
DECRIMINALIZING SAME SEX RELATIONS IN ASIA: SOCIO-CULTURAL FACTORS IMPEDING LEGAL REFORM

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I. INTRODUCTION

In 1967, homosexual acts between consenting adults were decriminalized in England and Wales.¹ Almost half a century later, however, it remains an offense to engage in same sex acts or same sex relations² in every former British colony in Asia, with the exception of Hong Kong.³ These former colonies include Bangladesh, India, Pakistan, and Sri Lanka in South Asia, and Brunei, Malaysia, Myanmar and Singapore in Southeast Asia.⁴ Each inherited a penal code from its erstwhile colonial government that, to this day, explicitly or implicitly prohibits same sex relations.⁵

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1. See Sexual Offences Act, 1967, c. 20, § 1 (Eng.) (decriminalizing homosexual acts in private between persons who had reached the age of 21; the age of consent was further lowered to 16 in 2000, equalizing the age of consent for opposite-sex relations).

2. The term “same sex relations” is diverse and is meant to include sexual expression between all persons of the same sex, not necessarily limited to persons who identify as lesbian, gay, bisexual, or transgender (LGBT).

3. See Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT’L & COMP. L. REV. 337, 338 (1997) (discussing the decriminalization of same-sex acts in Hong Kong in 1991, prior to decolonization in 1997).

4. See, e.g., No. 45 of 1860, BANGL. PEN. CODE (1860), c. 16, § 377 (criminalizing same-sex relations) (Bangladesh); No. 45 of 1860, PEN. CODE § 377 (1860) (India) (criminalizing “voluntary carnal intercourse against the order of nature”); No. 45 of 1860, PAK. PENAL CODE (1860), c. 16-A, § 377 (criminalizing voluntary “carnal intercourse against the order of nature”) (Pakistan).

5. See, e.g., BANGL. PEN. CODE, c. 16, § 377; INDIA PEN. CODE § 377; PAK. PEN. CODE, c. 16-A, § 377.

The persistent criminalization of same sex relations in these jurisdictions (collectively referred to in this article as “retaining jurisdictions”) seems particularly aberrant in light of the dramatic changes in norms related to homosexuality in recent years.⁶ In many countries, especially those in Western Europe, North America, and Latin America, legal and social reforms have progressed far beyond decriminalization, towards equal civil rights and broad social acceptance for lesbian, gay, bisexual, and transgender (“L.G.B.T.”) persons.⁷ Countries in North America and Western Europe, including the United Kingdom (“U.K.”), have increasingly incorporated L.G.B.T. rights into their foreign policy platforms and, in the process, have intensified calls to legalize same sex relations in other parts of the world.⁸

This article considers why former British colonies in Asia have resisted calls to decriminalize same sex relations and as a related matter, what prospects exist for reform. This article argues, *inter alia*, that recent trends elsewhere—especially in the West—do not predict the decriminalization of same sex relations in South and Southeast Asia and indeed, may make it more difficult to achieve.⁹ Nevertheless, at least some of the factors that have sustained the criminalization of same sex relations in Asia far can be addressed, and even reversed, by governmental and non-governmental measures.

Section II explains the legal framework for criminalization of same sex relations in Asia. Section III identifies several socio-cultural factors in the continued criminalization of same sex relations. These include (i) a common but misleading assumption

6. See *Human Rights: The Gay Divide*, ECONOMIST (Oct. 11, 2014), <http://www.economist.com/news/leaders/21623668-victories-gay-rights-some-parts-world-have-provoked-backlash-elsewhere-gay> (extolling changes in norms related to homosexuality as “one of the wonders of the world”).

7. *Id.*

8. See, e.g., *Cameron Threat to Dock Some UK Aid to Anti-Gay Nations*, BBC NEWS (Oct. 30, 2011), <http://www.bbc.com/news/uk-15511081> (discussing British Prime Minister David Cameron’s call for aid from the UK to have “more strings attached” for developing countries whereby recipients would need to “adhere to rules on poverty reduction, respect of human rights, good governance, and domestic accountability”).

9. The terms “Western” or “the West” are imprecise but are used in this article to refer generally to countries (and especially, governments) situated in North America and Western Europe.

that the statutory provisions are “unenforced,” which tempers any will to repeal them; (ii) a widespread misconception that the statutory provisions are necessary to prevent child abuse,¹⁰ (iii) a popular and political desire—steeped in the collective memories of colonization—to assert ‘cultural’ and ‘moral’ independence from the West,¹¹ (iv) a public discourse and legal framework that focuses on addressing religious and ethnic divisions, at the expense of gender and other inequalities, and (v) the prevalence of strong extended family networks and multigenerational households, which inhibit notions of intimacy and privacy that are crucial to garner popular support for decriminalization.

In explaining these factors, this article refers to norms throughout Asia, with particular attention to the Sri Lankan experience. Sri Lanka has received relatively little consideration in international legal literature on L.G.B.T. issues, yet is typical of Asian countries that criminalize same sex relations in many respects.¹² It is, for example, a former British colony that seldom enforces its prohibition of same sex relations in local courts.¹³ Like most of its neighbors, its legal framework permits different religious and ethnic groups to follow separate family laws (known as “personal laws”) and thereby

10. See HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF “SODOMY” LAWS IN BRITISH COLONIALISM* 51 (2008) (citing Yasmin Tambiah, *Realizing Women’s Sexual Rights: Challenges in South Asia*, 67 *NORDIC J. INT’L L.* 97, 102 (1998) (“One activist argues that ‘the criminalization of lesbianism’ in Sri Lanka derives not just from a ‘lack of clarity’ about how to classify sexual behavior before the law, but also from the stigma created by the ‘confusion between male homosexuality and pedophilia.’”)).

11. See Achim Hildebrandt, *Routes to Decriminalization: A Comparative Analysis of the Legalization of Same-Sex Sexual Acts*, 17 *SEXUALITIES* 230, 230 (2014) (“Countries that still criminalize same-sex acts are increasingly put under pressure by the international community to legalize them, which most African and Muslim countries have withstood so far. External intervention is perceived as the continuation of colonial politics, particularly in sub-Saharan Africa.”).

12. See, e.g., SRI LANKA PEN. CODE (1885), § 365 (using the same or similar language other countries in Asia have used to criminalize same-sex relations).

13. See BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, STATE DEP’T, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2013: SRI LANKA* 51 (2013) (reporting that although same-sex sexual activity is punishable by up to 10 years in prison, the provisions are rarely enforced); EQUAL GROUND ET AL., *HUMAN RIGHTS VIOLATIONS AGAINST LESBIAN, GAY, BISEXUAL, AND TRANSGENDER (LGBT) PEOPLE IN SRI LANKA: A SHADOW REPORT 2* (2013) (reporting no convictions for same-sex sexual activity since Sri Lanka’s independence in 1948).

tolerates family laws that discriminate on the ground of gender.¹⁴ Similar to its neighbors, Sri Lanka has not experienced a significant change in the incidence of its multigenerational households.¹⁵

This article concludes by identifying and evaluating strategies to foster a supportive political and socio-cultural climate for decriminalization. A study of the factors that contribute to the criminalization of same sex relations in Section III suggests, for instance, that Western governments should avoid heavy-handed demands for decriminalization, as this feeds a mistaken and counter-productive view of Western ‘ownership’ of L.G.B.T. rights.¹⁶ This is especially true of the U.K. government,¹⁷ which could consider publicly acknowledging and even apologizing for its historical role in exporting the criminalization of same sex relations—especially when pressing former colonies to decriminalize.¹⁸

14. See Dinusha Panditaratne, *Towards Gender Equity in a Developing Asia: Reforming Personal Laws Within A Pluralist Framework*, 32 N.Y.U. REV. L. & SOC. CHANGE 83, 84, 92 (2007).

15. See Human Dev. Dep’t: South Asia Region, The World Bank, *Sri Lanka: Addressing the Needs of an Aging Population*, at 13-17, Rep. No. 43396-LK (June 12, 2008).

16. See Erik Voeten, *The Recriminalization of Homosexuality in India and the Potential for Broader Backlash*, WASH. POST (Dec. 11, 2013), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/11/the-recriminalization-of-homosexuality-in-india-and-the-potential-for-broader-backlash/>; Max Fisher, *From Colonialism to ‘Kill the Gays’: The Surprisingly Recent Roots of Homophobia in Africa*, WASH. POST (June 27, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/06/27/from-colonialism-to-kill-the-gays-the-surprisingly-recent-roots-of-homophobia-in-africa/> (“Even Liberia, though never a colony, has seen homophobia worsen after a U.S. effort to pressure Nobel peace prize-winning President Ellen Johnson Sirleaf to repeal the country’s sodomy law. She refused.”).

17. See *Commonwealth Citizens Speak Out on Same-Sex Discrimination*, CHANNEL 4 NEWS (Nov. 11, 2013), <http://www.channel4.com/news/homosexuality-lesbian-gay-bisexual-commonwealth-sri-lanka> (“[Docking U.K. aid for nations that criminalize homosexuality] was criticized by some charities as it could make members of the L.G.B.T. community targets . . . Ms. Sen [a former commonwealth Head of Human Rights] said: ‘It is very difficult for Britain because of its legacy of colonialism. Most of the legal provisions that criminalize homosexuality . . . originally came from Britain.’”).

18. See Ranga Jayasurya, *Gay rights at CHOGM*, CEYLON TODAY (Nov. 10, 2013), <http://www.ceylontoday.lk/59-47138-news-detail-gay-rights-at-chogm.html> (referencing Sherman Rose, a gay rights leader in Sri Lanka calling for action by the British Prime Minister to “set the record straight” on the archaic law that criminalizes homosexuality); see also KALEIDOSCOPE TRUST, SPEAKING OUT: THE

II. THE LEGAL FRAMEWORK OF CRIMINALIZATION

A. STATUTORY FRAMEWORK

In South and Southeast Asia, same sex relations were, and continue to be, criminalized in every former colony of the British Empire, including Bangladesh,¹⁹ Brunei,²⁰ India,²¹ Malaysia,²² Myanmar,²³ Pakistan,²⁴ Singapore,²⁵ and Sri Lanka.²⁶ These retaining jurisdictions criminalize same sex relations through legislative provisions enacted by former colonial governments²⁷ that prohibit

Rights of LGBTI Citizens from Across the Commonwealth 3-4 (2014) (acknowledging the role of the British empire in criminalizing same-sex relations, and stating that the “law is still on our statute books—a relic of empire that has no place in a modern Commonwealth”).

19. See BANGL. PEN. CODE, c. 16, § 377 (“Whoever voluntarily has carnal intercourse against the order of nature . . . shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”)

20. See No. 16 of 1951, BRUNEI PEN. CODE (1951), c. 22, § 377 (“Whoever voluntarily has carnal intercourse against the order of nature . . . shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”).

21. See INDIA PEN. CODE § 377 (describing the crime in the same manner as the Bangladesh Penal Code).

22. See MALAY. PEN. CODE (1997), c. 16, § 377B (“Whoever voluntarily commits carnal intercourse against the order of nature shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping”).

23. See MYAN. PEN. CODE, c. 16, § 377 (“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine”).

24. See PAK. PENAL CODE, c. 16-A, § 377 (describing the crime in the same manner as Bangladesh).

25. See SING. PEN. CODE (2007), c. 224, § 377A (“Any male person who, in public or private, commits, or abets in the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years”).

26. See SRI LANKA PEN. CODE, § 365.

27. See BHUTAN PEN. CODE (2004), c. 14, § 213 (criminalizing “sodomy or any other sexual conduct against the order of nature”); see also Michael Aris, *Introduction*, in *BHUTAN: ASPECTS OF CULTURE AND DEVELOPMENT* 7, 13 (Michael Aris & Michael Hutt eds., 1994) (alleging that British control over Bhutan was systematically more diffused than its control over other former

“carnal intercourse” (in the case of Singapore), “gross indecency,” or (in the case of Sri Lanka and Malaysia) both carnal intercourse and gross indecency.²⁸

The prohibition of carnal intercourse appears in section 377 of the Indian Penal Code of 1860, and is replicated in sections 377 of the penal codes in other jurisdictions.²⁹ In Singapore, the offence of gross indecency between male persons appears in section 377A of the Penal Code.³⁰ Sri Lanka’s penal code of 1883 is anomalous in its numbering of the relevant provisions; section 365 prohibits carnal intercourse, while section 365A prohibits gross indecency. The Sri Lankan provisions were fortified in 1995, in two ways. First, the maximum penalty for both carnal intercourse and gross indecency in Sri Lanka was increased from ten years to twenty years imprisonment for offences committed by a person over the age of eighteen with someone under the age of sixteen.³¹ Second, section 365A was amended to prohibit gross indecency by “any person” (in place of the previous reference to “male persons”), with the effect that it now also prohibits same sex relations between women.³²

colonial states).

28. See SING. PEN. CODE § 377A (criminalizing specifically same sex relations between men under the term “gross indecency”); SRI LANKA PEN. CODE, § 365A (extending the application of the prohibition on “gross indecency” to “any person” regardless of the partners’ genders); MALAY. PEN. CODE, § 377D (extending the application of the prohibition on “gross indecency” to “any person” regardless of the partners’ genders).

29. See, e.g., Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L. 1, 8-9 (2009) (explaining how Section 377 of the Indian Penal Code is presently in force in almost all former British colonies in South, and South-East Asia, in fact using the same section number).

30. See SING. PEN. CODE § 377A; see also *id.* at 16-17, 43-46 (providing a history of the prohibition of carnal intercourse and the prohibition of gross indecency in Singapore).

31. See SRI LANKA PEN. CODE § 365A.

32. See *id.*; see also Chandra Jayaratne, *FAQ on the UN Human Rights Council Resolution 2014 on Sri Lanka*, GROUNDVIEWS (Aug. 30, 2014), <http://groundviews.org/2014/08/30/faq-on-the-un-human-rights-council-resolution-2014-on-sri-lanka/> (discussing the factors that appear to have propelled the amendments to sections 365 and 365A); Human Rights Comm., *Concluding Observations on Fifth Periodic Report of Sri Lanka*, ¶ 8, U.N. Doc. CCPR/C/LKA/CO/5 (Nov. 21, 2014) [hereinafter, Human Rights Comm., *Concluding Observations*] (same).

In addition to the statutory provisions enacted by colonial governments, a handful of former British colonies criminalize same sex relations through Sharia law, including Brunei, Malaysia, and the Maldives.³³ The sultanate of Brunei, for instance, affirmed its prohibition of homosexuality by proscribing it (alongside other sexual conduct such as premarital sex and adultery) in the Syariah Penal Code Order 2013.³⁴ Although this article focuses on the continued criminalization of same sex relations in the statutory provisions enacted by colonial governments, it is important to note that in some countries, decriminalization requires more than repealing such statutory provisions, and would involve addressing parallel prohibitions of same sex relations in Sharia law.

B. CONSTITUTIONAL ASPECTS

None of the constitutions of the retaining jurisdictions explicitly recognizes sexual orientation as a prohibited ground of discrimination.³⁵ To the extent that they may implicitly prohibit discrimination on the ground of sexual orientation, courts have been hesitant or unable to invalidate the relevant statutory provisions via judicial review.

The Supreme Courts of India and Singapore, for example, have recently declined to invalidate the relevant statutory provisions, reasoning that decriminalization was a task for their respective legislatures.³⁶ The Sri Lankan government, in its recent periodic

33. See KALEIDOSCOPE TRUST, *supra* note 18, at 51 (describing the parallel prohibition of same sex relations in statutory law and Sharia law in Malaysia); *id.* at 52 (describing the criminalization of same sex relations via Sharia law, although the publication of a new statutory criminal code is pending); INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, DISCRIMINATION AND VIOLENCE AGAINST WOMEN IN BRUNEI DARUSSALAM ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY 2 (2014) (describing the parallel prohibition of same sex relations in statutory law and Sharia law in Brunei).

34. See INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, *supra* note 33, at 2.

35. See, e.g., CONST. OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011, c. 3, art. 12(2) (prohibiting discrimination "on the grounds of race, religion, language, caste, sex, political opinion, place of birth or *any such grounds*" (emphasis added)).

36. See *Koushal v. NAZ Found.*, (2014) 1 SCC 1, 97-98 (India) (holding that decriminalization of same-sex relations is not a matter for the court system to address prior to the legislature); *Lim Meng Suang v. Attorney-General*, [2014] SGCA 53, 5 (Oct. 28, 2014) (Sing.) (holding that the legislature has the power to

reporting exercise under the I.C.C.P.R., acknowledged for the first time that sexual orientation is a ground of prohibited discrimination in Article 12(2) of the Constitution—which forbids discrimination on the basis of “race, religion, language, caste, sex, political opinion, place of birth *or any such grounds*.”³⁷ Yet other provisions of Sri Lanka’s Constitution limit the powers of judicial review to only *bills* of legislation, thereby maintaining the onus on the government to repeal sections 365 and 365A of the Penal Code.³⁸ As explained in Section III of this article, several socio-cultural factors continue to impede the legislative repeal of these statutory provisions.

C. LEGAL FRAMEWORK ELSEWHERE IN ASIA

In contrast to the former British colonies of South and Southeast Asia, same sex relations are legal throughout East Asia, including in China (since 1997),³⁹ Japan,⁴⁰ South Korea,⁴¹ Taiwan⁴² and the

decriminalize same-sex relations, not the court systems); *see also* Rehan Abeyratne & Nilesh Sinha, *Insular and Inconsistent: India’s Naz Foundation Judgment in Comparative Perspective*, 39 YALE J. OF INT’L L. ONLINE 74, 74 (2014) (discussing *Koushal* in detail); *Singapore: Court Ruling a Major Setback for Gay Rights*, HUMAN RIGHTS WATCH (Oct. 29, 2014), <http://www.hrw.org/print/news/2014/10/29/singapore-court-ruling-major-setback-gay-rights> (discussing *Lim Meng Suang*).

37. Compare Human Rights Comm., *List of Issues in Relation to the Fifth Periodic Report of Sri Lanka, Addendum: Replies of Sri Lanka to the List of Issues*, ¶ 43, U.N. Doc. CCPR/C/LKA/Q/5/Add.1 (Sept. 3, 2014), and Human Rights Comm., *Concluding Observations*, *supra* note 32, at ¶ 8, with CONST. OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011, c. 3, art. 12(2) (emphasis added).

38. CONST. OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011, c. 3, art. 120-24.

39. *See* Don Cochrane, Policy Issues Concerning Sexual Orientation in China, Canada, and the United States, Panel Presentation at Social Issues and Policy Challenges in Western China: Lessons Learned and Lessons Borrowed Conference 2 (Aug. 29-30, 2013) (discussing China’s abolition of the crime of “hooliganism” in 1997, which had been used to prosecute same-sex relations); *see also* Jue Liu, *Sex and Law in China*, WORLD OF CHINESE (Nov. 17, 2013), <http://www.theworldofchinese.com/2013/11/sex-and-law-in-china/> (commenting on the 1997 reforms, and stating that hooliganism was “broken into several specific crimes that were defined in detail, such as scuffles, indecent offenses to females by force, child molestation”); Steffi Lau, *Homosexuality in China*, US-CHINA TODAY (Mar. 10, 2010), http://www.uschina.usc.edu/w_usct/showarticle.aspx?articleID=14740 (noting several China-specific factors that led to decriminalization, such as (1) the lack of religious authorities/pressure, (2) the one child policy assumption that L.G.B.T. persons are less likely to bear children, and

former British colony of Hong Kong.⁴³ Moreover, they are legal in almost every jurisdiction in South and Southeast Asia that are *not* former colonies of the British Empire (either because they were never colonized, or because they were colonies of other European powers).⁴⁴ These countries include Cambodia, East Timor, Laos, Nepal, Philippines, Thailand, and Vietnam. While the majority of these countries never criminalized same sex relations, Thailand and East Timor decriminalized same sex relations in 1956 and 1975, respectively.⁴⁵

The legality of same sex relations is not, however, an assured legacy in Asian jurisdictions that averted British colonization. In Nepal, draft legislation was introduced to recriminalize same sex relations⁴⁶ several years after Nepal's Supreme Court invalidated statutory provisions that discriminated on the ground of sexual

(3) the increasing migration to cities from rural areas).

40. See Sanders, *supra* note 29, at 14 (noting that Japan legalized same-sex relations in 1881).

41. See *Korea, Republic of: Treatment of Sexual Minorities, Including Legislation, State Protection and Support Services*, IMMIGR. & REFUGEE BD. OF CANADA (Nov. 30, 2009), <http://www.refworld.org/docid/4f435fa52.html>.

42. See *Gay Histories and Cultures: An Encyclopedia 187-88* (George E. Haggerty ed., 2000) (noting that Taiwan has never had an anti-sodomy law).

43. See Petersen, *supra* note 3, at 338.

44. See Press Release, Amnesty Int'l UK, Indonesia: New Aceh Bylaw Imposing 100 Lashes for Gay and Extramarital Sex (Sept. 27, 2014); Michael Bachelard, *New Aceh Law Punishes Gay and Extramarital Sex with 100 Lashes*, SYDNEY MORNING HERALD (Sept. 28, 2014), <http://www.smh.com.au/world/new-aceh-law-punishes-gay-and-extramarital-sex-with-100-lashes-20140928-10n6xd.html> (explaining that the criminalization of same-sex relations in Aceh, Indonesia, is an exception to the general rule).

45. See Sanders, *supra* note 29, at 14 (explaining that in Thailand, “[t]he 1908 criminal code barred acts ‘against human nature,’” but “[t]he section was dropped in 1956 when a reform eliminated sections with no history of enforcement”); Hildebrandt, *supra* note 11, at 240 (stating that decriminalization in East Timor occurred in 1975, before decolonization).

46. See KALEIDOSCOPE HUMAN RIGHTS FOUND. ET AL., SHADOW REPORT TO THE UN HUMAN RIGHTS COMMITTEE REGARDING NEPAL'S PROTECTION OF THE RIGHTS OF LGBTI PERSONS 3-4 (2014); Bibek Bhandari, *Draft Marriage Law Hangs Over Nepal's LGBT Community Ahead of Rights Parade*, S. CHINA MORNING POST (Aug. 10, 2014), <http://www.scmp.com/news/asia/article/1570300/draft-marriage-law-hangs-over-nepals-lgbt-community-ahead-rights-parade>; Pratyush Nath Upreti, *A Queer Divide*, EKANTIPUR (Nov. 18, 2014), www.ekantipur.com.np/the-kathmandu-post/2014/11/17/oped/a-queer-divide/269802.html.

orientation.⁴⁷ In the former Dutch colony of Indonesia, same sex relations are legal *except* in the semi-autonomous province of Aceh, which in 2014 instituted severe penalties for same sex relations via the application of Sharia law.⁴⁸ As argued in Section III below, the embedding of religious belief systems into a country's legal framework (whether in its constitutional law, so-called 'personal' laws, or Sharia law) is among the many factors that contribute to the persistent criminalization of same sex relations in Asia.⁴⁹

III. UNDERSTANDING PERSISTENT CRIMINALIZATION IN ASIA

What factors explain the continued criminalization of same sex relations in South and Southeast Asia? This Section surveys five socio-cultural factors in the persistent criminalization of same sex relations in the retaining jurisdictions. The contributory factors include:

- a. A common but misleading assumption that the statutory provisions are not enforced, which in turn dampens enthusiasm their repeal;
- b. The widespread misconception that the provisions are necessary to prevent child abuse;
- c. A popular and political desire, borne out of the experiences of colonialism, to assert a 'cultural' and 'moral' independence from the West;
- d. Public discourse and legal frameworks that focus on addressing religious and ethnic divisions, rather than gender and other inequalities; and

47. See Sunil Babu Pant and Others v. Nepal Government and others: *Decision of the Supreme Court on the Rights of Lesbian, Gay, Bisexual, Transsexual and Intersex [LGBTI] People*, 2008 NJA L.J. 262, 285-286 (2008); see generally Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT'L L. REV. 11, 11-41 (2012) (discussing *Pant v. Nepal* in greater detail).

48. See Press Release, *supra* note 44 (describing Aceh's new law criminalizing gay and extramarital sex); Bachelard, *supra* note 44; see also *Country Advice – Indonesia*, REFUGEE REVIEW TRIBUNAL, AUSTRALIAN GOV'T (Feb. 28, 2011), www.refworld.org/pdfid/4f46151f2.pdf (reporting that other cities and regions have adopted measures criminalizing same sex relations either directly, or indirectly by interpreting laws against prostitution to criminalize same-sex relations); Julia Suryakusuma, *Viewpoint: Gays are Us: LGBT Rights are Human Rights*, JAKARTA POST (Oct. 31, 2012), <http://www.thejakartapost.com/news/2012/10/31/viewpoint-gays-are-us-lgbt-rights-are-human-rights.html>.

49. See Sanders, *supra* note 29, at 8.

e. The prevalence of extended family networks and multigenerational households, which inhibit notions of intimacy and privacy that would foster support for decriminalization.⁵⁰

A. MODALITY OF FACTORS THAT SUPPORT CRIMINALIZATION

Before detailing the incidence of these five factors, it is useful to consider their modality—in other words, the manner in which they support the criminalization of same sex relations. A helpful starting point in this task is Kenji Yoshino and Michael Kavey's analysis of comparative constitutional cases concerning discrimination on the ground of sexual orientation.⁵¹

1. Expressivist vs. Functionalist Modalities of Arguments Against LGBT Rights

Yoshino and Kavey consider three types of such constitutional cases concerning discrimination on the ground of sexual orientation: military service cases about laws that ban L.G.B.T. persons in the military; sodomy cases about laws that criminalize same sex relations; and relationship-recognition cases about laws that prevent same sex unions or their recognition.⁵² Building on the work of other scholars, Yoshino and Kavey usefully distinguish between two types of arguments that are articulated in support of hetero-normative laws.

50. See *Bangladesh: Treatment of Homosexuals Including Legislation, Availability of State Protection and Support Services*, IMMIGR. & REFUGEE BD. OF CANADA (July 19, 2010), www.refworld.org/docid/4dd1122f2.html [hereinafter *Bangladesh: Treatment of Homosexuals*] (stating that statutory provisions against homosexuality are not enforced in Bangladesh); Gregory Herek, *Facts About Homosexuality and Child Molestation*, SEXUAL ORIENTATION: SCI., EDUC., AND POLICY, http://psychology.ucdavis.edu/faculty_sites/rainbow/html/facts_molestation.html (last visited May 21, 2015) (describing the lack of a relationship between male homosexuality and child abuse using statistical studies); Fisher, *supra* note 16; Panditaratne, *supra* note 14, at 98-100 (discussing how newly independent nations focused on religious and ethnic divides, rather than gender equality); Albert Esteve & Chia Liu, *Families in Asia: A Cross-National Comparison of Intergenerational Co-residence 1* (2014) (unpublished manuscript) (stating that the dominant form of family households across Asia is an intergenerational co-residence).

51. See Kenji Yoshino & Michael Kavey, *Immodest Claims and Modest Contributions: Sexual Orientation in Comparative Constitutional Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW* 1079, 1080 (Michel Rosenfeld & András Sajó eds., 2012).

52. *Id.*

Yoshino and Kavey describe these arguments as either expressivist (in other words, arguing that the law expresses a “moral,” “natural,” or “inherent” truth, irrespective of any public policy or social function), or functionalist (arguing that the law serves a particular policy or function).⁵³

Yoshino and Kavey describe arguments in support of laws that ban L.G.B.T. persons in the military, for example, as generally functionalist.⁵⁴ Specifically, these arguments claim that such laws serve the function of enhancing the cohesion and efficacy of the military.⁵⁵ By contrast, they describe arguments to support laws that criminalize same sex relations as generally expressivist.⁵⁶ These arguments claim that criminalization expresses a moral or historical truth – rather than serving a particular policy or function.⁵⁷ Yoshino and Kavey cite the dicta of Chief Justice Burger in *Bowers v. Hardwick*⁵⁸ as quintessentially expressivist, when he opined that the condemnation of homosexual acts “is firmly rooted in Judeo-Christian moral and ethical standards” and that protecting such conduct “would be to cast aside millennia of moral teaching.”⁵⁹

Unlike in Yoshino and Kavey’s analysis, this article identifies and discusses socio-cultural impediments to decriminalization, rather than legal or normative arguments against decriminalization. As a result, Yoshino and Kavey’s categorization of arguments as either expressivist or functionalist cannot be straightforwardly applied to describe the manner in which socio-cultural factors hinder decriminalization. Nevertheless, by building on Yoshino and Kavey’s categorical analysis, several observations can be made on how socio-cultural factors sustain the criminalization of same sex relations in South and Southeast Asia.

53. *Id.*

54. *Id.* at 1080-86.

55. *Id.*

56. *Id.* at 1080.

57. *Id.* at 1086-88

58. *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring).

59. *Id.* at 196-97; Yoshino & Kavey, *supra* note 51, at 1086. See Yoshino & Kavey, *supra* 51, at 1092-96 (describing functionalist arguments as including the claim that same-sex unions pose a risk to procreative sex and fertility rates, and that expressivist arguments assume heterosexual marriage is biologically “natural,” thus same-sex marriage is inherently “unnatural”).

2. *Expressivist and Functionalist Modalities of Socio-cultural Factors Supporting Criminalization*

The first observation is that at least three of the five socio-cultural factors discussed below represent functionalist arguments in support of criminalization. Specifically, they feed or reflect arguments that the continued criminalization of same sex relations (i) is politically and legislatively efficient, (ii) prevents child abuse, and (iii) maintains social cohesion. The common assumption that the relevant statutory provisions are unenforced, for example, feeds a view that there is no urgent need to repeal these provisions and accordingly, and that political and legislative energy should be expended on more pressing matters. In other words, this factor represents a functionalist argument for political and legislative efficiency.

Similarly, the second socio-cultural factor discussed below—the widespread misconception that the statutory provisions are necessary to prevent child abuse—reflects a functionalist, albeit thoroughly discredited,⁶⁰ argument that gay men are predisposed to pedophilia and therefore must be criminally sanctioned. Another socio-cultural factor that represents a functionalist argument for criminalization is the priority accorded in public discourse and legal frameworks in South and Southeast Asia to resolving religious and ethnic divisions, rather than addressing laws that discriminate on gender and other grounds.⁶¹ The inherent functionalist argument in this factor is that decriminalization would threaten the delicate social cohesion among different religious and ethnic groups.⁶² As Singapore's founding leader, Lee Kuan Yew, stated with regard to possible decriminalization in his country, "we have a part Muslim population, another part conservative older Chinese and Indians. So, let's go slowly. It's a pragmatic approach to maintain social cohesion."⁶³

60. Herek, *supra* note 50 (debunking the claim that homosexual men are predisposed to child molestation).

61. See Panditaratne, *supra* note 14, at 98-100 (discussing how newly independent nations focused on religious and ethnic divides, rather than gender equality).

62. See Seth Mydans & Wayne Arnold, *Lee Kuan Yew, Founder of Singapore, Changing with Times*, N.Y. TIMES (Aug. 29, 2007), http://www.nytimes.com/2007/08/29/world/asia/29iht-lee.1.7301669.html?pagewanted=all%26_r=0&_r=0.

63. *Id.* ("China, Hong Kong, and Taiwan already have more liberal policies regarding gays, [Lee Kuan Yew] noted.")

Two of the socio-cultural factors discussed below do not fit neatly into Yoshino and Kavey's categorical analysis. As detailed below, one such factor in the persistent criminalization of same sex relations in South and Southeast Asia is the apparent desire to assert "cultural" and "moral" independence from the West.⁶⁴ This factor seems to reflect *both* expressivist *and* functionalist dimensions: it represents expressivist arguments to the extent that it is grounded in claims about moral values,⁶⁵ while also serving the function of demonstrating resistance to perceived Western normative trends and geopolitical interference.⁶⁶ These dual expressivist-functionalist dimensions are evident in the remarks made in 2007 by Singapore's then Minister of State for Law and Home Affairs, Ho Peng Kee, who declared, "Our laws are an expression and reflection of the values of our society and any public discourse in Singapore on such matters should be reserved for Singaporeans. Foreigners will not be allowed to interfere in our domestic political scene, whether in support of the gay cause or against it."⁶⁷

3. Foundational Modality of Socio-cultural Factors in Supporting Criminalization

If the postcolonial desire to assert normative independence from the West represents an amalgam of expressivist and functionalist arguments against decriminalization, the fifth and final socio-cultural factor discussed below—the prevalence of extended family networks and multigenerational households—does not appear to reflect either expressivist or functionalist arguments. Rather than reflecting such arguments for criminalization, this socio-cultural factor can be described as foundational to the popular appeal of various expressivist and functionalist arguments for criminalization. More

64. See Fisher, *supra* note 16.

65. See Sanders, *supra* note 29, at 8.

66. See George Baylon Radics, *Decolonizing Singapore's Sex Laws: Tracing Section 377A of Singapore's Penal Code*, 45 COLUM. HUM. RTS. L. REV. 57, 77, 81-82, 98 (2013); Chris Tan, *Out in Public: Turning the Lion City Pink?: Interrogating Singapore's Gay Civil Servant Statement*, in REINVENTING LESBIAN/GAY ANTHROPOLOGY IN A GLOBALIZING WORLD 317, 325 (Ellen Lewin & William L. Leap eds., 2009) (commenting that Singapore maintains its unenforced sodomy laws in order to draw an imaginary boundary between a "moral" and "wholesome" Singapore and the "immoral" West).

67. Sanders, *supra* note 29, at 45.

specifically, it underlies the popular appeal in South and Southeast Asia of many different arguments about the morality or function of criminalization, even when such arguments are no longer persuasive in the West.

As detailed below,⁶⁸ the prevalence of strong extended family networks and multigenerational households in South and Southeast Asia inhibit notions of intimacy and privacy that have proved critical to popular support for decriminalization elsewhere in the world. This socio-cultural factor is especially foundational to the popularity of arguments against decriminalization that emphasize the group over the individual. Such arguments include, for example, Lee Kuan Yew's reference to the need for social cohesion when explaining why Singapore should proceed slowly toward decriminalization⁶⁹ and Chief Justice Burger's appeal to shared Judeo-Christian moral values in *Bowers v Hardwick*.⁷⁰

In short, socio-cultural factors in South and Southeast Asia contribute to the criminalization of same sex relations in three different ways: (i) by reflecting or expressing moral arguments—in particular, “local” religious or cultural values; (ii) by representing arguments as to the alleged functions of the continued criminalization of same sex relations, including the maintenance of social cohesion between religious and ethnic groups, or the demarcation of normative independence from the West; and (iii) by underlying, or being foundational to, the popular appeal in South and Southeast Asia of a broad range of arguments that refer to the function or morality of criminalization, especially those arguments that prioritize the group over the individual.

B. INCIDENCE OF FACTORS THAT SUPPORT CRIMINALIZATION

1. Assumption of Non-Enforcement

Of the five socio-cultural factors discussed in this Section, the first is a commonly held belief that criminal prohibitions of same sex relations are “unenforced.” It is often assumed that the relevant statutory provisions, such as section 377 in India, or sections 365 and

68. See *infra*, Conclusion.

69. See Mydans & Arnold, *supra* note 62.

70. *Bowers*, 478 U.S. at 196-97 (1986) (Burger, C.J., concurring).

365A in Sri Lanka, are unenforced and therefore relatively harmless.⁷¹ A consequence of this view is that, even among those who in principle may be sympathetic to decriminalization, there is lack of urgency to achieve that end.⁷² In other words, the perception that there is already *de facto* decriminalization of same sex relations contributes to a sentiment that there is no pressing need for *de jure* decriminalization.

The assumption of *de facto* decriminalization has some factual basis in the rarity of convictions of adults engaging in consensual same sex relations. According to non-governmental organizations (“N.G.O.’s”) and other commentators, convictions of consenting adults pursuant to section 377 (or their equivalent) have rarely (if ever) occurred in Bangladesh,⁷³ Brunei,⁷⁴ India,⁷⁵ Myanmar,⁷⁶ Pakistan,⁷⁷ Singapore⁷⁸ and Sri Lanka.⁷⁹ In Sri Lanka, there do not

71. See *Koushal v. NAZ Found.*, (2014) 1 SCC 1, 83 (India) (relying on evidence that “less than 200 persons have been prosecuted . . . under section 377” in the last 150 years); *id.* at 21-22 (stating that there “had been no tangible material before the High Court to show that Section 377 had been used for prosecution of homosexuals as a class”).

72. See Sanders, *supra* note 29, at 31 (stating that a related factor could be fear that, once decriminalization is achieved, the government will be compelled to consider recognizing many other rights of LGBT persons).

73. See Sumit Baudh, *Decriminalisation of Consensual Same-Sex Sexual Acts in the South Asian Commonwealth: Struggles in Contexts*, in HUMAN RIGHTS, SEXUAL ORIENTATION AND GENDER IDENTITY IN THE COMMONWEALTH: STRUGGLES FOR DECRIMINALISATION AND CHANGE 287, 290-92 (Corinne Lennox & Matthew Waites eds., 2013) (describing that although Section 377 may not be often used, there are other tools the government uses to harass homosexuals); *Bangladesh: Treatment of Homosexuals*, *supra* note 50.

74. See INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, *supra* note 33, at 7 (describing the parallel prohibition of same sex relations in statutory law and Sharia law in Brunei).

75. See Baudh, *supra* note 73, at 294 (describing use of Section 377 in India).

76. See *Burma’s Homosexuality Law ‘Undermining HIV and Aids Fight’*, GUARDIAN (Mar. 21, 2014), <http://www.theguardian.com/global-development/2014/mar/21/burma-homosexuality-law-hiv-aids> (describing how some facets of society are calling for greater enforcement of section 377).

77. See KALEIDOSCOPE TRUST, *supra* note 18, at 53; Baudh, *supra* note 73, at 293 (describing use of Section 377 in Pakistan).

78. See Sanders, *supra* note 29, at 42-44 (describing enforcement of anti-homosexual laws in Singapore); Rupert Colville, *Press Briefing Notes on Singapore and Tunisia*, OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS (Oct. 31, 2014), www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15242&LangID=E.

appear to have been any convictions of adults engaging in consensual same sex relations since the country's independence in 1948.⁸⁰ In Singapore, the government has explicitly stated in the past several years that it will not enforce the statutory prohibition of same sex relations in section 377A of its penal code.⁸¹

The relative scarcity of convictions and recorded cases, however, is a deceptive indicator of legal and social acceptance of same sex relations. The laws against same sex relations might be publicly unenforced, to the extent that there are few recorded convictions of adults engaging in consensual same sex relations. In most of the retaining jurisdictions, however, there is ample evidence of significant *informal* enforcement, by way of arbitrary arrest and detention, and other forms of harassment on the basis of these provisions.⁸² More broadly, the statutory provisions continue "in force" by symbolizing and contributing to the stigmatization and marginalization of L.G.B.T. persons in former British colonies in Asia.⁸³

In Sri Lanka, the leading N.G.O. that advocates for decriminalization has documented several case-studies of sections 365 and 365A being used to arbitrarily arrest and detain L.G.B.T. persons (of both Sri Lankan and foreign nationality), as well as to blackmail, extort bribes, and coerce sexual favors from them.⁸⁴ During the regime of the previous government, the Criminal Investigation Department in Sri Lanka reportedly investigated and questioned N.G.O.'s that advocate L.G.B.T. rights, and one notable such organization – known as Companions on a Journey – ceased to

79. EQUAL GROUND ET AL., *supra* note 13, at 2; see BUREAU OF DEMOCRACY, *supra* note 13, at 51; see also Walter L. Williams, *Islam and the Politics of Homophobia: The Persecution of Homosexuals in Islamic Malaysia Compared to Secular China*, in 1 ISLAM AND HOMOSEXUALITY 1, 7 (Samar Habib ed., 2010) (stating Malaysia is a key exception to the general rarity of convictions for same-sex relations in former British colonies in Asia).

80. EQUAL GROUND ET AL., *supra* note 13, at 2.

81. See Mydans & Arnold, *supra* note 62.

82. Baudh, *supra* note 73, at 291-93.

83. Sanders, *supra* note 29, at 20-21; KEMONE BROWN, STRUGGLING AGAINST HOMOPHOBIC VIOLENCE & HATE CRIMES 4 (Rosanna Flamer-Caldera ed., 2011); see also EQUAL GROUND, TOWARDS A LESBIANS, GAYS, BISEXUALS, TRANSEXUALS AND TRANSGENDERED (LGBT) STIGMA AND DISCRIMINATION INDEX FOR SRI LANKA 103 (2011).

84. EQUAL GROUND ET AL., *supra* note 13, at 5-6.

operate.⁸⁵ Similar harassment of L.G.B.T. persons and organizations has been reported in other retaining jurisdictions, including in Brunei, Bangladesh, and India.⁸⁶

At least one international N.G.O. has pointed out that individual victims are unlikely to report and pursue redress for such harassment when they are acutely aware of living within a normative system in which L.G.B.T. behavior is criminalized and stigmatized.⁸⁷ The real and repressive reach of “unenforced” statutory provisions in India was recognized by the Delhi High Court in its historic, but since overturned, judgment in *Naz Foundation v. Government of NCT of Delhi & others*,⁸⁸ when it observed:

Even when the penal provisions are not enforced, they reduce gay men or women to what one author has referred to as ‘unapprehended felons’, thus entrenching stigma and encouraging discrimination in different spheres of life. Apart from misery and fear, a few of the more obvious consequences are harassment, blackmail, extortion and discrimination.⁸⁹

In making these observations, the Delhi High Court exposed the naïveté of the belief that laws criminalizing same sex relations are unenforced. Far from being innocuous relics of colonial-era codes, the relevant statutory prohibitions continue to be engaged against L.G.B.T. persons in unseen and often illegitimate ways.

85. *Id.* at 6-7; see U.N. High Comm’r for Refugees, *UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, 35-6, U.N. Doc. HCR/EG/LKA/12/04 (Dec. 21, 2012).

86. See INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, *supra* note 33, at 6-7 (regarding Brunei); *Bangladesh: Treatment of Homosexuals*, *supra* note 50 (regarding Bangladesh); see Abeyratne & Sinha, *supra* note 36, at 75-76 (noting judicial recognition of the harassment of L.G.B.T. persons in India on the basis of section 377).

87. INT’L GAY & LESBIAN HUMAN RIGHTS COMM’N, *supra* note 33, at 4-5.

88. *NAZ Found. v. Gov’t of NCT of Delhi*, 160 DLT 277 (Del), 41 (2009) (Delhi H.C., India), *overruled by* *Koushal v. NAZ Found.*, (2014) 1 SCC 1 (India).

89. See *NAZ Found.*, 160 DLT 277 at ¶ 50; see also Sujit Choudhry, *How to Do Comparative Constitutional Law in India: Naz Foundation, Same Sex Rights, and Dialogical Interpretation*, in *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* 45, 80 (Sunil Khilnani et al. eds., 2013).

2. *Misconception of Criminalization as Necessary to Combat Child Abuse*

In addition to the misleading assumption of non-enforcement, there is another, more pernicious misconception at play in the continued criminalization of same sex relations in Asia. While the preceding Section points to a segment of society that may support decriminalization but misleadingly believes that it already exists in practice, this Section suggests that there is a quite different segment of the population that consciously *opposes* legal reform because it believes that criminalization is necessary to prevent child abuse.

The belief that criminalization is necessary to prevent child abuse is based on a perceived association between homosexuality and pedophilia that is long discredited.⁹⁰ It is therefore difficult to fathom that this belief would play a significant role in the continued criminalization of same sex relations in any jurisdiction. Yet, the belief, and its underlying assumption that gay men are predisposed to pedophilia, remains widespread in the retaining jurisdictions—from the highest levels of government, to more locally influential groups like police officers, lawyers, and some N.G.O.'s. For example, in 2008, fifty-eight countries in the U.N. General Assembly, including Bangladesh, Brunei, Malaysia, and Pakistan, issued a statement that linked the principle of non-discrimination on the ground of sexual orientation with “deplorable acts, including pedophilia.”⁹¹ In particular, these countries declared:

The notion of orientation spans a wide range of personal choices that expand far beyond the individual sexual interest in a copulatory [sic.] behavior between normal consenting adult human beings, thereby ushering in the social normalization and possibly the legitimization of many deplorable acts, including pedophilia.⁹²

The above statement was issued in opposition to an immediately preceding statement by sixty-six countries in the General Assembly, which affirmed (for the first time in the U.N.) the right to non-

90. Herek, *supra* note 50.

91. U.N. GAOR, 63rd Sess., 70th plen. mtg. at 30-31, U.N. Doc. A/63/PV.70 (Dec. 18, 2008); UNITED NATIONS, INDEX TO PROCEEDINGS OF THE GENERAL ASSEMBLY: SIXTY-THIRD SESSION — 2008/2009, at 111, U.N. Doc. ST/LIB/SER.B/A.72 (Part I), U.N. Sales No. E.10.I.3 (2010).

92. U.N. GAOR, U.N. Doc. A/63/PV.70, *supra* note 91, at 30-31.

discrimination regardless of sexual orientation.⁹³ Notably, the majority of the countries that issued the statement affirming the right to non-discrimination were European, North American, and South American.⁹⁴ By contrast, the countries that supported the opposing statement were almost all Asian or African, with a large contingent belonging to the Organization of Islamic Conference.⁹⁵

Aside from Bangladesh, Brunei, Malaysia, and Pakistan, other retaining jurisdictions in Asia abstained from supporting either statement at the U.N. General Assembly.⁹⁶ Nevertheless, the view that same sex relations must be criminalized to prevent child abuse remains prevalent within these jurisdictions. In India, for example, a senior government official was reported in 2008 to have defended section 377 by describing it as a law that “acts as an effective deterrent against pedophiles.”⁹⁷

More recently, the Delhi Commission for Protection of Child Rights petitioned the Supreme Court of India to overturn the decision of the Delhi High Court in *Naz Foundation*⁹⁸ and thereby retain section 377, by citing a governmental duty to ensure that each “child may bloom without any fear of abuse [or] exploitation.”⁹⁹ The conflation of homosexuality and child abuse also appears to be

93. See *UN: General Assembly Statement Affirms Rights for All*, HUMAN RIGHTS WATCH (Dec. 18, 2008), <http://www.hrw.org/print/news/2008/12/18/un-general-assembly-statement-affirms-rights-all> (affirming “the principle of non-discrimination, which requires that human rights apply equally to every human being regardless of sexual orientation or gender identity”).

94. *Id.*

95. See U.N. GAOR, U.N. Doc. A/63/PV.70, *supra* note 91, at 30-31; Kerstin Braun, *Do Ask, Do Tell: Where Is the Protections Against Sexual Orientation Discrimination in International Human Rights Law?*, 29 AM. U. INT’L L. REV. 871, 890-91, 893-94 (2014).

96. U.N. GAOR, U.N. Doc. A/63/PV.70, *supra* note 91, at 30-31; *UN: General Assembly Statement Affirms Rights for All*, *supra* note 93.

97. HUMAN RIGHTS WATCH, *supra* note 10, at 48 (citing Nagendar Sharma, *Gays Have No Legal Rights Ministry*, HINDUSTAN TIMES (Aug. 28, 2008, 8:34 AM), <http://www.hindustantimes.com/india-news/gays-have-no-legal-rights-ministry/article1-334198.aspx>).

98. *NAZ Found. v. Gov’t of NCT of Delhi*, 160 DLT 277 (Del), ¶ 1 (2009).

99. *Koushal v. NAZ Found.*, (2014) 1 SCC 1, 18 (India); see also *India: Upholding the Decriminalisation of Homosexuality*, CHILD RIGHTS INT’L NETWORK (Feb. 24, 2012), <http://www.crin.org/en/library/news-archive/india-upholding-decriminalisation-homosexuality>.

prevalent in Singapore¹⁰⁰ and in Sri Lanka, where field research indicates that police officers and lawyers commonly consider sections 365 and 365A to be necessary (or at least useful) in dealing with child abuse.¹⁰¹

The misconception that criminalization is necessary to combat child abuse has been exacerbated in Sri Lanka by the country's particular experience of child sex tourism.¹⁰² In the last three decades of the 20th century, Sri Lanka, like several other countries in Asia, experienced a steady increase in child sex tourism.¹⁰³ Unlike in other Asian countries, however, the victims of such tourism in Sri Lanka tended to be boys.¹⁰⁴ Commentators have attributed this to a cultural premium on the sexual "purity" of girls, and the accordingly greater social freedoms granted to boys – which meant that they were more likely to be prostituted to foreign tourists.¹⁰⁵

It was against this backdrop that the Sri Lankan government decided, in 1995, to amend sections 365 and 365A, to increase the maximum penalties from ten years imprisonment to twenty years imprisonment when the offence involved a child under the age of sixteen.¹⁰⁶ By incorporating penalties for child abuse into existing statutory provisions on carnal intercourse and gross indecency,

100. *Singapore: Religious Homophobia, Gay Activism & Repealing the Sodomy Law*, INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N (Sep. 10, 2007) <http://iglhrc.org/content/singapore-religious-homophobia-gay-activism-repealing-sodomy-law>.

101. PRIYA THANGARAJAH, STRENGTHENING OF LEGAL PROTECTION FOR LGBT IN SRI LANKA: ROAD TO DECRIMINALIZATION—SITUATION ANALYSIS 16-19 (2013), http://issuu.com/equalground/docs/situation_analysis (showing that a majority of mental health professionals seem to consider homosexuality to be "deviant").

102. Tambiah, *supra* note 10, at 102; *see also* D.G. Harendra de Silva, *Children Needing Protection: Experience from South Asia*, 92 ARCHIVES OF DISEASE IN CHILDHOOD 931, 932 (2007) (noting tourists perpetrate a minority of the total number of child abuse cases in Sri Lanka).

103. *See* de Silva, *supra* note 102, at 932; ASS'N OF WOMEN FOR ACTION & RESEARCH, BEYOND BORDERS: SEX WITH CHILDREN – IMPLEMENTING EXTRA-TERRITORIAL LEGISLATION FOR SINGAPOREANS 6 (2006) (noting the increase of sex tourism in Thailand starting in the 1970s).

104. ECPAT INT'L, GLOBAL MONITORING: REPORT ON THE STATUS OF ACTION AGAINST COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN 11 (2006).

105. de Silva, *supra* note 102, at 932; *id.* at 11-12.

106. SRI LANKA PEN. CODE, §§ 365, 365A; THANGARAJAH, *supra* note 101, at 4.

however, the government unfortunately reinforced the erroneous association between child abuse and homosexual behavior.¹⁰⁷ That association remains a significant source of prejudice against the L.G.B.T. community and of popular resistance to decriminalization today.¹⁰⁸

3. *Postcolonial Resistance and LGBT Rights*

The scourge of child sex tourism is a small facet of a much larger story in Sri Lanka: that of an uneasy and often conflicted relationship with Western countries, rooted in the history of colonization.¹⁰⁹ In each of the retaining jurisdictions, a lingering effect of this history is that political and religious leaders are prone to resisting norms that are popularly (yet inaccurately) associated with Western countries.¹¹⁰ A well known example of this tendency is the invocation of “Asian values” by Southeast Asian leaders in defying calls for greater civil liberties and political rights in the region.¹¹¹

The continued criminalization of same sex relations in Asia has surfaced as another example of postcolonial resistance to allegedly foreign norms, especially in the context of significant advances in L.G.B.T. rights *outside* of Asia.¹¹² It is notable that the only former British colony in Asia that no longer criminalizes same sex relations is Hong Kong, which decriminalized in 1991—before its late decolonization in 1997.¹¹³ As one commentator explained with regard to Singapore, same sex relations continue to be criminalized to demarcate “imaginary cultural boundaries between a ‘moral’

107. See THANGARAJAH, *supra* note 101, at 13.

108. Hans Billimoria, *Are There Really Gay Sri Lankans?*, GROUNDVIEWS (Sept. 21, 2011), <http://groundviews.org/2011/09/21/are-there-really-gay-sri-lankans/>.

109. See Tambiah, *supra* note 10, at 102 (noting that child advocates and other conservative or religious groups who tend to conflate homosexuality with pedophilia tend to view homosexuality in general as an immorality borne from the “West”).

110. *Id.*; see, e.g., AMARTYA SEN, HUMAN RIGHTS AND ASIAN VALUES 28 (1997).

111. See SEN, *supra* note 110 at 28; see also Michael C. Davis, *Constitutionalism and Political Culture: The Debate Over Human Rights and Asian Values*, 11 HARV. HUM. RTS J. 109, 109 (1998).

112. *Human Rights: The Gay Divide*, *supra* note 6.

113. Petersen, *supra* note 3, at 338.

Singapore and the 'immoral' West."¹¹⁴

Other retaining jurisdictions also regard the prohibition of same sex relations as an imagined cultural boundary with the West. As far back as 1979, a Malaysian court declared, while addressing a wife's claim that her husband had engaged in same sex relations, that "[s]uch despicable conduct though permitted among some Westerners should not be allowed to corrupt the community's way of life."¹¹⁵ More recently, in Sri Lanka in 2013, the Criminal Investigations Department reportedly asked the leading local N.G.O. advocating L.G.B.T. rights to discontinue its work, telling them that homosexuality is not part of local culture.¹¹⁶ According to the leader of that N.G.O., Sinhalese nationalists, among others, have claimed that "homosexuality is a western value which erodes Sri Lankan culture, morals, and family values."¹¹⁷

The populist appeal of postcolonial resistance to decriminalization appears to be strengthened by three different phenomena; (i) repeated condemnation by Western nations of the general human rights record in a former colony,¹¹⁸ (ii) demands by Western governments (sometimes accompanied by sanctions and similar forms of

114. See Tan, *supra* note 66, at 325; Radics, *supra* note 70, at 77.

115. HUMAN RIGHTS WATCH, *supra* note 10, at 44.

116. See EQUAL GROUND ET AL., *supra* note 13, at 6-7; see also *Ensuring Gay Rights in Sri Lanka*, SUNDAY LEADER, <http://www.thesundayleader.lk/2012/03/04/ensuring-gay-rights-in-sri-lanka/> (last visited May 21, 2015) (reporting police investigations of another N.G.O. advocating L.G.B.T. rights, and the N.G.O. leader's insistence that it had not been involved in "the so-called promotion of Western conceptions of homosexuality").

117. *Sri Lanka: Treatment of Sexual Minorities, Including Legislation, State Protection, and Support Services*, IMMIGRATION & REFUGEE BD. OF CANADA (Jan. 13, 2012), <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=printdoc&docid=4f435fa52>; see also KALEIDOSCOPE TRUST, *supra* note 18, at 15 (commenting that Equal Ground and its leader has been publically accused [on a Sri Lankan nationalist page on Facebook] of attempting to convert a major Sinhalese Buddhist community to homosexuality); see generally Billimoria, *supra* note 108 (referring to newspaper articles suggesting that "Western ideals were being imposed upon [Sri Lanka]").

118. See Chris Godfrey, *Is Britain's Pro-Gay Foreign Policy Actually Helping Global LGBTI Community?*, VICE (Dec. 10, 2014), <http://www.vice.com/read/exporting-lgbti-rights-from-the-uk-abroad-327>; see also Joseph Were, *Museveni Anti-Gay Misstep*, INDEP. (July 6, 2014), <http://www.independent.co.ug/news/news-analysis/9117-museveni-anti-gay-misstep>.

economic pressure) to implement decriminalization or other rights of L.G.B.T. persons;¹¹⁹ and (iii) the domino effect of decriminalization in Western countries, whereby decriminalization presaged other, somewhat unforeseen normative developments.¹²⁰

Each of these phenomena can contribute to a more defensive or guarded approach to criminalization, as is evident in the recent political history of Sri Lanka. First, both before and after Sri Lanka's eighteen-year civil war ended in 2009, Western governments repeatedly censured Sri Lanka for its failure to promote ethnic reconciliation, accountability, and human rights, culminating in three successive resolutions against Sri Lanka in the U.N. Human Rights Council: in 2012, 2013, and 2014, respectively.¹²¹ In the context of this antagonistic relationship, during Sri Lanka's Universal Periodic Review in 2012, the Sri Lankan government declined a Canadian recommendation to decriminalize same sex relations.¹²²

Second, in 2014, the Sri Lankan government publicly rejected what it described as a demand by the U.K. that Sri Lanka recognize same sex marriages as a condition of receiving British foreign aid.¹²³ In issuing this statement, the government appeared to be rebuffing the U.K.'s strategy of applying economic pressure to induce recognition of L.G.B.T. rights as much as the right *per se*.¹²⁴

Third, in 2010, the Sri Lankan government asked its "gay community . . . to define the rights they seek," while concurrently noting that "gay marriage is acceptable in some western countries."¹²⁵ The Prime Minister of Sri Lanka at the time, D. M. Jayaratne, stated that, "It is not wrong for them to seek rights. But we

119. Godfrey, *supra* note 118 (commenting on how economic sanctions, alone, are not effective to deter populist, poll boosting, rhetoric against homosexuals).

120. See Indika Sri Aravinda, *Lanka for Dialogue with Gays*, DAILY MIRROR (June 25, 2010) <http://www.dailymirror.lk/4626/lanka-for-dialogue-with-gays>.

121. See Jayaratne, *supra* note 32.

122. See Human Rights Council, Rep. of the Working Group on the Universal Periodic Review, UN Doc A/HRC/22/16, at 8, 22 (Dec. 18, 2012).

123. Dave Rush, *Government says no to gay marriage in Sri Lanka*, REPUBLIC SQUARE (Apr. 24, 2014), <http://www.therepublicsquare.com/politics/2014/04/government-says-no-to-gay-marriage-in-sri-lanka/> (reporting the government has turned down a request to legalize gay marriage in Sri Lanka).

124. See *id.*; see also *Cameron Threat to Dock Some UK Aid to Anti-Gay Nations*, *supra* note 8.

125. Aravinda, *supra* note 120.

must know what exactly they want. They should communicate that to us and then we will see if it hurts our culture and take a decision accordingly.”¹²⁶

It is unclear whether anyone in the L.G.B.T. community responded to this particular request, but in any event, the Sri Lankan government is yet to implement the foundational and most requested right of the gay community: decriminalization.¹²⁷ The then Sri Lankan Prime Minister's statement suggests that the government was more wary of claims to *other* nonenumerated rights of L.G.B.T. persons (such as the right to same sex marriage) than of decriminalization itself.¹²⁸ In 2008, the Singaporean Prime Minister, Lee Hsien Loong, exhibited a similar wariness of same sex marriage and parenting when discussing the continued criminalization of same sex relations in Singapore.¹²⁹

In essence, the criminalization of same sex relations is now a feature of a familiar international dialogue, in which mostly Western governments criticize South and Southeast Asian governments for neglecting human rights. These governments in turn resist such criticism by invoking notions of sovereignty, culture, or “Asian values,” or by expressing uncertainty about the content or evolution of specific rights. The incorporation of L.G.B.T. rights into this dialogue, however, glosses over key historical realities, including the fact that criminalization was a product of colonial rule and, moreover, that L.G.B.T. rights have only recently been recognized in some nations that now pursue these rights abroad as a matter of foreign policy.¹³⁰

126. *Id.*

127. See Sanders, *supra* note 29, at 31, 38 (explaining a series of issues involving gays and lesbians that only starts with issues of criminal law, and noting that by 2009 decriminalization had occurred only in Hong Kong and Nepal).

128. See *id.* at 31 (describing this factor in the continued criminalization of same sex relations as “containment of issues” by governments).

129. See HUMAN RIGHTS WATCH, *supra* note 10, at 42; Radics, *supra* note 66, at 81, n.152 (citing Prime Minister Lee Hsien Loong who stated, “So, supposing we move on 377A, I think the gay activists would push for more, following the example of other *avant garde* countries in Europe and America, to change what is taught in the schools, to advocate same-sex marriages and parenting.”).

130. Compare Godfrey, *supra* note 118, and Cameron Threat to Dock Some UK Aid to Anti-Gay Nations, *supra* note 8, with Lawrence v. Texas, 539 U.S. 558, 558 (2003) (noting the U.S. elevated L.G.B.T. rights to a foreign policy goal only a few years after nationwide decriminalization in 2003 pursuant to the decision), and

The net political effect of the current dialogue is that Western nations have implicitly claimed “ownership” (or at least leadership) of L.G.B.T. rights – while tacitly, and historically inaccurately, depicting retaining jurisdictions as normatively “backward.” It is unfortunate that retaining jurisdictions continue to resist decriminalization without undertaking a real but more difficult task of postcolonial resistance – challenging the implicit, inaccurate and confining premises of the current dialogue on L.G.B.T. rights.

4. Prioritization of Religious and Ethnic Harmony Over Gender Equality

The preceding sections highlight three factors in the continued criminalization of same sex relations in Asia; the misleading assumption of *de facto* decriminalization, the erroneous association of homosexuality with child abuse, and a misguided postcolonial resistance to L.G.B.T. rights. A fourth factor is that retaining jurisdictions in Asia have prioritized religious and ethnic harmony over the potentially conflicting aim of gender equality.¹³¹ This prioritization has made any legal reform that challenges “traditional” gender roles—including decriminalization of same sex relations and other L.G.B.T. rights—more difficult to achieve.

The prioritization of religious views and ethnic harmony is apparent in the constitutional and family laws of retaining jurisdictions. First, the constitutions of most retaining jurisdictions—with the notable exceptions of India and Singapore¹³²—accord a privileged status to the religion of the majority population. The constitutions of Bangladesh, Brunei, Malaysia, and Pakistan, for example, establish Islam as the religion of the state,¹³³ arguably as a

Dan Robinson, *Obama Elevates Gay Rights as a Foreign Policy Priority*, VOICE OF AM. (Dec. 5, 2011), <http://www.voanews.com/articleprintview/174955.html>.

131. See Neil DeVotta, *Sinhalese Buddhist Nationalist Ideology: Implications for Politics and Conflict Resolution in Sri Lanka*, 40 POL’Y STUD. 10 (2007) (achieving ethnic concord may be a reaction to the “divide-and-rule” policies pursued by colonial administrations); cf. PETER VAN DER VEER, *RELIGIOUS NATIONALISM: HINDUS AND MUSLIMS IN INDIA* 29-31 (1994) (noting the preoccupation with religious division and classification).

132. E.g., CONST. OF THE REPUBLIC OF THE UNION OF MYANMAR, 2008, c. 8, arts. 361-62 (recognizing special position of Buddhism, but not establishing or explicitly privileging a religion).

133. BANGLADESH CONST., 1972, pt. 1, art. 2A; BRUNEI DARUSSALAM CONST.,

postcolonial return to an Islamic normative system that was relatively ignored during the colonial period.¹³⁴ Similarly, the Sri Lankan Constitution accords Buddhism “the foremost place” and requires the State to protect and foster Buddhism.¹³⁵ The practical significance of such constitutional provisions is to subject other legal norms—especially socially controversial norms like decriminalization—to additional levels of scrutiny and approval by religious authorities. Indeed, the Constitution of Pakistan states this explicitly, by providing that all existing and future laws must be in conformity with Islam.¹³⁶

Second, the prioritization of religious views and ethnic harmony over gender equality is apparent in the family laws of retaining jurisdictions. In particular, each retaining jurisdiction has separate family laws (known as “personal laws”) that apply to particular cultural groups—rather than a uniform and secular family law that applies to everyone.¹³⁷ Personal laws condone gender inequality in twin respects: they condone the unequal rights of men and women within cultural groups (for example, a given personal law may permit broader grounds of divorce for men than for women)¹³⁸ and furthermore, they create unequal rights among women across different groups (for instance, by entitling Christian or Hindu women

1984, pt. 2, art. 3; MALAYSIA CONST., 1957, pt. 1, art. 3; PAKISTAN CONST., art. 2.

134. Robert Ken Arakaki, Religion and State-Building in Post-Colonial Southeast Asia: A Comparative Analysis of State-Building Strategies in Indonesia and Malaysia 131-32 (Aug. 2004) (unpublished Ph.D. dissertation, University of Hawai'i) (regarding British imposition of a secular metanarrative); see, e.g., Agence France-Presse, *Sultan of Brunei Unveils Strict Sharia Penal Code*, GUARDIAN (Apr. 30, 2014, 6:09 PM), <http://www.theguardian.com/world/2014/apr/30/sultan-brunei-sharia-penal-code-flogging-death-stoning> (explaining the adoption of Sharia law in Brunei).

135. CONST. OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, 2011, c. 3, art. 9.

136. See PAKISTAN CONST., art. 227(1).

137. See Panditaratne, *supra* note 14, at 84 (citing person laws in India, Singapore, and Sri Lanka); see also DIVERS PATHS TO JUSTICE: LEGAL PLURALISM AND THE RIGHTS OF INDIGENOUS PEOPLES IN SOUTHEAST ASIA 107 (Marcus Colchester & Sophie Chao eds., 2011) (referring to personal laws in Bangladesh, Pakistan and Malaysia); see also Melissa Crouch, *Rediscovering “Law” in Myanmar: A Review of Scholarship on the Legal System of Myanmar*, 23 PAC. RIM L. & POL'Y J. 543, 551-52, 554 (2014); see also TAHIR MAHMOOD, STATUTES OF PERSONAL LAW IN ISLAMIC COUNTRIES – HISTORY, TEXTS AND ANALYSIS 58-61 (2d ed. 1995).

138. Panditaratne, *supra* note 14, at 84.

to larger maintenance payments than Muslim women).¹³⁹

The normative message of these discriminatory systems of personal laws is clear: the right to equality in one's personal and family relationships is secondary to other interests; namely, the communal interests of religious and ethnic groups, and the interests of the state in maintaining harmony between these groups. The founding leader of Singapore, Lee Kuan Yew, revealed how this message informs the realization of L.G.B.T. rights when he remarked that Singapore should "go slowly" in decriminalizing same sex relations, because of "a part Muslim population, another part conservative older Chinese and Indians," and a consequent need "to maintain social cohesion."¹⁴⁰

Sri Lanka's experience is particularly instructive in demonstrating how a preoccupation with communal interests, reflected in both constitutional and personal laws, can embed traditional gender roles and work against decriminalization. Since Sri Lanka's independence in 1948, and especially during the civil war of 1983-2009, the prevailing political discourse has centered on distributions of power between religious and ethnic communities, with little regard to gendered distributions of power.¹⁴¹

The postcolonial Sri Lankan state has managed the relationships between majority and minority communities by according the majority in Sri Lanka a constitutionally privileged status,¹⁴² and, in exchange, appeasing minority groups by allowing them to preserve their community-specific personal laws¹⁴³ even if these laws are gender biased. In the Tamil-majority north, for example, women

139. *Id.*

140. Mydans & Arnold, *supra* note 62.

141. See Bruce Kapferer, *Ethnic Nationalism and the Discourses of Violence in Sri Lanka*, 9 COMMUNAL/PLURAL J. TRANSNAT'L & CROSS-CULTURAL STUD. 33, 36 (2001); Sanjay Kumar, *The Rise of Buddhist Nationalism in Sri Lanka*, DIPLOMAT (July 9, 2014), <http://thediplomat.com/2014/07/the-rise-of-buddhist-nationalism-in-sri-lanka/>.

142. Panditaratne, *supra* note 14, at 102-03 (noting favored status of Buddhism).

143. See Gurharpal Singh, *Religion, Politics, and Governance in India, Pakistan, Nigeria and Tanzania: An Overview* 12 (Religions and Dev. Research Programme, Working Paper No. 55, 2011) (noting in India, "Muslim minority's fears were assuaged by the concession of Muslim Personal Law"); Panditaratne, *supra* note 14, at 103.

cannot dispose of real property without the consent of their husbands,¹⁴⁴ while Muslim family law allows only men to contract polygamous marriages.¹⁴⁵

No government has attempted significant reforms of these discriminatory personal laws in Sri Lanka because of the potentially disruptive effect on inter-ethnic relations.¹⁴⁶ In essence, the state has struck a strategic bargain with minority communities, whereby they are given more say over “private” and “family” norms, in exchange for less power in “public” or “political” spheres.¹⁴⁷ This does not augur well for L.G.B.T. rights, which are likely to be resisted by minority leaders who wish to exercise their influence in already limited spheres of autonomy. This became apparent in the 1990s, when Christian and Muslim leaders reportedly blocked informal proposals to repeal sections 365 and 365A of Sri Lanka’s penal code.¹⁴⁸

As suggested in the concluding section below, minority communities may become less zealous guardians of traditional

144. Panditaratne, *supra* note 14, at 89.

145. See Muslim Marriage and Divorce Act (Law No. 41/1975) (Sri Lanka); see also *Abeyundere v. Abeyundere*, 1 SLR 185, 200 (1998) (Sri Lanka) (holding a Muslim man can contract a bigamous marriage provided he as Muslim at the time of his first marriage).

146. Panditaratne, *supra* note 14, at 103 (noting a statement of the Sri Lankan government that, “in an environment which calls for the sensitivity to pluralistic religious and cultural beliefs, it has not been possible to address’ the ‘discriminatory features’ of personal laws”).

147. See Mydans & Arnold, *supra* note 62; see Panditaratne, *supra* note 14 at 103; see also Asanga Welikaka, *Implementing the Thirteenth Amendment: The First Step of a Long Journey*, GROUNDVIEWS (Jan. 22, 2015), <http://groundviews.org/2015/01/22/implementing-the-thirteenth-amendment-the-first-step-of-a-long-journey/> (noting weakly-enforced constitutional provisions on minority language rights and political devolution).

148. See *Where Do We Stand on Gay Rights?*, DAILY MIRROR (Nov. 9, 2011), <http://www.dailymirror.lk/14644/where-do-we-stand-on-gay-rights> (noting a large Muslim population appears to make decriminalization less likely); see Victor Asal et al., *Original Sin: A Cross-National Study of the Legality of Homosexual Acts*, 46 COMP. POL. STUD. 320, 328, 340-42 (2012) (noting the role of Christian and Islamic in reducing the chances of decriminalization); see also Lesley Newson & Peter J. Richerson, *Explaining Variation in Acceptance of Homosexuality: Testing a Cultural Evolutionary Hypothesis* (2011) (unpublished manuscript); Dasun Edirisinghe, *Population: Census Expert Disputes Anti-Muslim Claim*, ISLAND (Mar. 18, 2013), http://www.island.lk/index.php?page_cat=article-details&page=article-details&code_title=75030.

“personal,” “private,” or family norms if they are granted meaningful powers and influence in the political and public spheres.¹⁴⁹ This might be realized by equal constitutional recognition of majority *and* minority religions and languages, greater political devolution, and electoral schemes that ensure the proportional representation of minority communities in national and provincial legislatures.¹⁵⁰

5. Inhibited Notions of Privacy in Multigenerational Households

The fifth factor in the persistent criminalization of same sex relations in retaining jurisdictions also relates to family norms—but to societal, rather than legal, norms. In particular, it appears that strong, extended family networks and multigenerational households in South and Southeast Asia may be inhibiting notions of individualism and privacy and thereby, popular support for decriminalization. As scholars have noted, libertarian and privacy-based arguments played a critical role in decriminalizing same sex relations in the West.¹⁵¹ The persistence of extended family norms in South and Southeast Asia, however, suggests that these arguments have had less traction in Sri Lanka and other retaining jurisdictions in Asia.

Sociologists have observed that family norms in South and Southeast Asia are defying an expected trend of modernization—whereby as countries advance economically, their populations place a greater value on individualism and privacy and correspondingly are more likely to choose to live in smaller households and within

149. See *Minorities and Legislatures: Must the Rainbow Turn Monochrome in Parliament*, ECONOMIST (Oct. 25, 2007), <http://www.economist.com/node/10024517/print> (noting the possibility of a corresponding relationship between minority representation in legislatures an potential for safeguarding other minorities from government abuse); see also Sharad Raghavan, *Minorities Better Represented in the Indian Parliament than in the US*, LIVEMINT, <http://www.livemint.com/Opinion/bKRhH5ST4fMV7TvcbRMVxO/Minorities-better-represented-in-the-Indian-parliament-than.html> (last visited May 21, 2015) (comparing the representation of minority groups in different countries).

150. Panditaratne, *supra* note 14, at 102 (noting the failure to compliment such provisions in Sri Lanka).

151. See Sanders, *supra* note 29 at 25, 27-29 (noting the impact of privacy-based arguments on the Wolfenden Committee in England, the well-known statement of the former Prime Minister of Canada and the influence of privacy arguments in the United States); see, e.g., *Lawrence v. Texas*, 539 U.S. 558, 558 (2003).

nuclear families.¹⁵²

While households are becoming smaller in South and Southeast Asia,¹⁵³ the average household is still larger than in most Western countries. Most significantly, multigenerational living arrangements remain the norm, irrespective of household size.¹⁵⁴ It therefore appears that decreasing household sizes in South and Southeast Asia are being driven by lower fertility levels, rather than an increasing desire for privacy and the associated “nuclearization” of families.¹⁵⁵

Sri Lanka, for example, has experienced a decline in fertility levels such that its average household size currently hovers around four persons,¹⁵⁶ the lowest in South Asia.¹⁵⁷ This decrease in average household size, however, has *not* been accompanied by a corresponding change in multigenerational residence.

Over three-quarters (77%) of adults in Sri Lanka aged sixty years and older reside with at least one adult child, and a mere 6% live alone.¹⁵⁸ These figures are similar to those in the United States in 1900, when the average household size was 4.6 persons,¹⁵⁹ a majority (57%) of adults aged sixty five and under lived in multigenerational

152. See Esteve & Liu, *supra* note 50, at 5; John Bongaarts, *Household size and composition in the developing world in the 1990s*, 55 POPULATION STUD. 263, 265 (2001); Newson & Richerson, *supra* note 148 (stating economic development includes various aspects – such as migration to urban areas – that contribute to the twin phenomena of a greater value on privacy and smaller, more nuclear households).

153. W. Indralal De Silva, *Family Transition in South Asia: Provision of Social Services and Social Protection*, 20 ASIA-PAC. POPULATION J. 13, 14-15 (2005); see also Esteve & Liu, *supra* note 50, at 34.

154. See Esteve & Liu, *supra* note 50, at 1; see also Bogaarts, *supra* note 152, at 274.

155. See Esteve & Liu, *supra* note 50, at 34.

156. *Id.* at 34 (reporting that in 2010-2013, the average household size in Bangladesh and Pakistan was 4.4 and 6.5, respectively; in 2000-2004, 4.7 and 4.6 in India and Malaysia respectively; and in 2005-2009, 4.7 in Myanmar).

157. *Id.*; de Silva, *supra* note 102, at 14.

158. Human Dev. Dep't: South Asia Region, The World Bank, *supra* note 15, at 12-17 (noting that the living arrangement of Sinhalese reflected remarkable similarity to the living arrangements shown in the survey results and concluded “living arrangements are likely to have persisted over time”).

159. Campbell Gibson, *Average Household Size for the United States by Region and State: 1900, 1940, 1970, and 2000*, AMERICAN DEMOGRAPHIC HISTORY CHARTBOOK: 1790 TO 2010 (July 27, 2010), <http://www.demographicchartbook.com/Chartbook/>.

households, and less than 6% of the same age group lived alone.¹⁶⁰ By 2008, a few years after nationwide decriminalization in the United States, the average household size had fallen to 2.6 persons,¹⁶¹ only around 20% of senior adults lived in a multigenerational household, and over a quarter (27%) lived alone.¹⁶²

As has been observed, the norms of patrilocality and extended families result in the general perception that the family has a greater prerogative than the individual.¹⁶³ Aside from Sri Lanka, multigenerational living arrangements are common in other former British colonies in South and Southeast Asia. In India, the average household size has gradually declined to 4.7 persons,¹⁶⁴ but over 75% of senior adults reside with an adult child.¹⁶⁵ Indeed, commentators have noted that “intergenerational co-residence . . . in India not only shows no sign of declining, but also displays an *upward* trend.”¹⁶⁶

Multigenerational households appear to be even more common in affluent Singapore, where the average household has only 3.5 persons while 85% of adults aged sixty years and older reside with at least one adult child.¹⁶⁷ In economic terms, families in Singapore—in stark contrast to families in the United States and Great Britain—have not used their higher incomes to “purchase” more privacy.¹⁶⁸

While multigenerational households are common throughout Asia, they appear to be generally *less* common in countries that do *not*

160. PEW RESEARCH CTR., THE RETURN OF THE MULTI-GENERATIONAL FAMILY HOUSEHOLD 2, 10 (2010) (referring to adults aged sixty five years and older).

161. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 4-5 (2012).

162. PEW RESEARCH CTR., *supra* note 160, at 10.

163. Carolien Huijgen, Family Formation and Marriage Patterns: A Comparison Between Sri Lanka and Europe 47 (2010) (unpublished Masters thesis, University of Utrecht).

164. See Esteve & Liu, *supra* note 50, at 34 (noting a decline from 5.1 in 1980-1984 to 4.7 in 2000-2004).

165. See also *id.* at 4, 10-13, 16, 33 (noting that older adults usually live with an adult son since they are more likely than daughters to continue to reside in a parental home after marriage).

166. See, e.g., *id.* at 14, 35-36 (referring to the percentage of all adults living with their parents or adult children, while percentage living alone varies from 2.6% to 7.78% depending on gender and age) (emphasis added).

167. *Id.* at 34; Human Dev. Dep't: South Asian Region, The World Bank, *supra* note 15 at 13.

168. Lisa Cameron, *The Residency Decision of Elderly Indonesians: A Nested Logit Analysis*, 37 DEMOGRAPHY 17, 18 (2000).

criminalize same sex relations.¹⁶⁹ Hence the rate at which adults aged sixty years and older who live with their children are slightly lower in Thailand (71%), the Philippines (70%) and Taiwan (69%),¹⁷⁰ and markedly less so in Indonesia (63%).¹⁷¹ Of the former French colonies in Asia, none of which criminalize same sex relations,¹⁷² Vietnam has recently come to the forefront of L.G.B.T. rights by taking steps towards recognizing same-sex marriage.¹⁷³ Notably, the co-residence rate of adults aged sixty five years and older there fell significantly from 2000 to 2010, and now stands at less than 65%.¹⁷⁴

In China, which decriminalized same-sex relations in 1997, the rate of co-residence also fell significantly during the 1990s, to less than 69% for women and 60% for men by the year 2000.¹⁷⁵ In Hong Kong, which is still the only former British colony in Asia to have decriminalized same sex relations, demographic data suggests that multigenerational households were becoming less common around the time of decriminalization in 1991.¹⁷⁶ Specifically, historical surveys (albeit with limited sampling) indicate that the rate of co-

169. Compare GERIATRIC CTR. NEPAL, STATUS REPORT ON ELDERLY PEOPLE (60+) IN NEPAL ON HEALTH, NUTRITION AND SOCIAL STATUS FOCUSING ON RESEARCH NEEDS 9 (2010) (estimating that eighty percent of senior adults in Nepal live with their children), and Esteve & Liu, *supra* note 50, at 33 (stating fewer than seventy percent of adults aged sixty five and older in Malaysia live with their children), with PEW RESEARCH CTR., *supra* note 160, at 10.

170. Human Dev. Dep't: South Asia Region, World Bank, *supra* note 15, at 13.

171. Cameron, *supra* note 168, at 22.

172. See discussion, *supra* Part II.C.

173. See John Boudreau & Nguyen Dieu Tu Uyen, *Gay Weddings Planned as Vietnam Marriage Law Is Repealed*, BLOOMBERG BUS. (Jan. 7, 2015), <http://www.bloomberg.com/news/articles/2015-01-07/gay-weddings-planned-as-vietnam-marriage-law-is-repealed> (reporting that while Vietnam does not officially recognize same-sex marriage, its new marriage law abolished regulations prohibiting same-sex marriage).

174. See Esteve & Liu, *supra* note 50, at 33 (noting the rate of co-residence as 76.98% (1990), 74.87% (2000), and 62.01% (2010) for men, and 72.81% (1990), 72.43% (2000), and 64.86% (2010) for women).

175. See Zeng Yi, *Dynamics of Elderly Living Arrangements in China*, in NEW PERSPECTIVES ON CHINA AND AGING 93, 96 (Ian G. Cook & Jason L. Powell eds., 2007); see also Esteve & Liu, *supra* note 50, at 33 (reporting slightly different figures and indicating that the co-residence rate had already fallen below 70% by 1990).

176. Iris Chi & Nelson Chow, *Housing and Family Care for the Elderly in Hong Kong*, in HOUSING OLDER PEOPLE: AN INTERNATIONAL PERSPECTIVE 49, 50-51 (Satya Brink ed., 1998).

residence of senior adults fell from over 80% in 1984 to less than 60% in 1994.¹⁷⁷

The contrasting data on multigenerational households, between countries that continue to criminalize same sex relations on the one hand and non-criminalizing jurisdictions on the other, is unsurprising in light of sociological theory. If multigenerational family settings reflect (and perhaps) reinforce relatively lower preferences for individual autonomy and privacy, support for decriminalization is likely to be more sluggish in countries with strong extended family networks and multigenerational households. In this context, equality-based arguments for decriminalization may have a more immediate effect in these countries, rather than the libertarian and privacy-driven arguments that propelled decriminalization in Western countries.

IV. CONCLUSION

This article has aimed to identify and discuss a number of socio-cultural impediments to the decriminalization of same sex relations in Asia. It has sought to explain, in particular, the extent to which five factors have reinforced the continued criminalization of same sex relations. These factors include: the widespread assumption that criminal prohibitions of same sex relations are unenforced; frequent misconceptions surrounding homosexuality and child abuse; a politicized desire to assert “cultural” and “moral” independence from the West by resisting the recognition of L.G.B.T. rights; the political focus placed on addressing religious and ethnic divisions over gender-based ones; and finally, the social prevalence of extended family networks that inhibit notions of intimacy and privacy.

To some extent, these factors fuel functionalist arguments against decriminalization; for example, that decriminalization is unnecessary and would be an inefficient use of political resources, or that criminalization helps to maintain social cohesion. To a lesser extent, the above factors are expressions of moral arguments, and particularly, of the significance of “local” religious or cultural values—including as regards the relative importance in society of the

177. See CHAK KWAN CHAN, SOCIAL SECURITY POLICY IN HONG KONG: FROM BRITISH COLONY TO CHINA’S SPECIAL ADMINISTRATIVE REGION 135 (2011); *id.* at 55

individual and the group.

In concluding, it is worth considering, if only briefly, some strategies that could foster a supportive political and socio-cultural climate for decriminalization against the backdrop of the five factors discussed above. While a substantial exploration of these strategies is beyond the scope of this article, the following are among the approaches or measures that could incentivize or support the decriminalization of same sex relations in Asia.

One such strategy would be for Western states to avoid or relinquish a tone of “ownership” of L.G.B.T. rights in their foreign policy rhetoric and platforms. A landmark step in this direction would be a public acknowledgement by the U.K. government of its historical role in the criminalization of same sex relations in its previously dominion states throughout Asia.¹⁷⁸

At the national level, several reforms could be deployed to foster greater support for decriminalization. Governments of countries that are not inclined to decriminalize same sex relations could begin to (i) engage in public consultations on the issue of decriminalization – and in that process, study relevant laws in other Asian countries that do not criminalize same sex relations; (ii) consistently combat child abuse through statutory provisions that are specifically designed for that purpose; and (iii) work towards a legal framework that emphasizes the principles of equality and non-discrimination on *all* grounds—including on gender and sexual orientation—without prioritizing issues of religion, race, and ethnicity.

This last strategy might involve, for instance, constitutional or statutory reforms to prohibit discrimination on various grounds and the gradual implementation of a uniform family law in place of ethnically-based and gender-discriminatory personal laws.¹⁷⁹ The passage of such reforms may be easier in countries where minority

178. See Erik Voeten, *The Recriminalization of Homosexuality in India and the Potential for Broader Backlash*, WASH. POST (Dec. 11, 2013), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/11/the-recriminalization-of-homosexuality-in-india-and-the-potential-for-broader-backlash/>;

179. See Keith Hotten, *Right to Family*, in LAW OF THE HONG KONG CONSTITUTION 809, 824-25 (Johannes Chan & C.L. Lim eds., 2011) (describing the process taken by Hong Kong to implement a uniform family law with regard to polygamous marriages).

ethnic communities play a visible and substantial role in political and public spheres, aside from (for instance) commercial and private spheres.

Aside from any inherent merits of more balanced power relations among ethnic communities, politically empowered minority communities appear less likely to oppose changes to “personal,” “private” and family norms (such as prohibitions on same sex relations), compared to minority communities whose political identities are limited to the safeguarding of laws and traditions regarding interpersonal norms.

It should also be borne in mind that, in contrast to the libertarian arguments that feature in advocacy for L.G.B.T. rights in Western countries, employing more equality-based arguments toward decriminalization in South and Southeast Asian countries—that have strong, multigenerational family links—could yield a more immediate and substantial effect on decriminalization.

At least some of the above strategies and reforms have already been encouraged by N.G.O.’s advocating decriminalization. In addition, N.G.O.’s could play a more active educational role to dispel popular misconceptions about the statutory provisions and target influential groups in society, like lawyers, police, mental health professionals, university students, and clergy. Greater engagement with the U.N. Human Rights Committee, during a country’s periodic reporting exercises under the International Covenant on Civil and Political Rights (I.C.C.P.R.), could also be a promising means to advocate decriminalization.¹⁸⁰

Finally, it must be observed that the factors impeding decriminalization, and the strategies and reforms suggested above, are by no means conclusive. There is naturally a range of dynamics at play, including the potential for a single, yet forceful, individual or group to emerge as momentous advocate for change. Approximately one hundred and fifty years after the criminalization of same sex relations in former British colonies, such a change would be a long overdue measure of justice to L.G.B.T. communities in Asia.

180. See Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights*, ¶ 20, U.N. Doc. A/HRC/22/17 (Dec. 13, 2012) (describing efforts taken by the O.H.C.H.R. to promote decriminalization of and anti-discrimination towards same-sex activity).