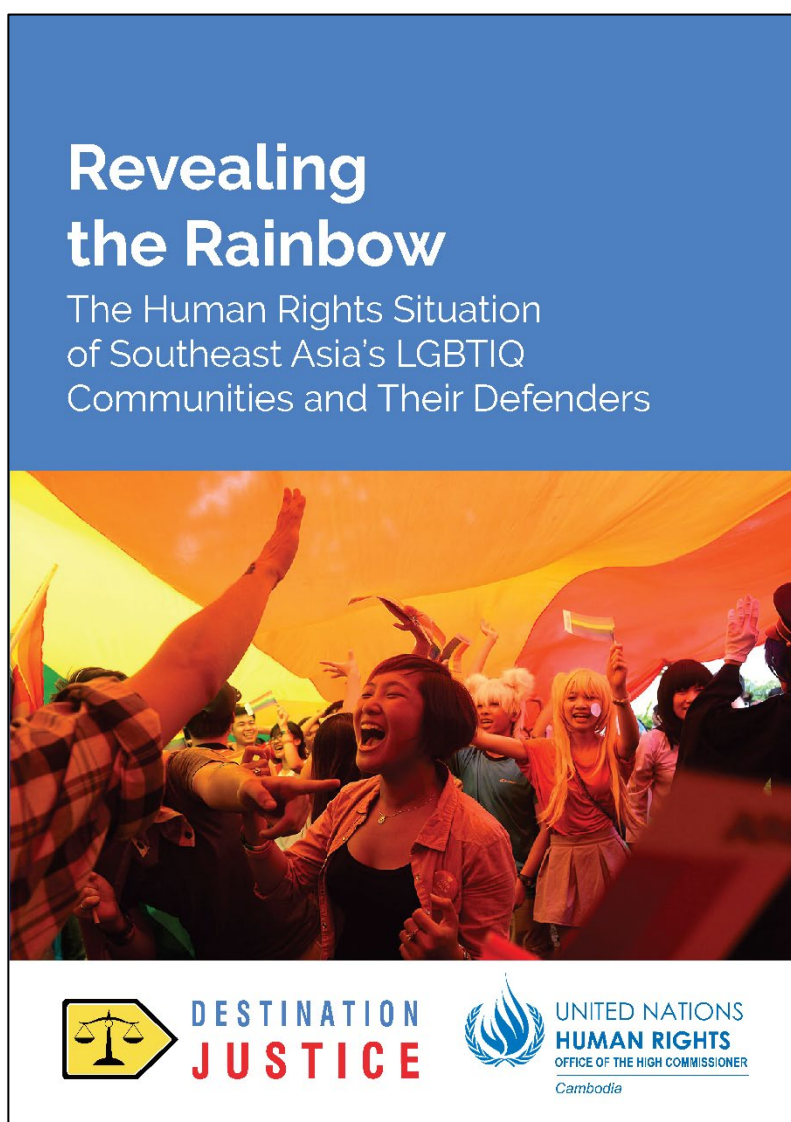


LGBTIQ Communities and Their Defenders Country Information Pack: **Myanmar**

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Myanmar: Country Profile

Human Rights of LGBTIQ Communities and HRDs: Situational Analysis

Introduction

UPR Cycles

First UPR Cycle: 27 January 2011

Second UPR Cycle: 6 November 2015

Third UPR Cycle: October/November 2020

Issues concerning the lesbian, gay, bisexual, transsexual, intersex, and queer (**LGBTIQ**) community and human rights defenders (**HRDs**) of the Republic of the Union of Myanmar (**Myanmar**) were raised during both its first and second Universal Periodic Review (**UPR**) cycles.

While Myanmar stated during its first UPR that it was working with the United Nations (**UN**) Human Rights Council (**HRC**) and the Office of the High Commissioner for Human Rights (**OHCHR**) to create more human rights oversight, a wide range of recommendations to strengthen protections for LGBTIQ persons and HRDs have consistently failed to enjoy Myanmar's support. These include recommendations regarding the abolition of the death penalty, decriminalisation of same-sex sexual relations, discrimination, and freedoms of assembly, association and expression.

As set out in this Country Profile, the current situation facing the LGBTIQ community and their defenders in Myanmar reflects Myanmar's mixed response to relevant UPR recommendations. Notable progress has been made since Myanmar's first UPR cycle vis-à-vis the visibility of the LGBTIQ community in Myanmar and to decrease media censorship and increase press freedom in Myanmar. However, discrimination against LGBTIQ people and the targeting of HRDs still occurs with impunity.

In the lead up to Myanmar's third UPR cycle in October/November 2020, which will be the first under Myanmar's recently-elected civilian-led government, recommending States and civil society organisations (**CSOs**) have the opportunity to develop improved UPR recommendations that aim to provide more protections for Myanmar's LGBTIQ community and HRDs.

"LGBT rights are now raised from a human rights and gender perspective [...] [T]he perception towards LGBT, I would not say changing as a whole country, but especially the Yangon community and city community is really changing. There is respect towards LGBT, because there is a lot of visibility."

Hla Myat Tun,
Program Director, Colors Rainbow

Past UPR Cycles for Myanmar

First UPR Cycle (27 January 2011)

National Report Filed:¹ Myanmar's national report for the first UPR was published on 10 November 2010. The report did not mention either the LGBTIQ community or HRDs in general. It did, however, suggest that Myanmar was committed to increasing the number of workshops conducted on human rights issues in cooperation with the UN HRC and OHCHR.² The report also stated that legal provisions in effect in Myanmar protected against discrimination of any kind³ and guaranteed the right to peaceful assembly and freedom of association.⁴

Stakeholders Submissions Made:⁵ The summary of the 24 stakeholders' submissions was published on 18 October 2010. Without explicitly mentioning LGBTIQ HRDs, stakeholders expressed concern about the lack of freedom of expression and information;⁶ the existence of legal provisions allowing for the arrest and imprisonment of writers, journalists, and activists for solely exercising their right to freedom of expression;⁷ and legal provisions restricting the independence and functioning of CSOs.⁸

First UPR Cycle for Myanmar: Recommendations Received

In its first UPR, held in January 2011, Myanmar received a number of recommendations directly relevant to HRDs — though not explicitly referring to those working with the LGBTIQ community:

- Take immediate steps to end the persecution of HRDs (Austria).
- Investigate and punish all cases of intimidation, harassment, persecution, torture and forced disappearances, especially against HRDs (Uruguay).
- Abolish death penalty (Greece, Belgium, Italy).
- Immediately and unconditionally release all HRDs (Norway) and those imprisoned for peacefully exercising their rights to freedom of expression, association and assembly (United Kingdom).

¹ National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Myanmar, U.N. Doc A/HRC/WG.6/10/MMR/1, 10 November 2010, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/169/86/PDF/G1016986.pdf?OpenElement> (last visited 1 July 2017).

² First UPR cycle: *National Report*, Myanmar, para. 132.

³ First UPR cycle: *National Report*, Myanmar, para. 37.

⁴ First UPR cycle: *National Report*, Myanmar, para. 42.

⁵ *Summary of Stakeholders' submissions prepared by the Office of the High Commissioner for Human Rights: Myanmar*, U.N. Doc A/HRC/WG.6/10/MMR/3, 18 October 2010, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/169/86/PDF/G1016986.pdf?OpenElement> (last visited 1 July 2017).

⁶ First UPR cycle: *Stakeholders' Summary*, Myanmar, para. 44.

⁷ First UPR cycle: *Stakeholders' Summary*, Myanmar, para. 45.

⁸ First UPR cycle: *Stakeholders' Summary*, Myanmar, para. 50.

- Take steps to review domestic laws with a view to guaranteeing the right to freedom of expression, association and assembly (Indonesia).
- Remove all restrictions on freedom of expression, association and assembly in law and in practice (Norway, Canada, France).

Source: *Report of the Working Group on the Universal Periodic Review: Myanmar*, U.N. Doc A/HRC/17/9, 24 March 2011, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/123/72/PDF/G1112372.pdf?OpenElement> (last visited 1 July 2017).

Comments Received; Response to Recommendations: Myanmar noted without accepting the recommendation⁹ about the abolition of death penalty.¹⁰ It explained that “although the death penalty has not yet been abolished, Myanmar has never carried out the death penalty since 1988. The Myanmar practice is in line with the international law.”¹¹

During the UPR Interactive Dialogue, various countries expressed concerned about a number of alleged human rights violations in Myanmar.¹² Myanmar acknowledged the importance of this issue, detailing how “since 2006, the Government had issued a public notice in the press for complaints against human rights violations to the ministries concerned.”¹³ It also accepted the recommendation to increase access to human rights education and training, especially for its military and law enforcement officers.¹⁴ Nevertheless, every recommendation concerning the protection of the HRDs and following investigations of their persecution failed to enjoy Myanmar’s support.¹⁵

During the dialogue, there was also discussion of the state of fundamental freedoms in Myanmar.¹⁶ However, while Myanmar accepted the recommendation to review domestic laws to offer better protection of the freedoms of expression and assembly,¹⁷ it chose not to support

⁹ This is standard diplomatic language commonly used by States under review to declare that they do not accept a given recommendation.

¹⁰ First UPR cycle: *National Report*, Myanmar, paras. 106.9, 106.63-106.37.

¹¹ *Report of the Working Group on the Universal Periodic Review: Myanmar, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, U.N. Doc. A/HRC/17/9/Add.1, 27 May 2011, para. 9, available at http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/MM/A_HRC_17_9_Add.1_Myanmar_E.pdf (last visited 1 July 2017).

¹² First UPR cycle: *National Report*, Myanmar, paras. 26, 59, 66, 72, 83.

¹³ First UPR cycle: *National Report*, Myanmar, para. 88.

¹⁴ First UPR cycle: *National Report*, Myanmar, para. 104.9.

¹⁵ First UPR cycle: *National Report*, Myanmar, paras. 107.30, 107.56, 107.66.

¹⁶ First UPR cycle: *National Report*, Myanmar, paras. 35, 40, 64, 66, 82, 85.

¹⁷ First UPR cycle: *National Report*, Myanmar, para. 104.10.

recommendations which suggested the removal of restrictions on those freedoms from domestic laws.¹⁸

Second UPR Cycle (6 November 2015)

National Report Filed:¹⁹ Myanmar's report for the second UPR was published on 5 August 2015. It mentioned neither the LGBTIQ community nor HRDs in general. It did, however, report that Myanmar had made legislative reforms in order to improve the right to freedom of association. This included passing the 2012 Law Relating to the Rights of Peaceful Assembly and Peaceful Procession, enabling the right to stage demonstrations and gatherings, and the 2014 Registration of Association Law, allowing the formation of associations and providing for the free conduct of their activities.²⁰

Stakeholders Submissions Made:²¹ The summary of the 47 stakeholders' submissions was published on 28 August 2015. While LGBTIQ HRDs were not explicitly mentioned, for the first-time concerns were raised as to the laws criminalising consensual same-sex sexual conduct.²²

Second UPR Cycle for Myanmar: Recommendations Received

In its second UPR, held in November 2015, Myanmar received a number of recommendations in regards to HRDs:

- Release immediately and unconditionally all HRDs (Norway), ensure their protection (Chile), and create a safe environment for them to exercise their activities (Norway).
- Investigate and punish all cases of intimidation, harassment, persecution, torture and forced disappearances, especially against HRDs (Uruguay).
- Repeal Section 377 of the 1861 Penal Code to ensure the rights of women, religious minorities and the LGBTI community are protected (Australia) and to ensure that only non-consensual sexual relations between persons of the same sex are punishable (Spain).
- Abolish the death penalty (Panama, Greece, Holy See, Poland, Slovenia, Spain, Portugal, Sierra Leone, Switzerland, Luxembourg, France, Australia, Croatia, Lithuania).
- Increase efforts to counter incitement to violence and hate speech (New Zealand) targeting persons belonging to minorities (Algeria).

¹⁸ First UPR cycle: *National Report*, Myanmar, paras. 107.8, 107.47, 107.65.

¹⁹ *National report submitted in accordance with paragraph 15 (a) of the annex to Human Rights Council resolution 5/1: Myanmar*, U.N. Doc A/HRC/WG.6/23/MMR/1, 5 August 2015, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/172/10/PDF/G1517210.pdf?OpenElement> (last visited 1 July 2017).

²⁰ Second UPR cycle: *National Report*, Myanmar, paras. 38, 40.

²¹ *Summary of Stakeholders' submissions prepared by the Office of the High Commissioner for Human Rights: Myanmar*, U.N. Doc A/HRC/WG.6/23/MMR/3, 28 August 2015, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/194/21/PDF/G1519421.pdf?OpenElement> (last visited 1 July 2017).

²² Second UPR cycle: *Stakeholders' Summary*, Myanmar, para. 22.

- Ensure the effective protection of freedom of opinion and expression (New Zealand, Italy) including by reviewing and amending the 2014 News Media Law and Printing and Publication Law (Belgium, Ghana, Austria, Latvia).
- Ensure the effective protection of freedom of assembly by amending the 2011 Peaceful Gathering and Demonstration Law (Luxembourg, Sweden, France, Estonia).
- Continue the strengthening of the national human rights institutions and mechanisms (Nepal, Republic of Korea) and in particular the National Human Rights Commission (Egypt, Chile, Senegal, Portugal, Sierra Leone).

Source: *Report of the Working Group on the Universal Periodic Review: Myanmar*, U.N. Doc A/HRC/31/13, 23 December 2015, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/290/35/PDF/G1529035.pdf?OpenElement> (last visited 1 July 2017).

Comments Received; Response to Recommendations: During the UPR Interactive Dialogue, Myanmar indicated that it had not changed its approach to the death penalty, the legality of the Section 377 of the 1861 Penal Code, and the decriminalisation of same-sex sexual relations,²³ effectively noting without accepting recommendations in these regards.

Regarding the need to combat discrimination against vulnerable groups,²⁴ Myanmar stated that it “never exercis[e]d discriminatory practices based on race, religion or gender”²⁵ and that its Constitution prohibited all forms of discrimination.²⁶

Myanmar accepted the recommendation to ensure the protection of HRDs and create a safe environment for them.²⁷ At the same time, however, it refused to release political prisoners, arguing that “there is no arbitrary arrest or detention in the country on political grounds.”²⁸ Similarly, while Myanmar accepted recommendations concerning the protection of the freedom of expression²⁹ — except those dealing with hate speech directed towards minority

²³ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 144.11, 144.56-144.64, 145.21, 145.29; *Report of the Working Group on the Universal Periodic Review: Myanmar, Addendum, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, U.N. Doc. A/HRC/31/13/Add.1, 10 March 2016, para. 12, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/047/68/PDF/G1604768.pdf?OpenElement> (last visited 1 July 2017).

²⁴ Second UPR cycle: *Report of the Working Group*, Myanmar, para. 52.

²⁵ Second UPR cycle: *Report of the Working Group, Addendum*, Myanmar, para. 14.

²⁶ Second UPR cycle: *Report of the Working Group*, Myanmar, para. 71.

²⁷ Second UPR cycle: *Report of the Working Group, Addendum*, Myanmar, paras. 144.82-144.83.

²⁸ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 144.71, 145.23; Second UPR cycle: *Report of the Working Group, Addendum*, Myanmar, para. 13.

²⁹ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 143.62, 143.98-143.99, 144.80-144.81.

groups³⁰ — Myanmar did not support recommendations concerning the full enjoyment of freedom of assembly for citizens.³¹

Finally, recommendations concerning the strengthening of its National Human Rights Commission in accordance with Paris Principles were completely accepted by Myanmar.³²

Situation of the LGBTIQ Community and its HRDs in Myanmar

Right to Equality and Non-Discrimination

Criminalisation of Same-Sex Sexual Relations: While the United Kingdom long ago repealed its laws criminalising same-sex relationships, Myanmar is among 17 remaining former British colonies to continue to apply them.³³ Section 377 of the Penal Code of Myanmar,³⁴ an inheritance of the British colonial era that explicitly prohibits homosexuality, is rarely used by the police and judicial system. However, LGBTIQ community members regularly face arrest and prosecution under other sections of the Code,³⁵ such as Sections 290,³⁶ 292,³⁷ and 294.³⁸

Other laws in Myanmar are used more commonly to respond to the same objective, such as the 1950 Emergency Provisions Act, which prohibits anything "affecting the morality of a group of people or the general public."³⁹ Likewise, the 1945 Police Act authorises the police to take into custody "any person found between sunset and sunrise having his face covered or otherwise disguised, who is unable to give a satisfactory account himself."⁴⁰

Intimidation and Targeting of LGBTIQ Persons and HRDs: According to the Asian Human Rights Commission, such legal provisions facilitate the targeting, intimidation, and arrest of LGBTIQ individuals and HRDs.⁴¹ For instance, a study published in 2015, for which 25 members of the LGBTIQ community were interviewed, revealed that law enforcement officials regularly verbally harass, physically assault, threaten, and request bribes from LGBTIQ community

³⁰ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 144.51, 145.31-145.32; Second UPR cycle: *Report of the Working Group, Addendum*, Myanmar, para. 14.

³¹ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 145.33-145.36.

³² Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 143.42-143.48.

³³ "Facing 377: Discrimination and Human Rights Abuses Against Transgender Gay and Bisexual Men in Myanmar", *Colors Rainbow*, February 2015, p. 12, available at <http://equalitymyanmar.org/book/wp-content/uploads/2015/02/AnnualReport-rainbow.pdf> (last visited 25 July 2017).

³⁴ Myanmar, the Penal Code, India Act XLV. 1860, 1 May 1861, available at http://www.burmalibrary.org/docs6/MYANMAR_PENAL_CODE-corr.1.pdf (last visited 25 July 2017).

³⁵ "Facing 377: Discrimination and Human Rights Abuses Against Transgender Gay and Bisexual Men in Myanmar", *Colors Rainbow*, February 2015, p. 14.

³⁶ Section 290 of the Penal Code is entitled "Punishment for public nuisance in cases not otherwise provided for."

³⁷ Section 292 of the Penal Code is entitled "Sale, etc., of obscene books, etc."

³⁸ Section 294 of the Penal Code is entitled "Obscene acts and songs."

³⁹ "1950 Emergency Provisions Act", Act No. 17, 9 March 1950, Section 5(j), available at http://www.burmalibrary.org/docs19/1950-Emergency_Provisions_Act-en.pdf (last visited 25 July 2017).

⁴⁰ "The Police Act", Burma Act VI 1945, 19 March 1946, Section 35(c), available at http://www.burmalibrary.org/docs15/1945-Police_Act-en.pdf (last visited 25 July 2017).

⁴¹ "BURMA: Police Torture of Gay and Transgendered People", Asian Human Rights Commission, 21 July 2013, available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-137-2013> (last visited 25 July 2017).

members.⁴² In this regard, during Myanmar's second UPR, Lithuania encouraged Myanmar to put an end to the impunity of law enforcement officials alleged to have committed acts of torture and ill-treatment.⁴³ However, while Myanmar expressed full support for the recommendation,⁴⁴ concrete measures appear to be yet to be taken.

Role of the National Human Rights Commission: The Myanmar LGBT Rights Network stated in 2013 that it would file a complaint against the Mandalay police to the National Human Rights Commission — established in 2011⁴⁵ — following the police's alleged abuse and torture of gay men and transgender people while in detention.⁴⁶ However, the Commission initiated reforms in 2014 through the National Human Rights Commission Law which ensured that it did not effectively commence operations until 2015.⁴⁷ Since its inception, people have expressed concern over this mandate-limiting reform and the Commission's perceived lack of independence vis-à-vis the government.⁴⁸ This concern is consistent with various States' recommendations made during Myanmar's second UPR cycle, which Myanmar accepted, that Myanmar take steps to ensure the Commission exercised its mandate in compliance with the Paris Principles.⁴⁹

Freedom of Opinion and Expression

Government Position: In October 2011, the Director of the Press Scrutiny and Registration Division of the Burmese Ministry of Information, Tint Swe, publicly called for the abolition of media censorship in the State, stating that it was "not in harmony with democratic practices."⁵⁰ The year 2012 marked a turning point in terms of freedom of expression in Myanmar. The drafting of the Media Law and the Printing and Publishing Law, later enacted in 2014,⁵¹ were seen as a positive attempt by the government to dismantle the State's censorship apparatus. Freedom House, noted that official censorship significantly decreased in 2012 and pre-

⁴² "Facing 377: Discrimination and Human Rights Abuses Against Transgender Gay and Bisexual Men in Myanmar", Colors Rainbow, February 2015, pp. 36-46.

⁴³ Second UPR cycle: *Report of the Working Group*, Myanmar, para. 143.81.

⁴⁴ Second UPR cycle: *Report of the Working Group*, Myanmar, para. 143.81.

⁴⁵ See "Myanmar National Human Rights Commission formed", The New Light of Myanmar, 6 September 2011, available at http://www.burmalibrary.org/docs11/National_Human_Rights_Commission_Formed-NLM2011-09-06.pdf (last visited 25 July 2017).

⁴⁶ "Myanmar LGBT Rights Network to Sue Police for Alleged Abuse of 12 Gay and Transgender Detainees", Fridae, 25 July 2013, available at <http://www.fridae.asia/gay-news/2013/07/25/12375.myanmar-lgbt-rights-network-to-sue-police-for-alleged-abuse-of-12-gay-and-transgender-detainees> (last visited 25 July 2017).

⁴⁷ "Republic of the Union of Myanmar President Office (Order No. 23/2014) on the Formation of Myanmar National Human Rights Commission", 24 September 2014, available at <http://www.myanmarpresidentoffice.gov.mm/2015en/?q=briefing-room/2014/09/25/id-4232> (last visited 25 July 2017).

⁴⁸ "All the President's Men", Burma Partnership and Equality Myanmar, 25 September 2014, pp. 26, 20, available at <http://www.burmapartnership.org/wp-content/uploads/2014/09/All-the-Presidents-Men1.pdf> (last visited 25 July 2017).

⁴⁹ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 143.42-143.48.

⁵⁰ Kyaw Kyaw, Khin Maung Nyane & Aun Parameswaran Ponnudurai, "Call to End Media Censorship", Radio Free Asia, 7 October 2011, available at <http://www.rfa.org/english/news/myanmar/censorship-10072011203136.html> (last visited 25 July 2017).

⁵¹ News Media Law, Pyidaungsu Hluttaw Law No. 12/2014, 14 March 2014, unofficial translation, available at http://www.burmalibrary.org/docs17/2014-Media_Law-en.pdf (last visited 25 July 2017); Printing and Publishing Law, Pyidaungsu Hluttaw Law No. 13/2014, 14 March 2014, [Burmese only], available at http://www.burmalibrary.org/docs18/2014-03-14-Printing_and_Publishing_Law-13-bu.pdf (last visited 25 July 2017).

publication censorship was eliminated.⁵² Private newspapers were introduced in 2013 and journalists in exile started returning to the State.⁵³

Concerns Over Law Reforms: In 2014, however, concern grew over the newly enacted Media Law and Printers and Publishing Law,⁵⁴ as illustrated by Belgium, Ghana, Austria, and Latvia in their recommendations to Myanmar during its second UPR cycle.⁵⁵ Some concerns include the establishment of a Media Council, whose members are appointed by the government of Myanmar to regulate the media, and also the government's powers to ban reporting that would be harmful to "community peace and tranquillity."⁵⁶ Such provisions could easily be used against any professional reporting on LGBTIQ issues, considering that the so-called "sodomy law" inherited from the British colonial era is still in effect in Myanmar.

Hate Speech: There are also regular reports of hate speech against the LGBTIQ community in Myanmar. One of the most recent examples was a statement made by Myint Kyu, the Border and Security Affairs Minister for the Mandalay region, in 2015:

The existence of gay men who assume they are women is unacceptable and therefore we are constantly taking action to have the gays detained at police stations, educate them, then hand them back to their parents.⁵⁷

Freedom of Association and Assembly, and the Right to Freely Participate in the Cultural Life of the Community

IDAHOT and Pride Celebrations: In 2012, Aung Myo Min, founder of the non-governmental organisation (NGO) Human Rights Education Institute of Burma (now known as Equality Myanmar) returned to Myanmar after 24 years in exile in Thailand. Equality Myanmar was the first NGO to address issues relevant to the LGBTIQ community through its Colours Rainbow program.⁵⁸ In the same year, Colors Rainbow oversaw the first International Day Against Homophobia (IDAHO) held openly in Myanmar and organised in five different communities. The event was attended by 1,355 people including activists, NGO workers, UN officials, and

⁵² "Freedom of the Press: Burma", Freedom House, 2013, available at <https://freedomhouse.org/report/freedom-press/2013/burma> (last visited 25 July 2017).

⁵³ "Freedom of the Press: Burma", Freedom House, 2014, available at <https://freedomhouse.org/report/freedom-press/2014/myanmar> (last visited 25 July 2017).

⁵⁴ "Freedom of the Press: Burma", Freedom House, 2015, available at <https://freedomhouse.org/report/freedom-press/2015/myanmar> (last visited 25 July 2017); "Myanmar: News Media Law - Legal Analysis", ARTICLE 19, 2014, available at <https://www.article19.org/data/files/medialibrary/37623/News-Media-Law-Myanmar-EN.pdf> (last visited 25 July 2017); "Myanmar: Printing and Publishing Law", ARTICLE 19, November 2014, available at <https://www.article19.org/data/files/medialibrary/37765/14-11-11-LA-print-publishing.pdf> (last visited 25 July 2017).

⁵⁵ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 144.80-144.81, 145.31-145.32.

⁵⁶ "Freedom of the Press: Burma", Freedom House, 2016, available at <https://freedomhouse.org/report/freedom-press/2016/myanmar> (last visited 25 July 2017).

⁵⁷ "Letter to Mandalay Chief Minister U Ye Myint, re: Harassment of LGBT People in Mandalay", Human Rights Watch, 2 September 2015, available at <https://www.hrw.org/news/2015/09/02/letter-mandalay-chief-minister-u-ye-myint> (last visited 25 July 2017).

⁵⁸ "Aung Myo Min", British Council, Burma, available at <http://www.britishcouncil.org.mm/life-stories/interviews/aung-myo-min> (last visited 25 July 2017).

media representatives, and received broad media coverage.⁵⁹ Later in 2012, events were also organised for the Transgender Day of Remembrance in seven communities.⁶⁰

Growing Visibility of the LGBTIQ Community: These events, alongside the recent media reforms, led to a more visible LGBTIQ community and to the creation of other similar organisations in Myanmar. For example, the associations “YG” and “&PROUD”,⁶¹ created in 2013 and 2014 respectively, regularly organise events for the LGBTIQ community in Yangon. As of 2014, the Myanmar LGBT network consisted of 35 CSOs.⁶² In 2017, while Myanmar did not host a Pride event, some member of the LGBTIQ community hosted a day to dress nicely and pick up litter in their community as an act of public service while also aiming to gain some visibility.⁶³

Limited Law Reform: Despite its pledge to guarantee the right to freedom of peaceful assembly, Myanmar neither repealed nor amended the Right to Peaceful Assembly and Peaceful Procession Act⁶⁴ — a law that authorities use to arbitrarily arrest and imprison HRDs. In fact, Myanmar even confirmed its unwillingness to repeal or amend the Law in its response to all four recommendations made on this issue.⁶⁵

Conclusion

Since its first UPR cycle, Myanmar has made a number of efforts to address some of the recommendations it has accepted. Most notably, Myanmar has introduced law reforms to reduce media censorship in the State. Since 2012, the LGBTIQ community in Myanmar has also been steadily growing in visibility, with a growing CSO community and increasingly frequent LGBTIQ-related community events.

At the same time, progress appears to have stalled in a number of other areas, despite Myanmar's equal commitment in the UPR process to reforms in those areas. Although Myanmar committed itself in the first UPR to a review of freedom of assembly laws and in its second UPR to strengthening protection of HRDs, it still maintains a law in place that is used to arbitrarily arrest and imprison HRDs. Similarly, ill-treatment of LGBTIQ people by law enforcement officials, and anti-LGBTIQ hate speech, continues with impunity. In addition, questions have already been raised about the impartiality of the newly-operational National

⁵⁹ “Annual Report”, Human Rights Education Institute of Burma, 2012, p. 14, available at <http://equalitymyanmar.org/book/wp-content/uploads/2015/03/Annual-Report-2012.pdf> (last visited 25 July 2017).

⁶⁰ “Annual Report”, Human Rights Education Institute of Burma, 2012, p. 14.

⁶¹ “YG”, Facebook Page, available at <https://www.facebook.com/EventsYG/timeline> (last visited 25 July 2017); “&PROUD”, FilmFreeway, 2017, available at <https://filmfreeway.com/festival/YangonLGBTFilmFestival> (last visited 25 July 2017).

⁶² “Annual Report”, Equality Myanmar, 2014, p. 24, available at <http://equalitymyanmar.org/book/wp-content/uploads/2015/10/2014-EQMM-Annual-Report.pdf> (last visited 25 July 2017).

⁶³ Lae Phyu Pyar Myo Myint & Nyein Ei Ei Htwe, “Prejudice and progress: a snapshot of LGBT rights in Myanmar”, Myanmar Times, 1 June 2017, available at <http://www.mmtimes.com/index.php/lifestyle/26228-prejudice-and-progress-a-snapshot-of-lgbt-rights-in-myanmar.html> (last visited 25 July 2017).

⁶⁴ “The Right to Peaceful Assembly and Peaceful Procession Act”, Pyidaungsu Hluttaw Law No. 15/2011, 2 December 2011, available at http://www.burmalibrary.org/docs15/2011-Peaceful_Assembly_and_Procession_Act-en.pdf (last visited 25 July 2017).

⁶⁵ Second UPR cycle: *Report of the Working Group*, Myanmar, paras. 127, 145.33-145.36.

Human Rights Commission. Despite notable progress, therefore, many LGBTIQ persons and HRDs still face discrimination and harassment and their position in Myanmar remains vulnerable.

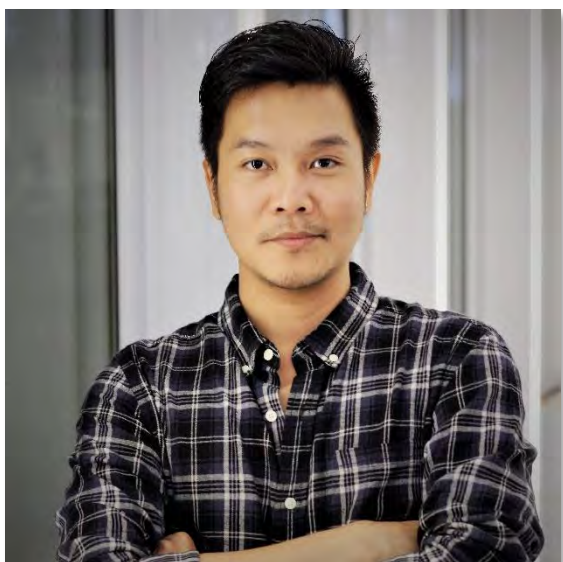
Recommendations

In the lead-up to the third UPR review of Myanmar in October/November 2020:

- CSOs should actively engage in monitoring the implementation of those recommendations Myanmar accepted during the first two UPR cycles so as to gather relevant data on the improvement of the human rights situation in the country and to report at the third UPR cycle.
- CSOs should continue documenting violations and abuses endured by LGBTIQ people and their defenders so as to provide recommending states and the relevant UN mechanisms with solid evidence-based information.
- CSOs and recommending states should emphasise the universality and benefit to Myanmar of reforms such as the abolition of capital and corporal punishment, and the decriminalisation of consensual same-sex sexual activity.
- CSOs and recommending states should work collaboratively to develop UPR recommendations for Myanmar's third cycle that focus on strengthening legal protections for and eliminating discriminatory practices against the LGBTIQ community and LGBTIQ HRDs.

Myanmar: LGBTIQ HRD Interview

Human Rights of LGBTIQ
Communities and HRDs:
Frontline Voices



**Hla Myat Tun,
Program Director, Colors Rainbow**

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

I studied public policy for my Masters and I realised that I want to do human rights. I realised that LGBT rights are more important and there was no one working on LGBT rights in Myanmar around 2010. I started focusing on LGBT rights in 2012. I worked with the LGBT community through the HIV/AIDS [Human Immunodeficiency Virus/Acquired Immune Deficiency Syndromes] programme in 2004. I was doing the HIV/AIDS prevention programme with some INGOs [international non-governmental organisations] in Myanmar

and I was training people on preventive health and HIV issues. Before 2012 I was working for general human rights, human rights documentation against land rights, women's rights, children's rights, torture, ethnic minority rights and transitional justice.

In 2012, I joined my current organisation, a leading LGBT organisation in Myanmar called "Colors Rainbow", and became an LGBT activist. Colors Rainbow was established in 2007 as a LGBT rights programme and through an NGO called "Human Rights Education Institute Burma." We decided to be established as an LGBT organisation in Myanmar and we relocated to Myanmar in 2013 after I joined the organisation. We were based in Thailand, Chang Mai, but in 2013 we relocated here back in Myanmar and we started doing all the advocacy work and awareness raising, training, events, public wellness and community events.

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

I would say the culture and the Burmese community. The Burmese culture in Myanmar - we never talked about gender and we especially don't really recognise LGBT gender at all. So, we started promoting LGBT identity, gender identity, in 2013, and just let the people know what LGBT gender is. We have different genders and they need

to understand the LGBT gender. So that's what we're doing now.

Have you ever felt personally at risk because of your work as a human rights defender (HRD)?

No, because we are different from other countries. Maybe in the past, during the military regime, I would say if I were a human rights activist that I would be at high risk. But I started after the election in 2011, so we relocated here in 2013, according to the given opportunities to establish a human rights organisation. So, I didn't feel I was in danger or at risk at all. So, and especially as an LGBT activist, we are okay. But Burma is a bit different from other countries because we have a lot of transgender people already, a lot of trans and transgender people, working as beauticians and makeup artists and are really accepted in that frame. But they are not really accepted if they want to become a teacher or a lawyer or a politician or another profession. So LGBT are not really highly visible — only trans women are visible everywhere, but not gay men and not lesbian women. So we started raising gender identity of LGBT people along with human rights and equality and non-discrimination based on sexual orientation and gender identity.

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

Promoting LGBT gender identity is a big and right strategy; being seen as HIV-related person do not empower LGBT to come out and be proud. So we started raising awareness about different genders and

sexual orientation and LGBT issues, and started talking about human rights from the gender perspective and abolishing Article 377, which criminalises homosexual acts in the country. Promoting gender identity is the strategy that I think is successful.

Have there been any celebrations of the LGBTIQ community in Myanmar recently?

The Transgender Day of Remembrance and Yangon's first parade occurred 20 November 2016. That's the first ever event that we organised as a march. It was not really like a pride parade because the theme was sad and set as Remembrance Day and Memorial Day, so we just informed the local police station that we are going to have a march; they provided security. We didn't make it really big because we didn't have time because the security provision was really short notice and we weren't well organised. But we made it.

On 17 May 2017, we organised IDAHOT [the International Day against Homophobia, Transphobia and Biphobia] at one of the shopping malls in Yangon and celebrated the day. There were thousands of people attended and the event was being receptive.

How have things have changed over the past few years regarding LGBTIQ rights and being a human rights defender in Myanmar?

LGBT rights are now raised from a human rights and gender perspective, but before that, the LGBT community was portrayed as always related with HIV/AIDS and sex workers, or STI [sexually transmitted infections], or those kinds of things. But since

we started talking about LGBT and gender identity, we also work with some journalists and the media, provide training for them, and we work with lawyers, so understanding of LGBT and gender identity is improving.

Especially the print media — they started writing about LGBT from a positive point of view and portray them as people with human rights and equality and from a human rights perspective. So the perception towards LGBT, I would not say changing as a whole country, but especially the Yangon community and city community is really changing. There is respect towards LGBT, because there is a lot of visibility and we appear on TV and talk shows in different medias and talking about equality and non-discrimination and equal opportunities in the workplace.

We also provide training for the grassroots level community, and the training also supports the LGBT human rights movement. Because of our training, the LGBT community has power and they realise that we deserve equal rights. So they have power, and they also post their identities on Facebook, and that kind of community empowerment is really effective within the young LGBT community.

So in the past there were only a few — five or 10 out and proud gay guys, even in Yangon city, but there were a lot of trans — but now there are a lot of gays and lesbians and they are out of the closet and really proud and they have high self-esteem of their identities. The online community is also really important and they are also changing things, they are providing their change in society. They are also contributing.

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

It's important to push our government, because honestly most of the members of parliament do not know what the UPR is, so we are introducing what it is and we are just warming up with the process. Only a few organisations are really aware of the UPR process and UPR recommendations. Especially for the LGBT community and organisations, Colors Rainbow is the only organisation that is really familiar with the UPR process and totally involved in the UPR process since the beginning, especially the second cycle.

So for both CSO members and organisations and the government, both sides, we still need to have a lot more information on the UPR process and recommendations. So it will take time for us to really work on the UPR process because the government did not know much about it. At the moment, CSOs seem to know more about the UPR recommendations than the government does.

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

Myanmar is changing really fast. I am really positive with this current government because we voted for them because we believe that they respect human rights and equality and non-discrimination. But not all of the current government and members of Parliament are aware of LGBT issues. Even

the senior officials of the current government, the NLD [National League for Democracy], do not realise that gender issues are important in Myanmar.

Is there anything in particular you would like to talk about or say that we haven't covered?

Our government and members of Parliament really need to be aware of, and recognise, the existence of the LGBT community and they need to see the LGBT community as people or a group of people, or the citizens, that they got votes from. So, they have to also consider the rights of the people who voted for them, which is very important, because we voted for them because we believe in the NLD and we believe in their values of human rights. But they have to prove that.

Before, they said they will abolish Article 377, they will repeal Article 377. They know and are aware of the existence of the LGBT community, but now they are in power they

have to prove that. They have to prove what they said.

The LGBT community, ourselves, we need to follow up on what the government has said, what they have committed and what they have promised. Since the government is very new, and they are taking their time to start their administration and operation in the country, because all of the Parliamentarians in the current government are new to the Parliament and they have never experienced this before. So, they have a lot of problems, and at the same time, we are also giving them time and taking our time for ourselves to be able to promote, and build our capacity on advocacy and lobbying, and also collating data for the advocacy and lobbying purpose in upcoming years. So, 2016 is our preparatory time for us and for them. So, we haven't really been pushing the government in 2016 because this is the year for us to build capacity and data gathering and this kind of information gathering for our effective advocacy and lobbying purpose in the upcoming four years.

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.

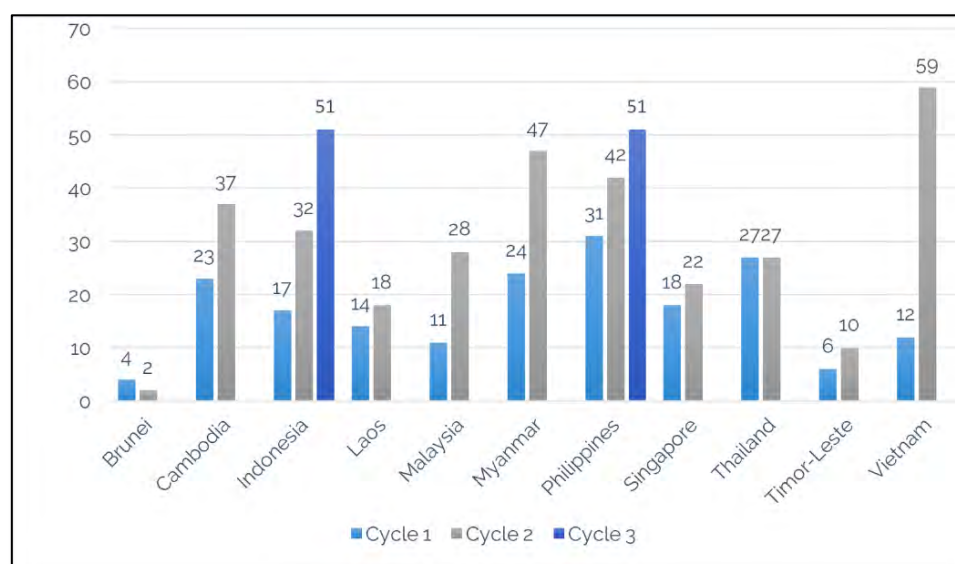


Figure 1: Southeast Asian Stakeholder UPR Submissions in Each Cycle

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%2bxQTspR9eqkzThSr5nhgfhp> (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.

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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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