

Sexualities, Genders and Rights: Implications for the Asian Region

Keynote Address
Conference on Sexualities, Genders and Rights in Asia
Bangkok, 7 July, 2005.

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The topic at hand is challenging because it invites us to recognize human biodiversity – with a degree of self-reflection and open-mindedness. This invitation to be humanistic and pluralistic is evidenced clearly in the great array of papers and abstracts submitted for this international conference on sexualities - from all over the world. The words used by these written submissions are wonderful and wondrous in their diversity and ingenuity. Many are most telling in their apprehensions, aspersions and aspirations, and call upon us to respond with a sense of humility and humanity. In all seriousness, a sense of humour is also needed at times in the face of the global environment of felicitous filibuster and rambunctious rancour.

Let us therefore listen to some of the words. “Erectile dysfunction”. “Ointmented vagina” (sic). “Bisexual and transgender intersections”. “Spatial scale, queer subjectivities”. “Treasonous sex”. “Heteronormativity”. “Gay specificity”. “Homoeroticism”. “Demonization of homosexuality”. “Valorisation of the heterosexual patriarchal family”. “Homophobia”. “Penile gallery”. “Polysexual pedagogies”. “Aggressive masculine dialectics.” “Alternate sexualities”. “Glocal feminism”. “Non-heterosexual identity construction”. “Non-visual queerness”. “Lesbian pulp, queer Gothic fiction”. “Coming out, sticking out”. “Lesbian aesthetics”. “Transgender culture, Thai boxing”. “Queer cosmopolitics”. “Panhumanism, cosmopolitanism”. “Theatrics of cruising”. “Mutual fulfillment, unilateral security”. “Heterotopia”. “Eroticised intimacy continuum”. “Homosocial desire, heterosexual hegemony”. “Faux utopia, alternative queer reality”. “Diasporic Asian butch dykes”. “Transgressive masculinities”. “Heterosexism”. “Fag hags”. “Pre-sexual minorities”. “Postcolonial perverse”. “Homo-phil family”. “Performativity”. “Virtualized gay identity”. “Lesbian continuum”. “Queer diaporas, cosmic blood”. “Regionalist imagery”. “Androgyny, trans-species sexualities”. “Trangenderedness”.

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What ever happened to “Intellectual orgasm” or “ Organic inter-sexualism”? The whole point of this rich tapestry of words is that it invites us to be liberal and not to do unto others what you would not wish done to you. From a human rights perspective, it has not always been this way, nor is it totally settled today.

First, there is the conundrum of approach. Some people approach sexualities and genders from the angle of a person’s conduct rather than state of being. Is it a matter of “doing” or “being” ? Some really believe that homosexuality, lesbianism and transgenderedness are based on conduct – “the doing” and can thus –should thus be changed. Of course, I disagree with this, since the issue is about the reality of “being”. Yet, I must also be aware that I should not only talk to the converted but somehow find a bridge to talk with the unconverted. Fortunately, the advocacy of human rights provides us with this bridge, because a basic principle of human rights is non-discrimination – treat everyone decently irrespective of a person’s sex, race, social origin or other status.

On a related front, I am truly conscious of definitional challenges facing terminology and its proliferation. Sexualities can be taken imply to the condition or state of being sexual or concerned with sex. Sex itself has many meanings – traditionally and biologically, a character being male or female, and now something more. Gender denotes the relationship between that character and the social and other environment, particularly affecting image, self-image and status. Meanwhile, sexual orientation(s) has crept into the international vocabulary to denote propensities especially from the angle of heterosexuality, homosexuality, lesbianism, and bisexuality. On another front, the newish terminology of “gender identities” calls upon the public to enable persons to self-define in regard to how they see themselves rather than being cast in the mould of the identity conferred at birth or assigned by society.

In the United Nations (UN), the struggle even to use some of these terms is well-known, particularly through rickety attempts to pass UN resolutions on non-discrimination in regard to sexual orientation(s). The hill is even steeper in regard to how to insert gender identities into the international and national mindset. Intriguingly also the “s” might be missing from all the terms above in some discourses, posing a key question of how pluralistic we are.

Second, I must be cognizant of history and how to prevent various historical calamities from re-happening. A multitude of transgressions have taken place against those wishing to express themselves differently from the heterosexual norm. Remember well the pink triangle which was pasted on to homosexuals in concentration camps and the genocide that took place during the Second World War. More recently, history did repeat itself – and is still doing so. Remember the Taliban in Afghanistan and what they did to those suspected of homosexual behaviour. I have three versions of what they did. They buried them alive, threw them over walls to kill them, and/or crushed them under a pile of bricks or stones. Clearly this attack on human life and integrity was and is heinous and execrable. Whether or not one likes those expressing themselves differently in terms of sexualities and genders, there is absolutely no excuse for use of violence against them. And this violence is a truly abhorrent and egregious violation of human rights.

Third, there is inevitably a cultural challenge vis-a-vis those who advocate a variety of sexualities and genders beyond the male-female stereotype. It is argued by not so liberal lobbies that this or that religion or cultural practice rejects various expressions of sexual orientations or identities beyond heterosexuality. In this context, the usual polemic is to claim that homosexuality and related practices are a “sin”. Yet, if we look hard and fast at the context, we may find that this or that religion may have a more liberal voice which needs to be identified and expanded. It is necessary to look for a more liberal interpretation of religions and cultures – which also exists, offering a safe haven from dogma and strictures which are not really rational.

The point is that religions and cultures are by their very nature evolutive, rather than static. If we understand that their axioms have to be seen contextually, of course they are open to change in accordance with the times, and it is their more liberal voices with whom we should network. That resonance often shows the way towards a more humane approach. What human rights offers us is an important instrument of change, an utensil for rationalisation and re-interpretation from a more secular angle. The comfort zone of human rights is its overarching umbrella: universal protection of humans – whoever they are and whatever their designation - protection from stigmatization, ostracization, marginalization, alienation and exclusion, especially where the national, local and cultural settings are dysfunctional or dysfunctioning.

Fourth, those of us who tend to be legalistic should take stock of the fact that the issue of rights, sexualities and genders is dependant upon much more than the law. There is an intensely psychological bent to the whole affair and how the collective psychology, including at times that of the medical profession, determines or contributes both to the progress and regress of those claiming to be different sexually. We need only note that in one big country, its professional bodies concerning psychiatry and psychology only de-listed homosexuality from its list of mental illnesses in the 1970s. The World Health Organization followed suit over a decade later. Thailand wisely took a similar step some five years ago. How liberating to find increasing acknowledgement that to be is simply to be, and not to pretend to be something else. Yet, even in some of the most developed settings, some psychologists and psychiatrists still harbour the feeling that homosexuality and other expressions of sexual orientations and identities are an illness. This is evidenced by the availability of conversion or reparative therapy, offered to some candidates, allegedly to change them into heterosexuals - a service questioned by other sectors of the medical sector. While this medical debate continues, what is clear from a human rights perspective is that we need to mobilize society as a whole, including the medical profession to abide by human rights and not fuel misconceptions conducive to stereotypes and prejudices, resulting in discrimination and violence.

Fifth, it is necessary to avoid confusions and the stoking the fires of confusion, at times caused by the media itself. Being a homosexual does not imply that one is automatically a paedophile. Indeed, a paedophile is someone who likes to have sex with children and the person might be a heterosexual and not a homosexual at all. Likewise, there is no evidence to suggest that homosexuals who adopt children are more likely to molest children than heterosexuals are likely to. Incidentally, sodomy

which is often stereotyped as a homosexual practice also takes place between man and woman.

Interlinked with this is the question of privacy which human rights try to safeguard as a right. Private sexual acts between consenting adults should be respected and it is the prism of human rights which helps to set the parameters between the public realm where laws and policies are directed by Governments to control the conduct of individuals and groups, on the one hand, and the private realm where individuals and groups should be able to lead their lives in peace and freedom, on the other hand. Yet, this is often transgressed by the public realm which seeks to impinge and infringe - on the basis of the so-called public interest which is in reality no more than the draconian vision of the Governmental interest or that of a powerful illiberal group.

At this juncture, it is instructive to test the theme “sexualities, genders and rights” from a more rights-oriented perspective with key lessons for and from the Asian region. First, it should be underlined that the best parts of Asian traditions, religions and philosophies preach compassion, peace and liberality of thought and action. This is a key message for all countries and societies. The preferred Asian wisdom is already there if we open our eyes to its presence, and it is a basis for human rights, human well-being and human dignity – irrespective of the origins of the human person. It should also not be forgotten that the human person is not only a material being but also a spiritual being. The spiritual element thus invites us to address not only the cognitive (knowledge-based) element of life but also the attitudinal, emotional and behavioural aspects of humanity, as well as that which transcends the corporeal entity. That is also a common platform with human rights which has an ethical rationale underpinning them, responding to not only physical needs but also psychological and non-material aspirations.

Second, as implied above, sexualities and genders are intertwined with sexual orientations and identities in the plural. It is really about a degree of autonomy in choosing our state and status in our sexual and other relations with society at large. While homosexuality and lesbianism are often under discussion, the net actually has to be cast much wider. It should cover transgendered and transsexual cases where a person may seek to change one’s gender to become another, at times through medical help. From the angle of law and rights, what is most worrying is that many countries (over 80) still have various national laws which criminalize same-sex relationships. From an internet website, nearly twenty countries globally are identified as having laws which can imprison people for life or send them to death for homosexual behaviour. Over ten of these countries are in Asia, especially West Asia. Out of scores of countries which still prohibit homosexuality, a number are found in West, South and Central Asia.

This calls for stocktaking and reforms, but it inevitably faces a degree of intransigence from those authorities which invoke religious and cultural grounds against homosexuality, in addition to the alleged “sin” factor. Even if it may be too difficult to get everyone to agree on the premise that it is not a sin, from a human rights perspective, at least one can start from the premise that it is objectionable to criminalize homosexual behaviour between consenting adults in their private context. This preferred position rests upon international law, and is also the law of many

countries today. Asian countries, and elsewhere, should self-reflect to mirror the international position transparently and effectively.

Third, like other less liberal settings, some Asian countries use laws and policies not only directly but also indirectly to counter those who wish to express their sexual orientations and identities. Classic cases include laws against sodomy, laws against debauchery and laws to protect public morals and public security, all of which confer enormous power upon the authorities to exercise untrammelled discretion vis-a-vis others. The official line that “this is not a question of homosexuality, but debauchery” is a means of diverting attention for the same end of curbing homosexuality. At times matters are aggravated by the fact that anti-sodomy laws are used for political ends to annihilate political opponents, infamously manipulated in one Asian country in recent years. This tendentious use of national laws is a travesty of good faith and it is the perspex of human rights which helps us to expose these anomalies. No matter what laws, policies or practices, whatever their name or designation, they cannot escape from being measured against international standards and it is the universal guarantees of human rights – their universality – which provide the basic minimum standards against which national laws, policies and practices must be measured and reformed.

Fourth, at the national level, there have been some bold steps in liberalizing laws and practices in relation to sexual orientations and sexual identities. Famously the recent law in Spain permits marriage between those of the same sex as well as conferring concomitant rights similar to those of heterosexuals. This is the case of the Netherlands, and Canada has followed suit. Interestingly, a number of countries now have laws which allow transsexuals to change the sexual identity attributed to them at birth. This moves away from the biological approach for birth certification to the sexual identity approach for identity certification. In Asia, China, Japan and Singapore have made the same change. While others have not moved this far yet, as a starting point, at least it can be advocated that all Asian countries should decriminalize homosexual behaviour between consenting adults in the private sphere. Progressively, steps can be evolved to liberalize legal positions on sexual orientations and sexual identities in other areas, bearing in mind the need to work with and prepare public opinion for change. Needless to say, good laws should also be well implemented, and lax law enforcement is still pervasive on many fronts.

Fifth, references to international, universal human rights standards such as human rights declarations and treaties/conventions are important as benchmarks. Yet it should be noted that the only Convention to which are all Asian countries are parties is the 1989 *Convention on the Rights of the Child*. However, all Asian countries at least verbally accept the 1948 *Universal Declaration of Human Rights*. Even though many Asian countries are still not parties to most human rights Conventions, including the 1966 *International Covenant on Civil and Political Rights*, the weight of that Covenant and related jurisprudence through its monitoring body – the Human Rights Committee – exert more than persuasive influence on the preferred position for Asian countries.

In a classic case concerning Australia – *Toonan v Australia*, the Human Rights Committee in 1992 deliberated upon the issue of human rights and the Tasmanian law which at the time incriminated homosexual behaviour. The

Committee recommended reform of such law, as it was inconsistent with the *Covenant*, and later such reform took place. The Human Rights Committee particularly referred to Article 17 of the *Covenant* concerning the right to privacy as protecting homosexual acts between consenting adults (done in private) and interpreted the word “sex” in Articles 2(1) and 26 as encompassing sexual orientation - one of the grounds for protection against discrimination.

The relevant Articles read in full as follows:

“Article 2

(1) Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...”

“Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.”

“Article 26

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

The Committee’s reflections in the *Toonen* case are of interest not only from the angle of the right to privacy and non-discrimination but also from the angle of the Committee’s rejection of misconceptions concerning HIV/AIDS and homosexuality, seen as follows:

“ 8.5 As far as the public health argument of the Tasmanian authorities is concerned, the Committee notes that the criminalization of homosexual practices cannot be considered a reasonable means or proportional measure to achieve the aim of preventing the spread of AIDS/HIV. The Australian Government observes that statutes criminalizing homosexual activity tend to impede public health programmes “by driving underground many of the people at the risk of infection”. Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.”

The Committee on Economic, Social and Cultural Rights under the 1966 *International Covenant on Economic, Social and Cultural Rights* has been innovative in referring explicitly to sexual orientation in some of its deliberations known as General Comments. The most instructive is perhaps General Comment No.14 on the Right to the Highest Attainable Standard of Health, whose reference to non-discrimination is as follows:

“ 18. By virtue of Article 2.2 and Article 3, the Covenant proscribes any discrimination in access to health care and underlying determinants of health, as well as to means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), sexual orientation and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal enjoyment of exercise of the right to health.”

Sixth, there are also various special procedures of the UN which monitor the situation of human rights globally, even where States do not agree to such monitoring. This is part of the universal jurisdiction of the UN backed by the *United Nations Charter*. Several of these special procedures have monitored the implementation of human rights by Asian and other countries, including in relation to sexual orientations. For example, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has referred to many cases where those expressing their sexual orientations have been murdered. The resolutions concerning the mandate of this procedure have proved to be some of the rare instances where the UN has referred explicitly to the term “sexual orientation”. For example, the UN Human Rights Commission Resolution, E/CN.4/RES/2002/36 of April 22, 2002 states as follows:

“6. Reaffirms the obligation of Governments to ensure the protection of the inherent right to life of all persons under their jurisdiction and calls upon Governments concerned to investigate promptly and thoroughly cases of killings committed in the name of passion or in the name of honour, all killings committed for any discriminatory reason, including sexual orientation...

12. Takes note of the Report of the Special Rapporteur, in particular the attention given therein to violations of the right to life of women, refugees and internally displaced persons, persons belonging to national or ethnic, religious and linguistic minorities, persons expressing their right to freedom of opinion and expression and persons killed because of their sexual orientation.”

Seventh, there have been attempts to have more explicit enunciation and protection of human rights in regard to sexual orientation at the international level. There was a famous attempt in 2003 to submit a resolution on this at the UN Human Rights Commission. However, the attempt was blocked by conservative States, including some less than liberal Asian countries.

Pending more progressive developments concerning explicit coverage of the above, one can also try to expand coverage indirectly/impliedly. This was done in part in the *Toonen* case mentioned by means of liberal interpretation. This has also

been done in relation to international refugee law whereby the notion of protection for “social group” has been interpreted to cover those claiming discrimination in regard to sexual orientations, particularly homosexuals, thus preventing their being sent back to face dangers in their country of origin.

And eighth, the international perspective can be complemented by various regional approaches of a liberal kind, as seen in Europe. The European human rights protection system is well known, and several European countries are moving towards a range of rights for same sex partnerships, including in regard to social welfare, pensions and mobility. This is increasingly recognized at the institutional level, such as through the European Court of Human Rights and the European Union. By contrast, Asia does not yet have an inter-governmental human rights protection system along the line of the European system, and the region may be too heterogeneous and vast to have a common inter-governmental platform. Yet, Asia itself is not monolithic. Several countries show the way by adopting a liberal approach towards sexual orientations and identities. There has been a flurry of films and artistic outpour from Asia – whether it be “Tropical Malady” or something else (“Adventures of Iron Pussy”?) - which invite the whole continent and beyond to reflect well on the situation and set it in a human rights perspective. The region also has strong non-governmental networks, with many catalytic non-governmental organizations (NGOS), and academic institutions which provide an important regional input to protect human rights. They exemplify the humane face which helps to open the door to more liberal treatment of sexual orientations and sexual identities.

The lessons learnt from the human rights dimensions above is that the advocacy in regard to sexualities and genders linked with sexual orientations and sexual identities must convey adamantly at least two key messages which are the bedrock of human rights: No Discrimination and No Violence. In this unfinished journey, the preferred directions for the future include the following:

- **promote global, national and local socialization and mobilization processes which represent a liberal approach towards sexualities, genders, sexual orientations and sexual identities, identifying and utilizing well progressive interpretations of religions and cultures to reject discrimination and violence;**
- **adjust medical texts and positions so that they do not view homosexuality and other expressions of sexual orientations and identities as mental illnesses;**
- **liberalize national responses towards sexual orientations and sexual identities, and reform national laws and practices which incriminate homosexual behaviour between consenting adults in the private sphere, integrate the notion of non-discrimination into the national settings, such as through the national Constitution, and enforce them to encompass sexual orientations and sexual identities;**

- **foster accession to international human rights treaties and implement them well, including in regard to the diversity of sexualities and genders, and even without such accession, encourage countries to follow the path of these treaties and integrate them into the national system;**
- **follow the recommendations of international bodies which protect human rights, including the various human rights committees under human rights treaties and the special procedures of the UN, such as the Special Rapporteurs;**
- **interpret human rights in a liberal manner directly and indirectly so as to cover sexual orientations and identities, at least on a step-by-step progressive basis;**
- **provide more space for the voices of those representing a plurality of sexual orientations and sexual identities, and members of civil society, including NGOs, to protect human rights and build a humane attitude towards sexual orientations and sexual identities;**
- **avoid stereotypes, overcome misconceptions such as the mistaken belief that homosexuality spreads HIV/AIDS, work with communities and the media to maximize their role as a voice of reason and liberality, through sustained awareness-raising and educational processes, and attend to the physical/psychological health and other needs of all persons without discrimination;**
- **nurture education from a young age which fosters an open mind to human biodiversity and non-discrimination, and disseminate positive role models respectful of human rights;**
- **guarantee nationally and internationally that there can be no condoning of violence or discrimination against all groups and that action must be taken preventively and curatively to overcome negative practices.**

