we are still at risk.

Does civil society know how to use the UPR recommendations and comments for advocacy in Brunei?

It is quite sad that most people are not even aware of the UPR process. Very few people know what is actually going on. But the mechanisms are there, it's just a matter of making them more accessible and understandable to the people. They need education on how they can play a more active role in the process and how to access it as a tool for positive change within the country. Perhaps an awareness video explaining the UPR process and showing

how the people can act in collaboration with the government for their rights, could be a great start.

What gives you hope when looking to the future of LGBTIQ rights in Brunei?

I have hope in the people. No matter who you are, who you worship, or who you love, I want, I believe in a community of inclusion and open-mindedness, a community that does not define itself by boundaries. I think that the best examples of this would be our neighbours Malaysia and Singapore. Yes, they do have their problems but at the same time, they cashed in on their diversity. The inclusion of various cultures is what led them to be strong. And it is a lesson we could learn here as well.

Closing our doors, without ever considering what we are missing out on and alienating the people who have left their home to search for a life here, could cost us so much down the road. I understand the country's values of culture and tradition, and I fully support preserving the past, but not while ignoring the possibilities of our future.

Introduction

Context

Just over a decade ago, the United Nations (**UN**) introduced a new process for periodically evaluating the human rights performances of each its Member States. That process, known as the Universal Periodic Review (**UPR**), has now completed two full cycles of review and commenced its third cycle in May 2017. During the first two cycles, all Member States received two rounds of recommendations from their fellow Member States regarding how they could bolster their domestic human rights protections.

Likewise just over a decade ago, Southeast Asia played host to a significant summit in Yogyakarta, Indonesia. At this summit, international human rights experts agreed on a set of principles setting out the applicable international human rights laws in the context of sexual orientation, gender identity, gender expression, and sexual characteristics (**SOGIESC**). These principles are known as the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (**Yogyakarta Principles**). They are the first attempt to comprehensively map the human rights landscape for lesbian, gay, bisexual, transgender, intersex, and queer (**LGBTIQ**) communities worldwide. On 10 November 2017, the Yogyakarta Principles plus 10 (**YP+10**) were adopted, supplementing the initial Yogyakarta Principles with emerging developments in international human rights law.

Purpose and Methodology

Coinciding with the release of the YP+10, this report, **Revealing the Rainbow** (the **Report**), comprehensively analyses the human rights situation of Southeast Asia's LGBTIQ Communities and their defenders in Southeast Asia in the decade since the UPR and the Yogyakarta Principles were introduced. It documents both the legal framework and the factual reality in each of the 11 Southeast Asian States.

This Report aims to foster dialogue to improve the human rights situation of Southeast Asia's LGBTIQ communities and their defenders. In particular, it hopes to empower civil society organisations (**CSOs**) and UN Member States to fully capitalise on the UPR process as a means through which such improvements may be achieved. To that end, the Report offers State-specific as well as general recommendations for CSOs and recommending States to consider when engaging in the third UPR cycle for each Southeast Asian State.

This Report's baseline measure is the UPR recommendations accepted by each Southeast Asian State, namely the Nation of Brunei (**Brunei**), the Kingdom of Cambodia (**Cambodia**), the Republic of Indonesia (**Indonesia**), the Lao People's Democratic Republic (**Laos**), Malaysia, the

Republic of the Union of Myanmar (**Myanmar**), the Republic of the Philippines (**Philippines**), the Republic of Singapore (**Singapore**), the Kingdom of Thailand (**Thailand**), the Democratic Republic of Timor-Leste (**Timor-Leste**), and the Socialist Republic of Viet Nam (**Viet Nam**).¹

This Report focuses on identifying State practice consistent with, or which fails to fulfil, recommendations that the State accepted during their first and second UPR cycles and that impact on their LGBTIQ community and its defenders.

For both Indonesia and the Philippines, this Report additionally considers UPR recommendations accepted during each State's third UPR reviews, since these took place earlier this year.

A detailed Country Profile is included for each of the 11 Southeast Asian States. Each Country Profile includes:

1. **An overview of all UPR cycles the State has undergone.** This overview summarises the national reports prepared by the State under review; submissions from CSOs; the recommendations received by the State at the conclusion of each review; and the State's position in respect of those recommendations.

About the UPR Process

The UPR process, created in 2006, is the only peer-to-peer review system allowing an assessment of the human rights situation in all 193 Member States of the UN by their fellow Member States. States are reviewed every 4-5 years based on three reports:

- a national report prepared by the State under review;
- a compilation of all CSOs' submissions; and
- a compilation of all UN documents relevant to the human rights situation of the State under review.

Each UPR cycle is presided over by three States, known as a "troika." It begins with a presentation by the State under review of its national report, followed by an Interactive Dialogue between that State and representatives of any other State willing to speak. At any time, the State under review may respond to questions and recommendations from other States.

The UPR review results in the preparation and publication by the UN of a report summarising the Interactive Dialogue; responses from the State under review; and the recommendations made to the State under review.

Source and Further Information: UN Office of the High Commissioner for Human Rights, "Basic facts about the UPR", Website, available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited 16 November 2017).

¹ The situation of LGBTIQ HRDs in each country profile is based on research, with a focus on UN official documentation, national legislation, CSO reports, press reports, and social media.

2. **A detailed analysis of the evolution of the human rights situation of the State's LGBTIQ community and its HRDs.** This analysis is conducted in light of the recommendations made during the UPR process, and organised thematically in accordance with key applicable human rights.
3. **Recommendations to CSOs and UN Member States for ways to engage with the State in its upcoming UPR cycle.** These recommendations are offered in light of the human rights situation in each State, and the State's demonstrated receptiveness to the UPR process thus far.

Importantly, this Report looks not only at the situation of LGBTIQ communities in Southeast Asia but also particularly at that of those communities' defenders — referred to in this Report as human rights defenders (**HRDs**).

In light of the focus on HRDs, each Country Profile also features text of an interview between Destination Justice and an LGBTIQ HRD working in the State under analysis. Each interview provides invaluable first-hand insights into the reality of HRDs' work; the impact of their voice in the society; and the impact of the UPR process within their State.

All interviewees were asked similar, open-ended questions that were provided to them in advance and adapted to their personal situation and that of their State. The interviewees consented to being interviewed and to the publication of their interview in the relevant sections of this Report. They were also given the opportunity to amend their interview transcripts for accuracy or security purposes, and to suppress their identifying details.

Terminology

HRD: Destination Justice relies on the definition of HRD given by the UN in the Declaration on the Right and Responsibility of Individuals Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (**DHRD**),² and by the European Union in the EU Guidelines on Human Rights Defenders.³ Accordingly, the concept of HRD relied on in this Report incorporates the following concepts:

- HRDs are individuals, groups or associations that voluntarily or through paid work promote and/or protect universally-recognised human rights and fundamental freedoms, by employing peaceful means.

² UN General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 9 December 1998, A/RES/53/144, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx> (last visited 16 November 2017). See further United Nations Human Rights Office of the High Commissioner, "Declaration on Human Rights Defenders", available at <http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx> (last visited 16 November 2017).

³ European Union, *Ensuring Protection - European Union Guidelines on Human Rights Defenders*, 14 June 2004, 10056/1/04, available at https://eeas.europa.eu/sites/eeas/files/eu_guidelines_hrd_en.pdf (last visited 16 November 2017).

- HRDs can be identified by what they do, the environments in which they operate, and the principles they uphold.
- HRDs support fundamental rights and freedoms as diverse as the right to life and the right to an adequate standard of living. They work at the local, national, or international level, and their activities might differ greatly. Some investigate and report human rights violations in order to prevent further abuses. Some focus on supporting and encouraging States to fulfil their human rights obligations. Others offer capacity-building support to communities or favour access to information in order to increase public participation in local decision-making processes.

Ultimately, this Report considers an HRD as anyone striving achieve positive change in terms of the protection or promotion of human rights. Students, civil society activists, religious leaders, journalists, lawyers, doctors and medical professionals, and trade unionists are often identified as HRDs. However, this list is not exhaustive.

LGBTIQ: Acronyms used to identify the queer community vary throughout Southeast Asian States and between different CSOs and individuals. For consistency, this Report utilises the broad acronym "LGBTIQ" to encompass the various identities of the Southeast Asian queer community, except where a cited source uses a different acronym.

SOGIESC: Traditionally, 'SOGIE' has been used to denote sexual orientation (SO), gender identity (GI) and gender expression (E). However, with a slowly-evolving understanding of diverse identities within the LGBTIQ community in Southeast Asia, this Report instead uses the expanded acronym SOGIESC, since this also includes the notion of sexual characteristics (SC).

Key Findings

It has been said that the UPR process is an "unprecedented opportunity for SOGIESC HRDs to raise human rights violations against LGBTIQ people and proactively engage with governments."⁴ However, despite evidence of the growing visibility of LGBTIQ rights and HRDs within the UPR process, this Report identifies significant room for improvement within Southeast Asia in terms of the protection of LGBTIQ communities and their defenders.

As outlined in this Report, regional progress in this regard has been notably inconsistent. Some Southeast Asian States have indeed acted on accepted UPR recommendations. This Report describes multiple instances of States taking significant steps towards reforming their legal framework to include express protections of their LGBTIQ community and LGBTIQ HRDs, and implementing policies aimed at eliminating discriminatory practices.

⁴ "Sexual Orientation, Gender Identity and Expression, and Sex Characteristics at the Universal Periodic Review", ARC International, IBAHRI & ILGA, November 2016, p. 100, available at http://ilga.org/downloads/SOGIESC_at_UPR_report.pdf (last visited 16 November 2017).

At the same time, the Report also details numerous situations where States in Southeast Asia have actively limited the rights of the LGBTIQ community and LGBTIQ HRDs. Harsh laws and criminal sentences have been imposed for consensual same-sex sexual relations. Discrimination and serious abuses continue to occur. Institutions and officials have adopted positions unsupportive of LGBTIQ rights. Multiple States have also restricted the fundamental freedoms of LGBTIQ HRDs, including freedoms of assembly, expression, and association. On a regional level, therefore, LGBTIQ communities and their HRDs remain at risk overall — and with them, the future of LGBTIQ rights in Southeast Asia.

Nevertheless, causes for optimism remain. Notably, this Report shows Southeast Asia's LGBTIQ communities becoming increasingly visible, particularly in terms of participation in the cultural life of the community, and its HRDs becoming ever more active. In addition, and as illustrated in **Figure 1**, in all but two instances, the number of CSO submissions increased in successive UPR rounds for each Southeast Asian State. This amounts to a region-wide trend of increased — and increasingly visible — engagement on LGBTIQ rights, and by HRDs.

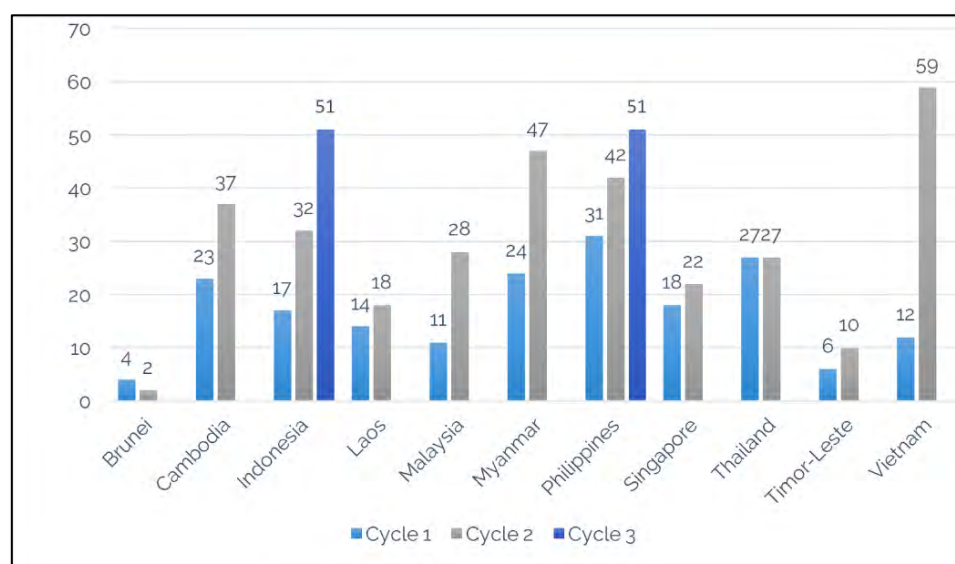


Figure 1: Southeast Asian Stakeholder UPR Submissions in Each Cycle

States also continue to engage in the UPR, and to do so in a seemingly genuine manner. This demonstrates the ongoing viability of the UPR process as an avenue for human rights advocacy and reform, at least at this stage. Accordingly, Destination Justice urges LGBTIQ communities and their HRDs, and CSOs and recommending UN Member States, to build the momentum for the UPR process as an advocacy platform, and to engage with the process more innovatively and tenaciously than ever during the third UPR cycle and beyond.

Legal Background

This Report analyses the situation of LGBTIQs and their defenders in Southeast Asia through specific human rights. These rights vary for each State depending on the particularities of that State's situation. This Legal Background section prefaces the State-by-State situational analysis by explaining how these rights are commonly interpreted under international law, with reference to the relevant international human rights instruments that protects these rights.

Chief among relevant human rights instruments are the long-standing Universal Declaration of Human Rights (**UDHR**),¹ the International Covenant on Civil and Political Rights (**ICCPR**),² and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**).³ These are the foundational modern human rights instruments commonly known as the "Human Rights Charter;" are binding on states that are party to them; and enshrine several rights today considered to have the status of customary international law.

Relevant rights are also found in the likewise-binding Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**) and the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**).⁴

In addition to these instruments, guidance is also offered by several recent, non-binding but instructive instruments. These include the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (**Yogyakarta Principles**);⁵ the ASEAN Human Rights Declaration (**AHRD**), applicable to all ASEAN member states;⁶ and the Declaration on the Right and Responsibility of Individuals,

¹ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf (last visited 16 November 2017).

² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at <http://www.ohchr.org/Documents/ProfessionalInterest/ccpr.pdf> (last visited 16 November 2017).

³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf> (last visited 16 November 2017).

⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at <http://www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf> (last visited 16 November 2017).

⁵ International Commission of Jurists (**ICJ**), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at http://www.yogyakartaprinciples.org/wp/wp-content/uploads/2016/08/principles_en.pdf (last visited 16 November 2017).

⁶ Association of Southeast Asian Nations (**ASEAN**), *ASEAN Human Rights Declaration and Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration*, February 2013, available at http://www.asean.org/storage/images/ASEAN_RTK_2014/6_AHRD_Booklet.pdf (last visited 16 November 2017).

Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (**DHRD**).⁷

Southeast Asian States generally have a low rate of ratification of international human rights instruments, as highlighted in **Annex 1**. In addition, the ambivalent regional approach to LGBTIQ rights can be seen in the region's varied voting record regarding the establishment of a UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, set out in **Annex 2**. Nevertheless, this presents civil society organisations (**CSOs**) and recommending States with a significant opportunity during the upcoming UPR cycle to urge each Southeast Asian State to take the important step towards strengthening human rights protection for their LGBTIQ communities and LGBTIQ HRDs, including by ratifying the relevant instruments and showing their support for the office of the newly-established Independent Expert.

The following human rights and fundamental freedoms are discussed in the Country Profiles in this Report, and accordingly briefly analysed and explained immediately below:

- Right to equality and freedom from discrimination;
- Right to liberty and security of the person;
- Prohibition of torture;
- Right to life;
- Right to privacy;
- Right to work;
- Freedom of opinion and expression;
- Freedom of peaceful assembly and association;
- Right to participate in public life; and
- Right to participate in the cultural life of the community.

⁷ United Nations, General Assembly, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 9 December 1998, A/RES/53/144, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RightAndResponsibility.aspx> (last visited 16 November 2017).

Right to Equality and Freedom from Discrimination

Legal Foundation

UDHR: Articles 1 and 2

ICCPR: Article 2(1) and 26

ICESCR: Article 2(2)

CEDAW: Article 1

Yogyakarta Principles: Principle 2

AHRD: Principles 1 and 2

Article 1 of the UDHR confirms that everyone is "born free and equal," while Article 2 serves as the core source of protection for the right to equality and to non-discrimination.

The United Nations Human Rights Committee (**CCPR**), which interprets and monitors implementation of the ICCPR, has considered cases where individuals have successfully relied on the right to equality and non-discrimination to

challenge the legality of alleged discrimination by a State. As a result of these cases, the CCPR has held in effect that "sexual orientation" is a recognised ground of prohibited discrimination.⁸ Furthermore, the CCPR has also expressed concerns about the criminalisation of consensual sexual acts between adults of the same sex,⁹ and called for the decriminalisation of these acts.¹⁰

Similarly, the UN Committee on Economic, Social, and Cultural Rights (**CESCR**), which interprets and monitors implementation of the ICESCR, has held that Article 2(2) of the ICESCR prohibits discrimination on the basis of sexual orientation and that "State parties should ensure that a person's sexual orientation is not a barrier to realizing Covenant rights, for example, in accessing survivor's pension rights."¹¹

The UN Committee on the Elimination of Discrimination against Women (**CEDAWC**) has referred to sexual orientation as part of the term "sex,"¹² declaring that:

⁸ UN Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, 31 March 1994, U.N. Doc. CCPR/C/50/D/488/1992, para. 8.7, available at <http://hrlibrary.umn.edu/undocs/html/vws488.htm> (last visited 17 November 2017). See also UN Human Rights Committee, *Mr Edward Young v. Australia*, Communication No. 941/2000, 6 August 2003, U.N. Doc. CCPR/C/78/D/941/2000, available at <http://www.equalrightstrust.org/content/ert-case-summary-mr-edward-young-v-australia-communication-no-9412000> (last visited 17 November 2017); UN Human Rights Committee, *X v. Colombia*, Communication No. 1361/2005, 30 March 2007, U.N. Doc. A/62/40, Vol. II, at 293, available at http://www.worldcourts.com/hrc/eng/decisions/2007.03.30_X_v_Colombia.htm (last visited 17 November 2017).

⁹ UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Barbados*, 11 May 2007, U.N. Doc. CCPR/C/BRB/CO/3, para. 13, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsncLNPIYsTOQN5Sbrs%2f8hyEn2VHMCAZQ%2fCyDY96cYPxM8cQ8bbavViNnuV6YU3gyHlmioCM17RLf4esahJ5a1%2bxQTspR9eqkzThSr5nh9fhp> (last visited 17 November 2017).

¹⁰ UN Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, 18 December 2006, U.N. Doc. CCPR/C/USA/CO/3/Rev.1, para. 9, available at <https://www.state.gov/documents/organization/133837.pdf> (last visited 17 November 2017).

¹¹ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights*, 2 July 2009, vol. U.N. Doc. E/C.12/GC/20, para. 32, available at <http://undocs.org/E/C.12/GC/20> (last visited 17 November 2017).

¹² UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 19 October 2010, U.N. Doc. CEDAW/C/2010/47/GC.2, para. 18, available at

Intersectionality is a basic concept for understanding the scope of the general obligations of State parties contained in Article 2. The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as [...] sexual orientation and gender identity.¹³

The AHRD prohibits discrimination. However, it uses the term "gender," not "sex." Though the efforts of LGBTIQ HRDs to include "sexual orientation" in the AHRD were unsuccessful, "gender" can arguably be interpreted broadly so as to include transgender persons and other groups within the LGBTIQ conceptual framework.¹⁴

Principle 2 of the Yogyakarta Principles prohibits discrimination on the basis of sexual orientation or gender identity. It describes in detail what such discrimination could entail:

Discrimination on the basis of sexual orientation or gender identity includes any distinction, exclusion, restriction or preference based on sexual orientation or gender identity which has the purpose or effect of nullifying or impairing equality before the law or the equal protection of the law, or the recognition, enjoyment or exercise, on an equal basis, of all human rights and fundamental freedoms. Discrimination based on sexual orientation or gender identity may be, and commonly is, compounded by discrimination on other grounds including gender, race, age, religion, disability, health and economic status.

Right to Liberty and Security of Person

Legal Foundation

UDHR: Article 3

ICCPR: Article 9

CEDAW: Article 11(f)

Yogyakarta Principles: Principle 5

AHRD: Article 12

DHRD: Article 12(2)

Article 3 of the UDHR guarantees everyone the fundamental right to "liberty and security," a right echoed in several other international instruments. The CCPR has clarified that this protection specifically extends to cover LGBTIQ people, and that:

[T]he right to personal security also obliges States parties to take appropriate measures [...] to protect individuals from foreseeable

threats to life or bodily integrity proceeding from any governmental or private actors
[...] **States parties must respond appropriately to patterns of violence against**

<http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf> (last visited 17 November 2017).

¹³ UN Committee on the Elimination of Discrimination against Women, *General Recommendation No. 28*, 19 October 2010, U.N. Doc. CEDAW/C/2010/47/GC.2, para. 18.

¹⁴ "The ASEAN Human Rights Declaration: A Legal Analysis", American Bar Association (ABA) Rule of Law Initiative, 2014, p. 11, available at <http://www.americanbar.org/content/dam/aba/directories/roli/asean/asean-human-rights-declaration-legal-analysis-2014.authcheckdam.pdf> (last visited 17 November 2017).

categories of victims such as [...] violence against persons on the basis of their sexual orientation or gender identity.¹⁵

The CCPR has also stipulated that "[a]rrest or detention on discriminatory grounds [...] is also in principle arbitrary."¹⁶

Article 12 of the AHRD¹⁷ refers to the "right to **personal** liberty and security"¹⁸ instead of the more common "right to liberty and security of person."¹⁹ Nevertheless, this difference may have minimal practical impact, given that the Inter-American Human Rights system, which also refers to "personal liberty and security", has interpreted this phrase consistently with the UDHR and the ICCPR, and has relied on the American Convention's prohibitions against torture and inhumane treatment to define the right to security of person.²⁰

Principle 12 of the Yogyakarta Principles clarifies that not only does the right to liberty and security of the person apply regardless of sexual orientation and gender identity, but that States have an obligation to prevent and punish acts of violence and harassment based on sexual orientation and gender identity and to combat the prejudices that underlie such violence.

In the context of HRDs specifically, Article 12(2) of the DHRD provides that States:

shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights [of HRDs].

¹⁵ UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person)*, 16 December 2014, U.N. Doc. CCPR/C/GC/35, para. 9, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fGC%2f35&Lang=en (last visited 17 November 2017) (emphasis added). See also UN Human Rights Committee, *Concluding observations: El Salvador*, 22 July 2003, U.N. Doc. CCPR/CO/78/SLV, para. 16, available at https://www.reproductiverights.org/sites/default/files/documents/XSL_CO.ElSalvador2003.pdf (last visited 17 November 2017).

¹⁶ UN Human Rights Committee, *O'Neill and Quinn v. Ireland, Views, Communication No. 1314/2004*, U.N. Doc. CCPR/C/87/D/1314/2004, para. 8.5 (finding no violation), available at <http://hrlibrary.umn.edu/undocs/1314-2004.html> (last visited 17 November 2017). See also UN Human Rights Committee, *Consideration of Reports Submitted by Parties Under Article 40 of the Covenant, Concluding Observations, Honduras*, 14 September 2006, U.N. Doc. CCPR/C/HND/CO/1, para. 13 (detention on the basis of sexual orientation), available at http://www.bayefsky.com/pdf/ireland_t5_iccpr_1314_2004.pdf (last visited 17 November 2017); UN Human Rights Committee, *Consideration of Reports Submitted by Parties Under Article 40 of the Covenant, Concluding Observations, Cameroon*, 4 August 2010, U.N. Doc. CCPR/C/CMR/CO/4, para. 12 (imprisonment for consensual same-sex activities of adults), available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRICAqhKb7yhsoEohhB%2fObfneRA6ucrf7cJW7%2bXtug1Hgeug0eK7ZvX2rAdy89HyiCyHPP41ofPuv76q%2bomwP4FHeGtD2fr6HhReFNC3aUgl6Zgcnx9KpuRN> (last visited 17 November 2017).

¹⁷ ASEAN Human Rights Declaration, 18 November 2012, Principle 12, available at http://aichr.org/?dl_name=ASEAN-Human-Rights-Declaration.pdf (last visited 17 November 2017).

¹⁸ ASEAN Human Rights Declaration, 18 November 2012, Principle 12 (emphasis added).

¹⁹ "The ASEAN Human Rights Declaration: A Legal Analysis", ABA Rule of Law Analysis, 2014, p. 29.

²⁰ "The ASEAN Human Rights Declaration: A Legal Analysis", ABA Rule of Law Analysis, 2014, p. 29.

Right to Life

Legal Foundation

UDHR: Article 3

ICCPR: Article 6

ICCPR OP2: Generally

Yogyakarta Principles: Principle 4

AHRD: Article 11

DHRD: Article 12(2)

The right to life is a foundational human right. The UDHR, ICCPR, Yogyakarta Principles and AHRD prohibit arbitrary deprivation of life. In General Comment 6, the CCPR has stressed that accordingly, "no derogation [from this] is permitted even in time of public emergency which threatens the life of the nation."²¹ Moreover, States Parties are not to interpret the right to life narrowly but must act proactively to protect the right of life.²²

While international law does not obligate states to abolish the death penalty altogether, this is desirable. Indeed, the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (**ICCPR OP2**) is specifically dedicated to the abolition of the death penalty. Under its Article 1, its States Parties undertake not to execute anyone within their jurisdiction and to take all necessary measures to abolish the death penalty. Of the Southeast Asian States profiled in this Report, those which retain the death penalty are Brunei, Indonesia, Laos, Malaysia, Myanmar, Singapore, Thailand, and Viet Nam, among which Brunei, Laos and Thailand have had *de facto* moratoria in place on in fact applying the death penalty since 1957, 1989 and 2009, respectively.²³

Under Article 6 of the ICCPR, states that do impose the death penalty must limit its application to only the most serious of offences and cannot impose it on persons under 18 years of age or on pregnant women. As the CCPR stressed in General Comment 6, the death penalty must be a truly exceptional measure of punishment.²⁴ Considering the UN's stance that same-sex sexual relations should not be criminalised whatsoever,²⁵ such acts would not, therefore, be considered a "most serious crime."

²¹ UN Human Rights Committee, *General Comment No. 6, Article 6, Right to Life*, 30 April 1982, U.N. Doc. HRI/GEN/1/Rev.1 at 6, para. 1, available at <http://hrlibrary.umn.edu/peace/docs/hrcom6.htm> (last visited 17 November 2017).

²² UN Human Rights Committee, *General Comment No. 6*, 30 April 1982, HRI/GEN/1/Rev.1 at 6, para. 1.

²³ "Death Penalty", Amnesty International, available at <https://www.amnesty.org/en/what-we-do/death-penalty/> (last visited 22 November 2017); "UN concerned at broad application of death penalty in Brunei's revised penal code" UN News Center, 11 April 2014, available at <http://www.un.org/apps/news/story.asp?NewsID=47552#.Wht4XUqWZPZ> (last visited 27 November 2017); ICJ, "Serious setback: Singapore breaks moratorium on death penalty", 18 July 2014, available at <https://www.icj.org/serious-setback-singapore-breaks-moratorium-on-death-penalty/> (last visited 27 November 2017).

²⁴ UN Human Rights Committee, *General Comment No. 6*, 30 April 1982, HRI/GEN/1/Rev.1 at 6, para. 7.

²⁵ See UN High Commissioner for Refugees, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008, para. II.B.i.19, available at <http://www.refworld.org/pdfid/48abd5660.pdf> (last visited 17 November 2017).

Article 12(2) of the DHRD requires states to take all necessary measures to protect HRDs against acts which would include arbitrary deprivation of life.

Prohibition of Torture

Legal Foundation

UDHR: Article 5

ICCPR: Article 7 and 2(3)

CAT: Article 2 and generally

Yogyakarta Principles: Principle 10

AHRD: Article 14

DHRD: Article 12(2)

Torture is prohibited under a wide range of international instruments, including a specific convention: the CAT. Article 1 of the CAT defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has

committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In General Comment 20, the CCPR has detailed the types of treatment included within the ICCPR's definition of torture under Article 7. Torture includes mental and physical suffering, as well as corporal punishment and extended solitary confinement.²⁶ Moreover, the use of medical experimentation without consent is within the scope of the definition of torture.²⁷ Finally, any information gained through torturous acts is impermissible.²⁸

In terms of discriminatory grounds, Principle 10 of the Yogyakarta Principles specifically obligates States to prevent and punish torture or inhuman and degrading treatment or punishment undertaken on the basis of the victim's sexual orientation or gender identity.

Article 2 of the CAT unequivocally provides that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture." In addition, Article 3 of the CAT prohibits States from "expell[ing] or return[ing] ('refouler') an individual to another State where

²⁶ UN Human Rights Committee, *General Comment No. 20: Article 7, Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30. para. 5. available at <http://hrlibrary.umn.edu/gencomm/hrcom20.htm> (last visited 17 November 2017).

²⁷ UN Human Rights Committee, *General Comment No. 20: Article 7*, 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30. para. 6.

²⁸ UN Human Rights Committee, *General Comment No. 20: Article 7*, 10 March 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 30. para. 12.

there are substantial grounds for believing that he or she would be in danger of being subjected to torture."²⁹

Article 12(2) of the DHRD requires States to take all necessary measures to protect HRDs against acts which would include torture.

Right to Privacy

Legal Foundation

UDHR: Article 12

ICCPR: Article 17

Yogyakarta Principles: Principle 6

AHRD: Article 12

DHRD: Article 12(2)

Article 12 of the UDHR describes the right to privacy as a prohibition on "arbitrary interference with [one's] privacy, family, home or correspondence" and on "attacks upon his honour and reputation."

The CCPR has held that a law criminalising sodomy "violates the right to privacy in the International Covenant on Civil and Political

Rights",³⁰ showing that same-sex sexual relations fall within the scope of the right to privacy.

Principle 6 of the Yogyakarta Principles adds that for LGBTIQ persons specifically:

[t]he right to privacy [in addition] ordinarily includes the choice to disclose or not to disclose information relating to one's sexual orientation or gender identity, as well as decisions and choices regarding both one's own body and consensual sexual and other relations with others.

In July 2015, Joseph Cannataci was appointed the first Special Rapporteur on the right to privacy for an initial three-year term.³¹ His mandate includes the requirement "[t]o integrate a gender perspective throughout [his] work."³²

Article 12(2) of the DHRD requires states to take all necessary measures to protect HRDs against acts which would include violations of HRDs' right to privacy.

²⁹ *V.L. v. Switzerland*, Communication No. 262/2005, U.N. Doc. CAT/C/37/D/262/2005 (2007), para. 8.2, available at <http://hrlibrary.umn.edu/cat/decisions/262-2005.html> (last visited 17 November 2017).

³⁰ Arvind Narrain, "Sexual Orientation and Gender Identity: A Necessary Conceptual Framework for Advancing Rights?", Arc International, 2016, p. 1, available at <http://arc-international.net/global-advocacy/human-rights-council/sexual-orientation-and-gender-identity-a-necessary-conceptual-framework-for-advancing-rights/> (last visited 17 November 2017).

³¹ "Special Rapporteur on the right to privacy", OHCHR, 2015, available at <http://www.ohchr.org/EN/Issues/Privacy/SR/Pages/SRPrivacyIndex.aspx> (last visited 17 November 2017).

³² UN Human Rights Council, *Resolution 28/16, The right to privacy in the digital age*, 1 April 2015, U.N. Doc. A/HRC/RES/28/16, para. 4(f), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/068/78/PDF/G1506878.pdf?OpenElement> (last visited 17 November 2017).

Right to Work

Legal Foundation

UDHR: Article 23

ICESCR: Article 6

CEDAW: Article 11

Yogyakarta Principles: Principle 12

AHRD: Article 27

DHRD: Articles 5, 9 and 11

General Comment 18 sets out the CESCR's interpretation of the right to work under the ICESCR. It emphasises that the ICESCR prohibits "any discrimination in access to and maintenance of employment on the grounds of [...] sex, [...] or] sexual orientation, [...] which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality."³³

Likewise, the CCPR has highlighted that when LGBTIQ people face discrimination based on their sexual orientation that impacts their access to employment, this violates Articles 2 and 26 of the ICCPR.³⁴

Article 11 of CEDAW obligates States Parties to eliminate discrimination against women and ensure equality between men and women in respect of the right to work. Under Article 11, this includes, among other things, equal opportunity and access to different professions, and equal pay. Concerning LGBTIQ people, Principle 12 of the Yogyakarta Principles provides that:

Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation or gender identity.

The right of HRDs to work is set out under Article 11 of the DHRD, which explains that "Everyone has the right, individually and in association with others, to the lawful exercise of his or her occupation or profession." Likewise, Article 9 specifically protects HRDs' right to provide "professionally qualified legal assistance or other forms of assistance and advice in defending human rights and fundamental freedoms." In addition, Article 5 makes it clear that HRDs are able to work within NGOs, associations and groups, and to communicate with NGOs and intergovernmental groups.

³³ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 18, Article 6, The Right to Work*, 6 February 2006, U.N. Doc. E/C.12/GC/18, para. 12(b), available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=4slQ6QSmIBEDzFEovLCuW1a0Szab0oXTdlmnsJZZVQfUKxXVisd7Dae%2FCu%2B13J25Nha7lgNlwYZ%2FTmk57O%2FSr7TB2hbCAidyVu5x7XcqjNXn44LZ52C%2BikX8AGQrVylc> (last visited 17 November 2017).

³⁴ UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee - Islamic Republic of Iran*, 29 November 2011, U.N. Doc. CCPR/C/IRN/CO/3, para. 10, available at <http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2fPPRiCAqhKb7yhsieXFSudRZs%2fX1ZaMqUUOS%2fToSmm6S6YKot4yT9B73L17SA%2feiYbnx2ciO3WOOtYqEMTBg8uMHZzpeXwyMOLwCLLxzMK2fpd8zvXOHOVZsw> (last visited 17 November 2017).

Freedom of Opinion and Expression

Legal Foundation

UDHR: Article 19

ICCPR: Article 19

Yogyakarta Principles: Principle 20

AHRD: Article 24

DHRD: Articles 6 and 7

The right to freedom of opinion and expression is at the heart of an active civil society and essential to the work of HRDs,³⁵ including LGBTIQ HRDs.

In General Comment 34, the CCPR has explained that the freedom includes, among other things:

the right to seek, receive and impart information and ideas, [...] the expression and receipt of communications of every form of idea and opinion capable of transmission to others, [...] political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse, [...] and commercial advertising.³⁶

However, Article 19(3) of the ICCPR permits narrow restrictions to the freedom of opinion and expression. Such exceptions must be "provided by law" and be "necessary for respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals." Any limitations must conform to the strict tests of necessity and proportionality, and the State should provide details of the restrictions.³⁷

In 1982, the CCPR permitted restrictions on a television and radio program discussing homosexuality³⁸ on the basis that the State was owed a "certain margin of discretion" in matters of public morals. Nevertheless, the CCPR equally pointed out that the conception and contents of "public morals" are relative and changing,³⁹ and State-imposed restrictions on freedom of expression must allow for this and should not be applied so as to perpetuate prejudice or promote intolerance.⁴⁰

Principle 19 of the Yogyakarta Principles explains how in the context of LGBTIQ people, freedom of opinion and expression includes:

³⁵ "Born Free and Equal: Sexual Orientation and Gender Identity in International Law", OHCHR, 2012, p. 55, available at <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf> (last visited 17 November 2017).

³⁶ UN Human Rights Committee, *General Comment No. 34, Article 19, Freedoms of opinion and expression*, 12 September 2011, U.N. Doc. CCPR/C/GC/34, para. 11, available at <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> (last visited 17 November 2017).

³⁷ UN Human Rights Committee, *General Comment No. 34, Article 19*, 12 September 2011, CCPR/C/GC/34, para. 27.

³⁸ "Chapter four: Freedom of Assembly, Association and Expression", International Commission of Jurists (ICJ), 2012, available at <http://www.icj.org/sogi-casebook-introduction/chapter-four-freedom-of-assembly-association-and-expression/> (last visited 17 November 2017).

³⁹ "Chapter four: Freedom of Assembly, Association and Expression", ICJ, 2012.

⁴⁰ "HRC: Hertzberg and Others v. Finland", Article 19, 6 February 2008, available at <https://www.article19.org/resources.php/resource/3236/en/hrc-hertzberg-and-others-v-finland> (last visited 17 November 2017).

the expression of identity or personhood through speech, deportment, dress, bodily characteristics, choice of name, or any other means, as well as the freedom to seek, receive and impart information and ideas of all kinds, including with regard to human rights, sexual orientation and gender identity, through any medium and regardless of frontiers.

Article 6 of the DHRD emphasises that HRDs not only enjoy the same freedom of opinion and expression as everyone else, but in addition, that this freedom extends specifically to matters concerning human rights and fundamental freedoms, and that HRDs have the right to "draw public attention to those matters." Article 7 notes that HRDs additionally have the right "to develop and discuss new human rights ideas and principles and to advocate their acceptance."

Freedom of Association and Assembly

Legal Foundation

UDHR: Article 20

ICCPR: Articles 21 and 22

ICESCR: Article 8

Yogyakarta Principles: Principle 20

AHRD: Articles 24 and 27(2)

DHRD: Articles 5 and 12

The freedom of association and assembly and the freedom of opinion and expression are fundamentally intertwined.⁴¹

The ICCPR explains that a person's freedom to associate with others includes the right to join and form trade unions (Article 21), and that freedom of assembly refers to the freedom to peacefully assemble (Article 22). Article 8 of the ICESCR elaborates on the freedom of

association, specifically in terms of the freedom to join and form trade unions.

As with the freedom of opinion and association, under the ICCPR and ICESCR, it is possible for states to impose narrow restrictions on the freedom of association and assembly provided that these are "provided by law;" "necessary for respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals;" and deemed to be necessary and proportionate.

In the context of LGBTIQ persons, Principle 20 of the Yogyakarta Principles clarifies that the freedom of association and assembly extends to "associations based on sexual orientation or gender identity" and work on "the rights of persons of diverse sexual orientations and gender identities." It further explains that where States impose limitations on the freedom of association and assembly:

[s]tates shall [...] ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to

⁴¹ UN Human Rights Committee, *General Comment No. 34, Article 19*, 12 September 2011, CCPR/C/GC/34, para. 4.

peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities.

Article 24 of the AHRD guarantees freedom of peaceful assembly. While there is no general protection of the freedom of association, Article 27(2) protects the specific right to join and form trade unions and "limits the obligation to the extent permitted by national law and practice."⁴² There are no official annotations of the AHRD or *travaux préparatoires* explaining what the former inaugural UN Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, Vitit Muntarbhorn, described as the AHRD's reinforcement of "ASEAN values" by omitting "various internationally guaranteed rights, particularly the right to freedom of association."⁴³ Such lack of transparency was a key critique of the AHRD, and prevents the development of a clear understanding of ASEAN's rationale for omitting a general freedom to associate.⁴⁴

Article 5 of the DHRD clarifies that HRDs' freedom of association and assembly specifically includes the right to form, join, and participate in NGOs, associations, and groups, and to communicate with NGOs and intergovernmental organisations. In addition, Article 12 clarifies that not only do HRDs have the freedom to undertake peaceful activities against violations of human rights and fundamental freedoms, but to be protected against acts by the State or others that violate or affect the enjoyment of human rights and fundamental freedoms.

Right to Participate in Public Life

Legal Foundation

UDHR: Article 21

ICCPR: Article 25

CEDAW: Article 7

Yogyakarta Principles: Principle 25

AHRD: Article 25

DHRD: Article 8

As the UDHR and ICCPR set out, the right to participate in public affairs includes the right to take part in the government of the State — directly as an elected representative, as well as through elected representatives. Governments must be driven by the will of the people as expressed through periodic and genuine elections with secret ballots and universal and

⁴² Sharan Burrow & Noriyuki Suzuki, "Asia Pacific Statement On ASEAN Human Rights Declaration", International Trade Union Confederation, 28 November 2012, available at https://www.ituc-csi.org/IMG/pdf/ituc_statement_on_asean_human_rights_declaration_final_2_.pdf (last visited 22 November 2017).

⁴³ Vitit Muntarbhorn, "'Asean human rights law' taking shape", Bangkok Post, 11 May 2017, available at <https://www.pressreader.com/thailand/bangkok-post/20170511/281719794500835> (last visited 21 November 2017).

⁴⁴ Sriprapha Petcharamesree, "The ASEAN Human Rights Architecture: Its Development and Challenges", The Equal Rights Review, Vol. Eleven, 2013, para. 4, available at <http://www.equalrightstrust.org/ertdocumentbank/Sriprapha%20Petcharamesree%20ERR11.pdf> (last visited 22 November 2017); Human Rights Watch, "Civil Society Denounces Adoption of Flawed ASEAN Human Rights Declaration", November 2012, available at <https://www.hrw.org/news/2012/11/19/civil-society-denounces-adoption-flawed-asean-human-rights-declaration> (last visited 22 November 2017); "Statement: Less than Adequate: AICHR consultation on ASEAN Human Rights Declaration", Article 19, 21 June 2012, available at <https://www.article19.org/resources.php/resource/3338/en/less-than-adequate-aichr-consultation-on-asean-human-rights-declaration> (last visited 22 November 2017).

equal suffrage. All people must also have equal access to public service.

The CCPR in General Comment 25 explained the right to participate in public life protects the rights of “every citizen” and that “no distinctions are permitted between citizens in the enjoyment of these rights on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁵ General Comment 25 also notes that the right to participate in public life includes “exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves [which] is supported by ensuring freedom of expression, assembly and association.”

Article 7 of CEDAW emphasises that in the context of the right to participate in public life, States have an obligation to ensure the equality of women with men. Similarly, Principle 25 of the Yogyakarta Principles provides that the right to participate in public life should not discriminate on the basis of sexual orientation or gender identity.

Article 8 of the DHRD explains that as for HRDs, the right to participate in public life also specifically includes the right:

to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

Right to Participate in the Cultural Life of the Community

Legal Foundation

UDHR: Article 27

ICCPR: Article 27

ICESCR: Article 15

CEDAW: Article 13(c)

Yogyakarta Principles: Principle 26

AHRD: Article 32

The right to participate in the cultural life of the community is set out primarily in Article 27 of the UDHR and Article 15 of the ICESCR. The CESCR, in General Comment 21, has explained that this right is a freedom which requires States not to interfere with the exercise of cultural practices and access to cultural goods, and simultaneously requires States to protect peoples’ ability to exercise this right.⁴⁶ Furthermore, the ICESCR “prohibit[s] any

⁴⁵ UN Human Rights Committee, *General Comment No. 25, Article 25, The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, U.N. Doc. CCPR/C/21/Rev.1/Add.7, para. 3, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2F21%2FRev.1%2FAdd.7&Lang=en (last visited 17 November 2017).

⁴⁶ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, U.N. Doc. E/C.12/GC/21, para. 6, available at <http://www.refworld.org/docid/4ed35bae2.html> (last visited 17 November 2017).

discrimination in the exercise of the right of everyone to take part in cultural life on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."⁴⁷

Article 13(c) of CEDAW ensures the right of women to equality with men in terms of participation in cultural life, which it describes as including recreational activities, sports, and all other aspects. Principle 26 of the Yogyakarta Principles similarly emphasises that the right to equal participation in public life is a right enjoyed by everyone regardless of sexual orientation and gender identity. Moreover, the Principle explains that the right includes the right to express diverse sexual orientation and gender identity, and obliges states to foster opportunities for all people to participate in public life and to:

[f]oster dialogue between, and mutual respect among, proponents of the various cultural groups present within the State, including among groups that hold different views on matters of sexual orientation and gender identity, consistently with respect for [...] human rights [...].

⁴⁷ UN Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of everyone to take part in cultural life*, 21 December 2009, U.N. Doc. E/C.12/GC/21, paras. 21-22.

Concluding Recommendations

Destination Justice's concluding recommendations stem from two basic considerations:

- A better and more informed use of the UPR process could have a real positive impact on the situation of the LGBTIQ communities and their HRDs in Southeast Asia.
- Though Southeast Asian countries and the LGBTIQ communities living and operating within these countries are extremely diverse, Destination Justice is convinced that to achieve recognition, equality and non-discrimination, both the Southeast Asian governments and the LGBTIQ communities should work together and in complementarity at the local, national, regional and international levels.

The following recommendations specifically address Southeast Asian governments, recommending States during the next — third/fourth — UPR cycle and the LGBTIQ communities and their HRDs.

Recommendations to Southeast Asian Governments

- Adopt a holistic approach to ending discrimination towards the LGBTIQ community, starting with ending the criminalisation of human rights defenders.
- Accept and implement at the best of their capacities, and before the next UPR review, all recommendations made on SOGIESC issues.
- Ensure an effective follow-up of the recommendations accepted during the UPR review, starting with submitting their follow-up report.
- Encourage fellow Southeast Asian States to strengthen human rights protection for their LGBTIQ communities and HRDs, and foster greater State-to-State and regional cooperation and collaboration in this regard.

Recommendations to Recommending States (During the UPR process)

- Work together with local LGBTIQ communities and HRDs to better understand their needs, the challenges they face, and the violations they endure and how it should be addressed during the UPR process.
- Foster and advocate for the inclusion of specific, measurable, achievable, realistic, timely (**SMART**) recommendations on SOGIESC into the working group final outcome report of every Southeast Asian State.

- Keep the States to which they made recommendations accountable, and more specifically follow-up regularly on the recommendations and seek cooperation from other States.

Recommendations to Civil Society & HRDs

- Work together between local, national, and international CSOs as well as the government to submit the most accurate possible information and SMART recommendations.
- Foster advocacy based on the recommendations made during the UPR, and use the UPR as an accountability tool regarding governments.
- Strengthen networking among CSOs and HRDs locally, nationally, and regionally to foster knowledge sharing and best practices in working with governments to address SOGIESC-based discriminations and to encourage policy change.
- For LGBTIQ communities at the local and national levels, collaborate with the competent authorities to foster legal and policy change, and to expand support for LGBTIQ, education and reporting stories.
- Work at all levels, including internationally and regionally, by using the UN and ASEAN mechanisms.

Printed with the financial support of the Office of the High Commissioner for Human Rights (OHCHR). The contents of this report do not necessarily reflect the opinion of OHCHR.

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About Destination Justice

Established since 2011, Destination Justice is a social change organisation. We are changemakers who believe that justice is key to a peaceful society — particularly a society where people can resolve their issues by resorting to independent, fair and transparent justice; a society where laws are made by the people, for them, and freely accessible to them; and furthermore, a society where everybody is equal no matter who they are, what they think, or who they love.

To achieve this, we work according to the idea that from little things big things can grow: one mind changed; one piece of information put out there; one practice improved. We set ideas in motion, we provide tools, and we take action when necessary.

Through our Rainbow Justice Project, Destination Justice aims to foster dialogue in Southeast Asia on sexual orientation, gender identity and gender expression, and sexual characteristics (**SOGIESC**), and to provide advocacy tools to changemakers for the promotion and protection of the lesbian, gay, bisexual, transgender, intersex and queer (**LGBTIQ**) community's rights.

Cover Photo Credit: "Dancers under a large rainbow flag during the third gay pride in Vietnam", AFP in the South China Morning Post, 'Vietnam hosts third gay pride parade as attitudes soften', 3 August 2014, available at <http://www.scmp.com/news/asia/article/1565550/vietnam-hosts-third-gay-pride-parade-attitudes-soften> (last visited 27 November 2017).

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