

# **Review of Legal Frameworks and the Situation of Human Rights related to Sexual Diversity in Low and Middle Income Countries**

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## Introduction

Despite the many programs carried out over the years to prevent HIV among gay, bisexual and other men who have sex with men, transgendered individuals and, more generally, sexual minority groups, these populations continue to be at increased risk of HIV together with its associated medical and social consequences<sup>1</sup> (Baral et al., 2007).

The term “social exclusion” describes the alienation or disenfranchisement that certain individuals or groups experience within society. While often connected to a person’s social class, gender, age or ethnicity, social exclusion is broader than this, being closely linked to social recognition and legitimacy (Honneth, 2007). Those who are socially excluded have little social value; they may be marginalized economically, politically and socially, and they cannot enjoy the economic and social opportunities available to others including access to good health.

Fundamental human rights and freedoms include, but are not limited to, the rights of sexual minorities to respect and dignity, non discrimination, equality, participation, life, identity, self determination, and access to health. Social exclusion not only offends against human dignity but also denies people their fundamental human rights – including rights to life and liberty, citizenship, education and health among others (Beall, 2005). Despite advances in recent years, sexual minorities continue to be among those most marginalized, excluded and discriminated against in many societies in the world (Amnesty International, 2007). As a consequence, their vulnerability to stigma as well as a range of social and health problems, including HIV is heightened (Cáceres et al 2002; Meyer 2007, Barrasa et al. 2007). The respect, protection and fulfillment of human rights (as well as recognition of human rights violations) are key determinants of the HIV/AIDS epidemic (Mann et al, 2000). The broad range of human rights- civil, political, economic, social and cultural- should be equally enjoyed by all groups of individuals, notwithstanding their sexual orientation or gender identity (UNAIDS, 2007).

By the early 1990s, it had become clear that the global epidemic was strongly structured both in its impact and effects. The late Jonathan Mann was among the first to suggest that HIV had the capacity to exploit the fault lines of an already unequal world (Mann & Carballo 1989; Tarantola et al 2006). Thereafter, the concept of social vulnerability as it affected the AIDS epidemic was taken up by many commentators who highlighted the importance of structural factors such as poverty and economic opportunity; gender, age, ethnicity and sexuality; social relations and peer networks; and the criminalization of certain practices in fuelling the epidemic (UNAIDS, 1998). Notions of vulnerability emphasize the importance of politics, history and culture in determining the risks individuals face and in affecting their capacity to respond (Aggleton 2004). However, vulnerability does not imply incapacity to develop agency, to resist or to change one’s own conditions of living (Paiva, 2005).

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<sup>1</sup> While a decade ago this population highly vulnerable to HIV was labelled as “men having sex with men” (MSM) to emphasize practices more significantly associated with HIV transmission, rather than specific identities (gay, bisexual, homosexual), today a new emphasis is made on identities, without disregarding practices. Consequently, our focus here is a category of vulnerability that involves gay, bisexual and other men having sex with men and self-identifying in diverse ways (including as heterosexuals) and transgender persons (travesties, transgendered, transsexuals) whose gender identity collides with their being labelled as “men”. In some cases, then, we will use the acronym “GBT and other MSM”. Likewise, addressing social exclusion and human rights violations on grounds of sexual diversity and non-heterosexual sexual practices makes it morally and rationally necessary to include the situation of women who have sex with women of all sexual orientations and identities.

Within the context of HIV, vulnerability depends on at least three groups of related influences (Aggleton 2004):

- Membership in groups or subcultures with higher HIV prevalence, so that the likelihood of pairing with a partner living with HIV is higher;
- Lower quality and coverage (in total numbers and in terms of populations groups covered) of services and programs;
- Higher-level social/environmental influences such as laws, public policies, social norms, culture (e.g. discrimination); which configure an environment hostile to the integration and needs of certain groups.

People who are socially vulnerable and excluded quickly become vulnerable to HIV. For young women and men, the links between poverty, migration and transactional sex are strong (Maganja et al. 2007; Salazar et al. 2007). For example, in most countries male-to-female transgender individuals encounter limited employment opportunities, with 'entertainment' and sex work being among the few viable options (Maganja et al. 2007; Melendez & Pinto 2007; Belza et al. 2000). Social exclusion may also be associated with increased use of alcohol and illicit drugs, which can be sources of vulnerability in their own right (Samet et al 2007; Kerr-Pontes et al. 2004).

The social exclusion of gay, bisexual and other men who have sex with men and transgender persons is an overwhelming reality worldwide. While progress has been in some countries, and a statement of international principles signed in 2006 in Yogyakarta, Indonesia (Yogyakarta Principles, 2007) has articulated the connection between sexual rights and human rights, in most countries of the world the situation remains problematic (Amnesty International, 2007).

Present challenges to equality and therefore to the realization of health, include:

- Continued existence of unjust and irrational laws – A number of countries have laws criminalizing same-sex relations and sexual/gender diversity, often leading to killings generated or openly tolerated by the State. In these countries, adequate provision for HIV prevention, treatment and care among sexually minority populations remains unthinkable. In other cases, while there is no criminalization, protection against hate crimes or other forms of discrimination does not exist, and the risk of occurrence of such crimes hampers the implementation of HIV prevention and treatment and care for such groups.<sup>2</sup>
- The presence of cultural barriers to law enforcement – In the event that laws are not an obstacle, cultural norms may still pose a de facto barrier to activities promoting HIV prevention, treatment and care among minority sexual groups. Such barriers may result from unfriendly services (i.e. effective discrimination) or self-segregation (internalized homo/transphobia). At a societal level, lack of concern about the very high HIV-related morbidity and mortality among men who have sex with men may reinforce the perception that populations of minority sexuality are prone to sexual disease and may lead to inadequate and insufficient health policies. Central in this process is lack of effective citizenship among people of sexual minority status. The

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<sup>2</sup> In 2007, a police crack-down on a "gay sex party" in Kuala Lumpur offers a sad but pertinent example of how condoms that men having sex with men used were admitted as official evidence of deviant behaviour: "Police found used condoms strewn all over the floor, seven tubes of lubrication jelly" (*International Herald Tribune*, 2007) -a clear indication that these men were practicing safer sex.

absence of explicitly protective laws may make this barrier all the more insidious.<sup>3</sup>

- Deficient health systems planning – Regardless of legal or societal barriers to HIV-related service provision, specific obstacles may result from within health planning itself. Health programs for HIV prevention, treatment and care usually have to deal with two sets of challenges: first, the relative invisibility of gay, bisexual and especially other categories of men who have sex with men, which results in a general lack of resources and an inability to respond; second, the over-identification of HIV with sexual minorities, which may trigger further stigmatization, as well as rejection by LGBT (lesbian, gay, bisexual, transgender) advocacy groups and communities who strive to downplay the role of HIV in sexual minority politics (Caceres, 2005). Health services and systems therefore may have insufficient capacity to respond to a broader array of morbidity among sexually minority populations and fail to obtain full legitimacy among them.

Not only structural but also physical violence affects sexual minorities and has an impact on overall morbidity and mortality. For example, in 2006 one death was estimated to occur every four days due to hate crimes against sexual minorities in Peru (Bramonte and Alvarez Chaves-MHOL, 2005). In 2007, 85 member states of the United Nations still criminalized consensual same-sex acts among adults – with penalties ranging from fines, imprisonment and even death, which serves to legitimize the violence that sexual minorities face (Ottoson, 2007).<sup>4</sup>

## Objective

This study sought to review published and unpublished data and information of policies, legal frameworks and regulations, homophobic practices (including violence) and related human rights violations, as well as stigma and discrimination with a pilot study to fill the most relevant knowledge gaps in sub-Saharan Africa, Asia, the Middle East and North Africa, Eastern Europe, and Latin America and the Caribbean.

## Methods

A database in *Excel* was designed to assemble information for key variables on a country basis. Low- and middle-income countries were classified into 9 regions: Asia (East, South, South-East); Africa (East-South and West-Central); Eastern Europe/Central Asia; Middle-East/North Africa, Latin America, and the Caribbean. Sources included:

- a) Key reports produced by human rights organizations, the United Nations system, the GFATM and selected activist organizations, based on studies produced following a well-described, sound methodology;

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<sup>3</sup> For example, in a recent study providers of mental health care to sexual and gender minority groups in a rural state in the USA claimed to adopt a “neutral” therapeutic posture when working with sexual minorities. However, evidence revealed that “LGBT clients had been denied services, discouraged from broaching sexuality and gender issues by providers, and secluded within residential treatment settings” and concluded that stated policy with respect to sexual minorities in terms of service delivery are often incongruent with practice (Willging et al., 2006).

<sup>4</sup> See also data in Figari et al (2005) and the series of surveys conducted in several Latin American cities on the Pride Parades (available at [www.clam.br](http://www.clam.br)).

- b) Institutional websites;
- b) Written and verbal information provided by key informants;
- c) Peer-reviewed publications;
- d) News and brief reports produced by activist organizations and clearinghouses;
- e) Abstracts and papers presented at the International AIDS Conferences; indicators registered at the monitoring and evaluation of Global Fund projects.

The central team conducted searches in *pubmed* and conference databases. These were complemented with searches in general engines (e.g. *Google*). Key reference people also helped locate information. An effort was made to locate either printed or Internet-accessible references for all records.

A second database was designed to assemble reference documents. When possible, references were converted into *PDF* files. A field was included in the database to provide an electronic link to either *PDF* or *html* files (in a folder attached to the database).

### ***Analysis***

Analysis was organized in three areas:

I. Legal frameworks, Laws and Regulations: Sodomy/homosexuality status; anti-discrimination provisions; protective/affirmative action provisions; same-sex unions / marriage; laws that allow transsexuals who have undergone gender reassignment surgery to obtain new personal documents reflecting their new gender

II. Homophobic violence: Homophobic crimes; other human rights violations related to homophobia; State violations of human rights; non-State violations of human rights.

III. Stigma and discrimination: Based on sexual orientation; based on gender identity; HIV-AIDS related.

A detailed analysis of the civil society response to these phenomena is beyond the scope of this report. However, where possible, such role will be discussed for each of the three areas outlined above.

## Findings and Data Analysis

We organize the findings and data analysis in three sections: Laws and Regulations, Human Rights of Same-Sex-Practicing or Gender-Variant Individuals, and Stigma and Discrimination. The first section focuses on legal aspects; the second section focuses on the role of the states; and the third section focuses on social interactions and civil society aspects.

### I. Law Traditions, National Legal Systems and Sexual Diversity

The main aim of this section is the description and analysis of the legal treatment employed by different countries concerning sexual diversity. The research on legal regulation of sexual diversity focused on the classification of legal regimes in view of homosexuality, which is understood as an identity category, as well as the factual condition of same-sex behaviors. This is a consequence of both the usage of polysemic concepts like 'sodomy'<sup>5</sup> to repress sexual diversity and of the non-existence of a suitable definition concerning the status of transsexuals and transgendered persons.

Secondly, this analysis utilizes general elements and comprehensive categories that can characterize legal traditions<sup>6</sup> given the peculiarity of each national legal system<sup>7</sup>, which comprise multiple and complex cultural, political, ideological, religious and demographic influences. Given the number of countries surveyed and the variation in their legal systems, there were unavoidable dangers of oversimplification in this procedure. However, it did enable us to analyze certain standardized criteria, highlight tendencies and draw a comprehensive overview of the legal regulation of sexual diversity.

By using a classification of the degrees of repression and protection of sexual diversity found, the present analysis suggests an approach to understanding the suitability of the various national legal systems in light of current legal traditions. It is also necessary to consider the influence of religion to characterize legal systems with respect to sexual diversity. Last but not least, we also can identify the most common and successful efforts to protect human rights regarding sexual diversity.

#### *A) Availability of data, sources*

The report is based on the legal instruments concerning sexual diversity in each country, data provided by national human rights institutions (such as Amnesty International, ILGA, Human Rights Watch and the International Gay and Lesbian Human Rights Commission). Although much data is available, and many elements were found, there was a lack of detail and precision. This is a consequence of the dynamics

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<sup>5</sup> This concept, which presents historical and cultural variations, is understood here as the practice of intentional sexual intercourse between people of the same sex, being men or women; in this report, such behavior is often termed as involving "acts against nature" in some national laws, which may designate sexual intercourse different from vaginal penetration. The variation of this concept, however, cannot be underestimated: in many legal systems, the concept of sodomy applies only to masculine sexual intercourse, and does not include women.

<sup>6</sup> A legal tradition is understood as the group of more or less extensive legal norms, unified by an original community of sources, fundamental concepts and methods and development processes (Ancel, 1980:58).

<sup>7</sup> A national legal system is understood as the group of legal norms in force in a country in a given moment, which may be limited to laws created by the legislature and/or the Executive Power, or may include judicial decisions.

and national peculiarities of each country in the formation and development of the respective national legal system.

*B) Data by region/country; analysis on the global level and by region*

Based on the present data collected concerning the legal regulation of sexual diversity, it is possible to categorize the regions of the world, both quantitatively and qualitatively, thus providing elements for a comparative analysis (sub-section “c”, below):

**Table 1 : Legal systems and LGBT rights per region**

Legal Systems		Region						
		Sub-Saharan Africa (48)	Latin America (17)	Caribbean (16)	Middle East & North Africa (15)	South Asia (08)	East Asia & Pacific (24)	Europe & Central Asia (27)
1. Repressive	1.1 Highly Repressive	18		11	6	6	8	0
	1.2 Moderately Repressive	12	3	0	7	2	5	2
2. Neutral	2. Neutral	15	5	5	1	0	9	11
3. Protective	3.1 Protective Measures	1	3	0	0	0	2	6
	3.2 Recognition Measures	1	6	0	0	0	0	8
TOTAL	153 (consolidated) 155 (general)	47	17	16	14	8	24	27
n.d.		1	-	-	1	-	-	-

1. **Repressive** – countries whose laws prohibit sexual intercourse between people of the same sex;
  - 1.1 Highly repressive – countries whose laws consider sodomy a crime and imposes severe penalties such as death, heavy labor, imprisonment for at least five years;
  - 1.2 Moderately Repressive – countries whose laws consider sodomy a crime and imposes penalties of less than five years or fines;
2. **Neutral** – countries which do not have any legal prohibition of same-sex behavior nor address sexual diversity (see remark 3);
3. **Protective** – countries whose laws prohibit discrimination against sexual diversity, in the Constitution or legislation, with or without positive measures of recognition;
  - 3.1. Protective with protection measures – countries whose laws prohibit discrimination against sexual diversity, without any positive measures of recognition;
  - 3.2. Protective with recognition measures – countries whose laws include an explicit prohibition of discrimination against sexual diversity, with positive measures such as marriage, civil union, transgender rights recognition.

There are some national legal systems which do not consider the practice of sexual intercourse with people of the same sex as a criminal act but use other discriminatory instruments against homosexuals, such as general legal prescriptions concerning the maintenance of the public morality. This might happen even in countries where there is protective legislation against prejudice. The present document cannot map such prejudiced application of laws as it is only an analysis of national legal systems in existence.

The classification is based on the data available and may appear contradictory in some cases. For example, a country may repress freedom of speech and behavior while at the same time authorize and tolerate surgery for sex-reassignment such as Iran. However, Iran was classified with the repressive states because it seems that for those cases the treatment is considered a medical procedure and a consequence of sickness unrelated to diversity and freedom from discrimination based on sexual orientation or gender variance .

The assignment of the category of neutrality to national legal systems which do not authorize nor provide any kind of protection to cases of sexual diversity only constitutes a formal description of the content of specific national legal system. It is not a political or ideological qualification of the respective system although generally the lack of provision concerning the protection against discrimination indicates a negligent position with regard to violations of human rights related to sexual diversity.

For further detail, see Appendix 1.

### *C) Comparative analysis: legal contemporary systems and sexual diversity*

Our effort to classify national legal systems according to the degrees of repression, neutrality and protection of sexual diversity yields an outcome that implies careful interpretation. Among the possible hypotheses, two crucial factors may be considered: (1) the suitability of the various national legal

systems to the contemporary legal traditions; and (2) religious influences in the development of each national legal system. Those factors have a great impact on the formation and dynamics of the national legal systems.

The legal regulation of sexuality shows two main trends, according to the most important law traditions in the West. Generally speaking, in countries where the legal system derives from the Common Law<sup>8</sup>, the repression to sodomy prevails, with a consequent restriction of sexual diversity. Most of such provisions come from the Labouchere Amendment (1885)<sup>9</sup>. In countries with national legal systems following the Roman-Germanic law tradition (Civil Law)<sup>10</sup>, the non-criminalization of sexual intercourse involving people of the same sex<sup>11</sup> currently prevails.

To those traditions, widely prevailing in the Western countries and influential in all countries, other law traditions are added which, to some extent, borrow from the Common Law and the Civil Law. This results in "mixed systems"<sup>12</sup>. Within all of those, the traditions called "Customary Law"<sup>13</sup> and "Muslim Law"<sup>14</sup> stand out.

The mixing between national legal system classifications regarding the regulation of sexual diversity and its affiliation concerning current legal traditions allow for the definition of specific hypotheses regarding potential change.

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<sup>8</sup> The tradition called "Common Law" includes the national legal systems founded since the creation of the Royal Courts of Justice of England, with a strong influence, most of the time, on the countries which were politically associated to England; it reaches approximately 6,5% of the world population (David, 1986; <http://www.droitcivil.uottawa.ca/world-legal-systems/fra-population.php>).

<sup>9</sup> The act reads: "Any male person who, in public or private, commits, or is a party to the commission of, or procures, or attempts to procure the commission by any male person of, any act of gross indecency shall be guilty of misdemeanour, and being convicted shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour." See [http://en.wikipedia.org/wiki/Labouchere\\_Amendment](http://en.wikipedia.org/wiki/Labouchere_Amendment)

<sup>10</sup> The tradition called "Roman-Germanic Law" (Civil Law) encompasses the national legal systems founded in the ancient Roman law, spread worldwide and reaching approximately 23,50% of the world population (David, 1986 e <http://www.droitcivil.uottawa.ca/world-legal-systems/fra-population.php>).

<sup>11</sup> The Penal Code adopted by the Revolutionary Constitutive Assembly of 1719, for the first time in modern history, excluded the criminalization of sodomy. This provision was maintained in the influent Napoleonic Penal Code, proclaimed in 1810 (Leroy-Forgeot, 1997:64).

<sup>12</sup> Mixed systems present possible variations in face of the legal systems referred to, combining the influence of two or more systems, according to the case (for example, national legal systems which mix elements from the Muslim Law, the Common Law and the Civil Law, such as Iran; or it presents the influence of the Common Law, from the Customary Law and the Muslim Law, such as Nigeria. Among those possibilities, it is observed that the presence of the Muslim Law, combined with one or more systems, reaches approximately 34,5% of the world population (<http://www.droitcivil.uottawa.ca/world-legal-systems/eng-population.php>).

<sup>13</sup> Customary Law, as a legal system, is understood as the adoption of conduct rules and judgment founded on the experience and community history, as well as the references to local traditions. Nowadays, the Customary Law has been found mixed with other traditions (be it the Common Law, the Civil system and the Islamic Law), according to each country (see it: <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-coutum.php>).

<sup>14</sup> The expression "Muslim Law" or "Muslim Laws" is related to the group of norms, interpretations and principles of conduct regarding the Islam, which is expressed in the "Sharia". The relationship between the Qur'am, the "Shari", the "Sunnah" and the "Figh" is complex and controversial. For this paper, by "Muslim Laws" as a family of law systems, we mean the group of national legal systems formulated and/or influenced in a decisive and important way by the Islamic religion.

For example, considering the **Repressive Legal Systems**, according to the affiliation of various country legal systems within certain law traditions and specific regions, it is possible to observe that:

In sub-Saharan Africa almost all national legal systems are of the mixed type (only Angola and Benin have Civil Law traditions). Most (30/47) of these legal systems are classified as repressive (i.e. 18 as highly repressive<sup>15</sup> and 12 as moderately repressive<sup>16</sup>). There is a strong presence of Customary Law among these 30 legal systems, 20 of which are mixed systems with the influence of such tradition, followed by Civil Law (19/27), Common Law (16/27), and Muslim Law (7/27). The Common Law traditions appear 10 times among the highly repressive systems while Civil Law traditions appear in nine cases and only six times among the less repressive. Muslim Law influences occur in five cases of the 18 classified legal systems and twice among the 12 less repressive systems.

Therefore, the combination of the influence of Common and Muslim Law appears as a potential factor for the development of highly repressive national legal systems with regard to sexual diversity.

In Latin America 3 repressive national legal systems were identified, all of them moderately repressive (El Salvador, Nicaragua and Panama). These three systems are examples of the Civil tradition.

In the Caribbean, 12 out of 16 countries were classified as repressive, all of them in high degree<sup>17</sup>. Ten of them are linked to a common law tradition, while 2 are of a mixed common law-civil law tradition.

In the Middle East and in Northern Africa, all the 14 countries are mixed systems with the influence of Muslim Law. Among the highly repressive systems (6/14)<sup>18</sup>, three of them reflect a triple presence of Muslim, Common and Civil law traditions. The other three have a double influence of Muslim and Civil Law. Among the less repressive systems (8/14)<sup>19</sup>, five are a mix of Muslim and Civil Law while two are combinations of Common and Muslim Law. Only one has the influence of Muslim, Customary and Civil Law. It is possible to conclude that the presence of Muslim Law as a factor of repression is decisive.

In the southern Asia region, all eight countries are repressive themselves, five of them highly repressive. Muslim Law appears in all the highly repressive systems (6/8)<sup>20</sup>, including two where it is exclusive. The exception is Sri Lanka, which is classified as a mixed system of Common, Civil and Customary Law. The combination of Common Law and Muslim law is present in four out of six highly repressive systems. The two less repressive states<sup>21</sup> have mixed systems of Customary and Common Law.

In East Asia and the Pacific, among the 13 repressive countries, eight are highly repressive<sup>22</sup>. The influence of the Common Law prevails, followed by Customary Law and Muslim Law. The remaining 5<sup>23</sup>

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<sup>15</sup> Gambia, Ghana, Guinea-Bissau, Ethiopia, Kenya, Malawi, Nigeria, Sao Tomé and Príncipe, Sierra Leone, Mauritania, Angola, Botswana, Mozambique, Seychelles, Sudan, Tanzania, Uganda and Zambia.

<sup>16</sup> Benin, Cameroon, Guinea, Eritrea, Mauritius, Senegal, Togo, Somalia, Liberia, Lesotho, Zimbabwe, Swaziland.

<sup>17</sup> Antigua and Barbuda, Barbados, Belize, Guyana, Dominica, Grenada, Jamaica, St- Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Trinidad and Tobago.

<sup>18</sup> Iraq, Iran, Libya, Saudi Arabia, Yemen, Egypt.

<sup>19</sup> Algeria, Lebanon, Morocco, Oman, Syria, Tunisia, Djibouti.

<sup>20</sup> Afghanistan, Bangladesh, India, Maldives, Pakistan, Sri Lanka.

<sup>21</sup> Bhutan and Nepal.

<sup>22</sup> Indonesia, Kiribati, Malaysia, Myanmar, Palau Papua-New Guinea, Solomon Islands, Tonga.

<sup>23</sup> American Samoa, Marshal Islands, Northern Mariana Islands, Philippines, Samoa.

are all related to a Common Law tradition, either exclusively (3) or in combination with Civil Law (1) or Customary Law (1).

In Eastern Europe and Central Asia, two countries (i.e. Turkmenistan and Uzbekistan) have Civil Law traditions and are among the less repressive systems.

In conclusion, the combination of the influence of Common Law and Muslim Law is a potentially relevant factor for the development of repressive national legal systems with regard to sexual diversity. This conclusion also reinforces the perception that Common Law, independent of the presence of Muslim law, is associated with highly repressive national legal systems, as found in Latin America and the Caribbean. Customary law is strongly present in sub-Saharan Africa, where legal systems are highly repressive.

With regard to **Protective Legal Systems**, only two countries in sub-Saharan Africa – Namibia (with protection measures) and South Africa (with recognition measures) can be characterized as such, the latter with same-sex unions recognized by the Constitutional Court). Both countries have a mixed system of Civil and Common Law;

In the Latin America and Caribbean regions, nine protective legal systems were registered, among them, four (Argentina, Brazil, Colombia and Uruguay) with recognition measures, and three (Costa Rica, Ecuador, Peru) with protection measures only. All those countries belong to the Civil tradition.

In the Middle East and the North Africa regions, there are no protective legal systems; a similar situation prevails in South Asia.

In the East Asia and Pacific regions, there are two countries whose national legal systems are protective – Fiji and Korea. The former follows the Common Law tradition; the latter has a mixed system of both Civil and Customary traditions.

In Europe and Central Asia, the available data show that all countries that have protective systems (14) follow Civil Law; out of those only eight (Croatia, Czech Republic, Estonia, Hungary, Romania, Russian Federation, Serbia and Montenegro, Slovak Republic) have recognition measures, such as the possibility of artificial insemination for lesbians. The remaining six (Bosnia and Herzegovina, Bulgaria, Georgia, Latvia, Lithuania, Poland) have protective measures in place only.

In conclusion, concerning the few protective legal systems found, the countries follow the Civil Law tradition. They were absent in three regions (South Asia, the Middle East and North Africa). In Latin America and the Caribbean the associations between protective legal systems and Civil Law, and between repressive legal systems and Common Law are high.

Finally, with regard to **Neutral Legal Systems**, in Sub-Saharan Africa, 12 countries characterized by such systems<sup>24</sup> are of mixed Civil and Customary tradition, two are affiliated to the Civil system and one is of mixed Muslim and Civil tradition.

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<sup>24</sup> Cape Verde, Congo Democratic Republic, Congo Republic, Gabon, Equatorial Guinea, Chad, Comoros, Madagascar, Rwanda, Mali, Cote d'Ivoire, Burkina Faso, Burundi, Central African Republic, Niger.

In the Latin America and the Caribbean region, the four neutral countries (i.e. Bolivia, Chile, Guatemala, Honduras and Paraguay) are affiliated to the Civil system;

In the Caribbean, five countries (i.e. Haiti, Cuba, Dominican Republic, Surinam and French Guyana) were found as presenting neutral legal systems. All of them were affiliated to a Civil Law Tradition;

In Southern Asia, there are no neutral national legal systems with regard to sexual diversity;

In the East Asia and the Pacific regions, nine countries fell in this category. Three countries affiliated to the Civil tradition were found (i.e. Cambodia, Vietnam and Laos); two countries have a mixed system with influence from Common Law and Customary Law (i.e. Micronesia and Vanatu); one country (Mongolia) has a mixed Customary and Civil system; one country (Thailand) has a mixed Civil and Common Law system; one country has a mixed system with Civil, Customary and Muslim Law influences (East Timor); and one country has a mixed Civil, Customary and Common Law system (Vanatu).

In the Middle East and North Africa, only Jordan has a neutral national legal system. This system is mixed and influenced by Common, Muslim and customary Law traditions.

In Europe and Central Asia, the 11 countries (i.e. Albania, Armenia, Azerbaijan, Belarus, Kazakhstan, Kyrgyz Republic, Macedonia, Moldova, Tajikistan, Turkey, Ukraine) are affiliated to the Civil Law tradition.

In conclusion, of the 46 countries with neutral legal systems, there is a strong correlation with the Civil Law tradition; only three do not share this correlation.

## **II. Human Rights of Same-Sex-Practicing or Gender-Variant Individuals**

Article II of the Universal Declaration of Human Rights recognizes that 'everyone' is entitled to the enjoyment of the rights enumerated therein and goes on to list certain traditional categories of discrimination: 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth', then adds 'or other status.' Thus, discrimination based on sexual orientation or gender nonconformity is inconsistent with respect for human rights.

But although human rights are universal standards, cultural understandings of sexual behavior and gender expression are not. This presents a dilemma in constructing a unified scheme for analyzing the laws and performance of states with regard to their residents who engage in sexual behavior with persons of the same sex or who present themselves in ways at variance with the common modalities that correspond to their biological sex. Indeed, even the definition of 'sexual behavior' in some cases may be a point of misunderstanding. In addition, the entire topic is fraught with extreme sensitivity to signs of cultural domination by some nations over others, signs associated with painful historical memories as well as contemporary realities.

Nevertheless, the human rights framework presents an opportunity to assemble relevant information from statutes, reports of human rights commissions and monitoring bodies (both private and multilateral), published articles, peer-reviewed journals and testimonies of affected individuals and to extract tentative conclusions from these data. While determinations of the levels of respect, violation, or fulfillment of human rights in these broad terms can never be as precise as an analysis of formal legal

frameworks, the use of certain indicators based on agreed human rights standards can permit a degree of measurement.

*A) Availability of data and sources*

Broad conclusions may be drawn about the role of states in fulfilling, respecting, or violating these rights of same-sex-practicing and gender-variant citizens and residents by examining available evidence of the actions and omissions of states in the aforementioned areas. 'Available evidence' in this case is an important consideration as the record shows substantial gaps. These gaps in themselves are an indication of a lack of attention paid to the defense of human rights for these populations.

Human rights advocacy organizations have prepared extensive reports on the situation of LGBT rights around the world and continue to monitor them and publish the results on their websites. Some of the reports are region-specific or deal with tendencies occurring in several countries at once. News accounts in general media provide additional background, and the incidents described in them may confirm tendencies reported elsewhere. Another source of data are LGBT-oriented websites, especially those that are country-specific, which often carry news items and general advisories about conditions facing individuals and organizations in a given region or country. Peer-reviewed journals and conference presentations were found not to be particularly rich sources for the purposes of this enquiry as they generally addressed rights violations, if at all, in general terms and only as they affected issues of health and risk-taking. Some country reports presented as part of countries' obligations under international covenants and the corresponding shadow reports prepared by citizen groups provided useful indications.

*Human rights categories: countries that violate, respect or fulfill LGBT human rights*

The human rights most often cited in regard to same-sex-practicing or gender-deviant individuals—sometimes referred to as lesbian, gay, bisexual and transgendered or LGBT persons—are:

Civil and political rights:

- Life
- Freedom from torture and cruel, inhuman, or degrading treatment or punishment
- Liberty and security of person
- Freedom from arbitrary or unlawful interference with privacy
- Freedom of thought, conscience and religion
- Freedom of opinion, expression and information
- Freedom of association
- Peaceful assembly
- Equal treatment before the law
- Freedom from retroactive criminal prosecution
- Humane and dignified conditions of confinement for those deprived of liberty
- Freedom to marry and found a family

Economic, social and cultural rights

- Freedom from discrimination
- Work

- Just and favorable working conditions
- The highest attainable standard of physical and mental health
- Education
- A share in cultural life and enjoyment of the benefits of scientific progress

The complexities of a country's national life ensure that none can be fit exactly into one of the three following categories of countries that violate, respect or fulfill human rights of LGBT persons. However, it is useful to outline the attitudes and actions that would characterize a posture of violation, respect or fulfillment for each of the human rights listed.

### *Countries that violate LGBT human rights*

Some countries maintain laws that punish homosexual behavior with fines, imprisonment or death. More common are the failures to protect LGBT persons from fatal attacks or the indifference of state agents in investigating and prosecuting these crimes. In addition, LGBT persons fleeing persecution for their sexual orientation may face accusations of disloyalty or alliance with hostile foreign powers.

Physical and psychological abuse of LGBT persons who fall afoul of authorities is common where legal statutes criminalize sexual behavior or where authorities create a climate of hostility. Accusations of homosexual behavior may be used by a government to attack its enemies more effectively as the sexual 'crimes' may be viewed less sympathetically by society than political dissidence. In addition, the vagueness of statutes describing crimes such as 'offense to public morals' or 'indecentry' provides wide latitude to agents of law enforcement to target individuals whose behavior or appearance is socially non-conforming or unacceptable to the officeholder.

Although in many cases anti-sodomy laws are seldom applied due to the difficulties of discovering private behavior, they are often cited as justification for other human rights violations, such as restrictions on the rights of association, opinion and assembly. As long as such laws remain on the books, LGBT individuals may be unable to see police protection for other crimes such as violence or blackmail for fear of being themselves charged with criminal sexual behavior. Such retroactive criminal prosecution demonstrates that the existence of anti-sodomy and similar laws is *prima facie* evidence of human rights restrictions notwithstanding the frequency of their application.

Government officials may substantially worsen the situation with respect to the human rights of LGBT persons by launching campaigns against homosexuality. These campaigns create a climate of intimidation that encourage further human rights violations and undermine protection of individuals who then may be victimized by private actors.

States may also use campaigns against homosexuality to achieve broader political goals either by attacking dissidents for their association with the topic or by directly accusing individuals of homosexual conduct. In these cases the LGBT-related rights violations are subsumed into a broader attempt to suppress legitimate political expression.

The right to gather and associate peaceably is central to the enjoyment of rights for LGBT persons as it is for any population. The denial of this right is one of the major obstacles to HIV/AIDS prevention and care: to obtain funds, to implement programs, to strengthen civil society organizations and empower individual and groups. The right to associate is also related to the right to form a family and to engage in domestic life free from arbitrary interference. Many countries prohibit the operations of LGBT social

venues or force them to function under the façade of other entities. Police protection may be denied, or police may harass, extort payments from or spy upon these venues to intimidate or collect data on patrons.

However, states' violations of human rights are not limited to repressive laws or direct actions by state agents. States also have the responsibility to act to promote rights when these are violated by other perpetrators. Furthermore, states are charged to take the initiative through their governing bodies and functions to encourage the protection and enjoyment of human rights. These distinctions are embodied in the charge to states that are signatories of human rights instruments to 'respect, promote and fulfill' human rights, that is, to refrain from committing violations (**respect**), to intervene when violations by non-state actors occur (**promote**) and to act in anticipation of violations to reduce their likelihood (**fulfill**). This tripartite responsibility of states is reflected in the Human Rights Matrix below (Table 2).

LGBTB persons suffer discrimination in legal proceedings when they are not protected from blackmail attempts or are punished arbitrarily in civil or criminal proceedings unrelated to their sexual behavior or gender expression, for example in child custody cases or employment disputes.

Degrading treatment of LGBT detainees is common all over the world especially when the individual is arrested under a related law. Few prison systems in the world provide adequate protection for persons who may be targeted by fellow inmates, and this vulnerability easily can be used by prison or police authorities to threaten targeted LGBT individuals.

#### *Countries that respect LGBT human rights in certain circumstances*

Some countries do not maintain laws that explicitly criminalize homosexuality although other national or local statutes may provide police authorities with substantial leeway to do so. Examples of these are prohibitions on 'carnal knowledge against the order of nature', 'public indecency', or 'offenses against public morals.' In other cases a country may not prohibit any type of sexual act but meanwhile remain passive in the face of 'honor killings' of family members for homosexuality.

Some countries that are tolerant of private homosexual behavior condemn any public recognition even of its existence in the country. By contrast, other countries have repealed laws against sodomy and other ambiguous statutes as a step toward assuring greater enjoyment of civil and political rights of LGBT citizens and residents. The repeals may occur in the context of modernization of the country's laws or the recognition of a more tolerant social attitude in the context of public health strategies to address the HIV/AIDS epidemic.

A few states have recognized the right of LGBT couples to the full enjoyment of the benefits awarded through marriage. Others recognize same-sex unions while stopping short of marriage equality. The majority of nations do not recognize either form of legitimization to same-sex partnerships.

#### *Countries that act to fulfill LGBT human rights*

A few countries take active steps to protect residents from discriminatory actions that would deprive them of their civil and political rights or their economic, social and cultural rights such as employment and education. These actions may take the form of anti-discrimination laws or administrative decrees, creation of procedures for bringing complaints of discrimination or state-supported campaigns to increase understanding and appreciation of the rights of the individuals affected. States may also

incorporate consideration of sexual orientation and gender identity in their asylum law and procedures in recognition that these issues may affect the ability of an applicant to return safely to his or her country of origin. States also may take the vulnerability of gender non-conforming individuals into account by ensuring safe conditions of incarceration for them.

### *HIV/AIDS and human rights*

An additional perspective of relevance is the treatment of LGBT individuals in the context of national HIV/AIDS prevention and care programs as part of their right to the 'highest attainable standard of physical and mental health'. The formulation and execution of reasonable and efficacious public health strategies necessarily requires that sexual behavior be addressed in a manner consistent with universal human rights standards as repeatedly expressed in international fora such as the 2001 UN General Assembly Special Session on HIV/AIDS (UNGASS) and the many international AIDS conferences held over the last two decades. While some countries devote public and private resources to combating HIV among LGBT individuals, others make no effort to do so. In some cases official documents reflect the country's rejection of the phenomenon and lack of interest in extending this human right to said populations (UNAIDS, 2007).

### *Public rejection, private tolerance*

Reports from several of the countries describe a familiar phenomenon of official intolerance combined with private acceptance of homosexual conduct, giving rise to an ambiguous social and legal posture with respect to a characteristic that may generate discrimination when revealed but that can be kept hidden (unlike ethnicity, race, age or sex), as we discussed below. Some countries have harsh penalties for homosexuality and oppose any loosening of legal or social sanctions while at the same time homosexual practices, at least among men, are known to be widespread and less controversial than sexual contact between males and females. Nonetheless, if the country maintains anti-sodomy laws and does not provide protection to victims of violence or other human rights violations, alleged private tolerance or societal ambiguity cannot be characterized meaningfully within the terms of the present analysis of respect, violation or fulfillment of human rights.

### *Freedom of thought, speech and association*

A particularly salient aspect of human rights in relation to LGBT populations is the extent to which individuals may form groups or associations for the purposes of promoting their human rights or even to gather socially to promote their own well-being. Some countries have cracked down on attempts to organize to improve the lives of LGBT persons and to combat discrimination, actions which constitute violations of these political and civil rights. Meeting places such as bars, clubs or organizations may be targeted by state authorities, constituting a restriction on the freedom of association that is particularly relevant for a population that is not linked by physical proximity or visible signs of membership.

### *Privacy and threat of exposure*

The right to privacy is another sensitive area for LGBT persons as it not only guarantees freedom from arbitrary harassment or interference from state agents but also may be essential to domestic peace and safety for individuals whose private behavior is highly stigmatized. Therefore, the threat of exposure can be utilized by both private and public actors to intimidate and control the actions of individuals and to

sustain a structure of permanent violation of their political and civil rights as well as their economic well-being. Police failure to respond to complaints of blackmail or turning these complaints into prosecutions of the victims is a particularly damaging form of violation of the right to privacy. Accusations of homosexual behavior or orientation are sometimes used to attack political opponents and divert attention from other aspects of dissidence to established authority.

**Table 2: Human Rights Matrix**

	States that violate rights	States that respect rights	States that fulfill rights
<b>(A) Civil and political rights</b>			
Life	Retains death penalty for sodomy; fails to pursue homophobic crimes or 'honor killings'	Eliminates criminal penalties for adult sexual behavior; investigates and prosecutes 'honor killings' and homophobic crimes	Pursues 'hate crimes' vigorously with or without formal statutes; takes action to reduce social stigma that engenders homophobic violence
Freedom from torture and cruel, inhuman, or degrading treatment or punishment/ Humane and dignified conditions of confinement for those deprived of liberty	Retains physical punishment for sodomy; subjects arrestees to humiliation or abuse by guards or other prisoners	Recognizes equal rights of detainees and prohibits abusive or humiliating treatment by guards and other personnel	Works to protect LGBT detainees from abuse while incarcerated
Liberty and security of person	Criminalizes consensual, private sexual activity between adults; criminalizes variant gender expression; permits or encourage police raids on LGBT venues; utilizes internet sites to entrap LGBT persons	Eliminates criminalizing statutes; recognizes or authorizes operation of LGBT venues; police do not target or seek to entrap LGBT persons	Campaigns to reduce stigma; prohibits discrimination based on sexual orientation and gender expression
Freedom from arbitrary or unlawful interference with privacy	Expresses official hostility toward LGBT individuals or groups; encourages public exposure and humiliation, including through police action	Refrains from stigmatizing language or policies by state agents; acts to defend the privacy of those arbitrarily targeted or abused	Prohibits discrimination in the workplace, housing, education or public facilities; discourages media sensationalism
Freedom of thought, conscience and religion	Imposes religious law against sexual behavior and gender expression	Separates religious authority from criminal or civil law	Recognizes religious expressions that incorporate LGBT concerns
Freedom of association/Freedom of opinion, expression and information	Bans LGBT groups; intimidates leaders through arbitrary criminal accusations or administrative harassment; denounces or forbids scholarly or journalistic discussion of	Recognizes LGBT organizations and their political rights	Cooperates with LGBT persons and organizations in pursuit of shared goals; supports non-stigmatizing scholarly and public discussion of LGBT themes

	homosexuality		
Peaceful assembly	Prohibits LGBT activities; fails to protect LGBT persons in the exercise of their right to assemble publicly	Authorizes and protects organized LGBT activities	Partners with LGBT organizations to promote rights and welfare
Equal treatment before the law	Sanctions and authorizes discrimination	Prohibits discrimination	Works to reduce discrimination
Freedom from retroactive criminal prosecution	Arrests LGBT persons who present blackmail complaints	Eliminates criminal statutes against sodomy or gender expression	Investigates and prosecutes blackmailers
Freedom to marry and found a family	Threatens custody of biological children of LGBT persons; prohibits adoption; deprives same-sex couples of marital benefits	Protects LGBT parental rights in custody disputes; permits adoption; recognizes same-sex unions	Protects LGBT parental rights in custody disputes; permits adoption; grants same-sex unions marriage-equivalent rights
<b>(B) Economic, social and cultural rights</b>			
Work/Just and favorable working conditions	Permits or endorses discrimination against LGBT workers in public and private employment; deports foreign workers on the grounds of homosexuality; bans LGBT persons from serving in the armed forces	Prohibits discrimination in public and private employment, including the armed forces	Prohibits discrimination in public and private employment, including the armed forces; responds to discrimination complaints and educates employers to respect workers' rights
The highest attainable standard of physical and mental health	Ignores LGBT populations in HIV/AIDS programs and permits police harassment of HIV/AIDS programs; permits or ignores discrimination or abuse of LGBT persons or same-sex couples in clinical settings	Incorporates LGBT populations in HIV/AIDS programs; favors respectful treatment of LGBT persons and same-sex couples in clinical settings	Partners with LGBT organizations to promote health of these populations; includes human rights of LGBT persons in anti-stigma campaigns for persons living with HIV; promotes respectful treatment of same-sex couples in clinical settings
Education	Endorses or permits expulsion of LGBT persons from schools and universities; fails to protect LGBT persons from school-based persecution or harassment; prohibits LGBT organizations in school settings	Guarantees the right to education to all persons; responds to complaints of discrimination in education	Promotes LGBT rights to education; authorizes LGBT organizations in schools and universities
A share in cultural life and enjoyment of the benefits	Denounces LGBT persons	Embraces all members of	Promotes diversity and

of scientific progress	and practices as incompatible with the country's cultural heritage	society as full citizens	encourages scientific investigation of issues related to sexual orientation and gender variance
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For further details, see Appendix 3.

*Specific human rights and examples of violation, respect and fulfillment*

Life:

Several states maintain statutes that authorize the death penalty for homosexual acts although actual executions have been rare except in Iran where public executions of males, some of them minors, for alleged homosexual acts have occurred. State agents may also fail to aid LGBT persons when attacked by third parties. An extreme example occurred when police agents in Jamaica allegedly initiated and then encouraged a fatal attack on a gay man in 2004 (Human Rights Watch, 2004). Two men were beaten to death in Abidjan, Cote d'Ivoire, in 2006 for allegedly 'feminine behavior'; police reportedly discouraged their supporters from pursuing a complaint (*Off the Map* p. 56).

In other countries individuals have been arrested and imprisoned for long periods after accusations of homosexual behavior. For example, police in Cameroon jailed three men for prohibited sexual acts after a newspaper exposé. The *Arab News* alleged in 2002 that homosexual men had been beheaded in Saudi Arabia (4 Jan 2002). Gay Palestinian residents of Gaza who flee to Israel say they fear for their lives if forced to return as they automatically will be considered collaborators (*BBC News*, 6 March 2003). Jordan's Article 340 provides for light punishment for murderers convicted of 'honor killings' of relatives suspected of sexual impropriety; a legislative attempt to toughen the penalties failed in 2003 (*BBC News*, 8 Sept 2003).

Official rhetoric that denigrates LGBT individuals or suggests that they are not fully human, such as comparing them to animals or openly stating that human rights do not or should not apply to them—as has occurred in Zambia, Zimbabwe, Namibia and Botswana [HRW: *More Than a Name*]*—severely weakens their enjoyment of the right to life by inviting attacks and suggesting that those responsible will be absolved or punished lightly.*

Freedom from torture and cruel, inhuman, or degrading treatment or punishment:

Fifty-two Egyptian men were arrested in 2001 for attending a party on the Queen Boat. They were subjected to degrading medical examinations and eventually condemned to lengthy jail terms. Human rights abuses in the Egyptian penal system are known to be common. Other Egyptians have been entrapped by police using the Internet (*The Advocate*, 13 May 2003). Gendarmes in Yaoundé, Cameroon, raided a bar frequented by gay men in 2005 and arrested 11 men who were held for a year for alleged same-sex behavior (*Off the Map*, footnote 37). Former Deputy Prime Minister Anwar Ibrahim of Malaysia was dismissed in 1998 by his political rival and accused of being a 'sodomist'; he was severely beaten in custody and held incommunicado (Amnesty International, 2001).

Liberty and security of person:

Although anti-sodomy laws may be used rarely, their impact on human rights of LGBT persons can be measured by the resistance to attempts to repeal them. For example, India has not had a prosecution

for homosexual behavior in 20 years, but the law still is reportedly used to harass AIDS prevention efforts or to legitimize parental control of their LGBT children. In response to a European Union requirement that new member states to bring their countries' penal codes into alignment with EU standards, Romania amended its ban on homosexual behavior in 1996 but retained a provision against 'public scandal', which can be used arbitrarily. That same year, two 17-year-old boys were arrested in a public park and severely beaten by police for alleged homosexual acts (*Crimes of Hate*). Violence in public spaces is a common experience for many gay men in Kenya (*Off the Map*, p. 58).

Freedom from arbitrary or unlawful interference with privacy:

In several African countries reports of gay gatherings or 'weddings' have caused a media furor in which alleged participants were named and pilloried in local newspapers. The Senegalese tabloid *Fraques*, the Ugandan *Red Pepper* and the Cameroonian *l'Anecdote* all participated in anti-gay campaigns of this sort between 2002 and 2006. Undercover agents are deployed in public parks in the U.S. state of New Jersey to police homosexual activity while tolerating heterosexual contacts. Chile repealed its anti-sodomy law in 1999 as part of a sweeping revision of the country's criminal code; the People's Republic of China did the same in 1997 (while it remains illegal in Hong Kong with the latest prosecution occurring in 2007). Nicaragua repealed its anti-sodomy law in 2008. The minister of justice of Mauritius promoted legislation in 2006 to prohibit discrimination based on sexual orientation and participated in a public march in support of it. The United States Supreme Court overturned The Texas anti-sodomy law in 2003 (*Lawrence v. Texas*) arguing that consensual homosexual behavior was protected under the right to privacy.

Freedom of thought, conscience and religion:

Violations of the human rights of LGBT persons are frequently couched in terms of religious mandates and justifications. The Chief Mufti of Russian Federation denounced a planned 2006 gay pride march in Moscow and encouraged his followers to 'flog' participants (*The Independent*, 17 Feb 2006) as homosexuals represent a threat to the continuity of the human race.

Freedom of opinion, expression and information:

News organs may be penalized or attacked for attempting to raise LGBT concerns in a measured or non-judgmental fashion. The Uganda Radio Simba was fined in 2004 for a discussion of LGBT rights in the context of the HIV epidemic. The Zimbabwe Book Fair banned the local gay rights group GALZ (Gays and Lesbians of Zimbabwe) from participating, allegedly due to pressure from official sources. This action signaled the start of a lengthy harassment campaign against the group and its leaders.

Peaceful assembly:

LGBT organizations often face hostile and sometimes violent opposition to their attempts to place the topic of homosexuality or gender variance in the public domain through forums, public meetings or marches. Jerusalem Open House attempted to stage a Gay Pride event in that city in 2006, which generated several days of violent demonstrations by religious opponents. The national police petitioned to cancel the event arguing that it was unable to provide adequate security. However, police protection enabled the group to stage its event the following year. Police in Russia failed to intervene to prevent violent attacks on public gay rights events in Moscow in 2006 and 2007. In one-party states such as China and Vietnam, LGBT organizations are suppressed as unauthorized civil organizations.

Equal treatment before the law:

A Chilean lawyer and judge was deprived of custody of her three children in a 2004 ruling explicitly based on her same-sex relationship.

Freedom to marry and found a family:

Many countries manifest contradictory tendencies in this regard reflecting the ongoing conflict between the growing recognition and visibility of same-sex relationships and cultural or religious objections. In 2003 Croatia granted same-sex couples cohabitating for at least three years the same rights as unmarried heterosexual couples. However, a 2006 measure to formalize this practice and to recognize same-sex unions was blocked in the country's legislature.

### *Economic, social and cultural rights*

Work/Just and favorable working conditions:

A number of states have moved in recent years to change laws against employment of LGBT persons. The government of Singapore eliminated the ban on homosexuals in 'sensitive government positions' in 2003. Anti-discrimination laws applying to the private sector are in place in many European countries and some smaller jurisdictions in other countries. Taiwan banned workplace discrimination based on sexual orientation in 2007. Namibia's labor code includes a provision against discrimination based on sexual orientation although homosexual acts between men remain illegal in that country.

Schoolteachers and others who come in contact with children are particularly vulnerable to reprisals if their sexual orientation becomes known to employers or parents. Even in countries that are relatively tolerant of LGBT employees in other spheres may exercise discrimination in this way (Australian Human Rights and Equal Opportunity Commission, 2007) .

The highest attainable standard of physical and mental health:

A nation's official attitudes toward homosexual behavior influence the attention paid to AIDS prevention and care services directed toward this population and their right to high health standards. The UNGASS monitoring process through which countries periodically submit Country Progress Reports provides an insight into the official stance toward the respect or promotion of this human right. Although indicators 8, 9 and 14 refer to 'most at-risk populations' and indicator 19 refers specifically to men who have sex with men, some countries report no information, leave the response blocks for these indicators blank, argue that the behavior involved is illegal and therefore cannot be researched, or report only on commercial sex workers or injection drug users. A few skip indicator 19 entirely.

In other countries the response is ambiguous: national AIDS plans may include outreach to homosexually-active populations at the same time as police will detain or harass anyone found distributing condoms to men suspected of homosexual acts (*Off the Map*, 47). Some countries eventually incorporate LGBT concerns and work closely with LGBT organizations to promote healthy sexual behavior among these populations. Examples include many countries of Latin America, some Asian nations and some countries of the former Soviet Union.

A UN specialist in Uganda was quietly forced out of the country in 2004 when he attempted to collaborate with LGBT groups on the HIV/AIDS epidemic. Ghanaian authorities prohibited a 2006 LGBT conference and threatened to arrest the organizers.

Education:

Schools in the United States are battlegrounds for the right to associate and promote LGBT identity and rights. Government officials often act to keep LGBT-friendly organizations or curricula out of school settings.

Taiwan's Gender Equity Education Act of 2003, which sought to equalize opportunities for males and females in education and to eliminate gender stereotypes in curricular materials, also prohibited discrimination based on sexual orientation in schools. It identified gay, transgender and pregnant students as 'disadvantaged' and mandated special assistance for them.

Share in the cultural life and enjoyment of the benefits of scientific progress:

A Kuwaiti university professor was dismissed for acknowledging homosexual practices in the country, and the magazine that published her comments was prosecuted for obscenity. The truth of her assertions was not permitted as a defense [*The Guardian*, 29.3.97]. The organization Gays and Lesbians of Zimbabwe (GALZ) was prohibited from participating in a 1996 book fair in that country as part of an official denunciation of homosexuality in which GLBT persons were characterized explicitly as not meriting universal human rights protections. For example, in 2007 the Iranian government shut down the opposition newspaper **Sharq** for interviewing a lesbian poet even though sexuality was not the topic of the discussion. Iranian authorities have long suppressed independent news media to control dissent on political and economic issues.

### *Regional trends*

Some Asian and Latin American countries have made strides toward protecting the human rights of LGBT individuals, including prohibiting employment discrimination, removing laws against adult sexual behavior and incorporating LGBT concerns in national health policy. African states are generally resistant to changes in this direction with rare exceptions such as South Africa and Cape Verde. Homosexual advocacy has become a convenient focus of attacks against cultural or political pressures from the developed world as the phenomenon can be characterized as 'un-African'. North African and Middle Eastern countries display ambiguous attitudes of extra-official private tolerance and strict repression of homosexual behavior that enters the public sphere. Eastern European countries sometimes take an ostensibly more tolerant attitude but do not suppress violent actions by private actors against LGBT advocates.

## **III. Stigma and Discrimination**

### A) Availability and types of data; sources

There are no official documents and statistics around issues of stigma and discrimination based on sexual orientation or gender identity. Most of our sources are non-governmental and community-based organizations' documents and key informants' accounts, generally non-systematic. For some countries, very informal sources such as LGBT tourist guides or Wikipedia are almost the sole sources of information.

Following UNGASS, UNAIDS recommends a National Policy Composite Index that includes an indicator for stigma and discrimination (UNAIDS 2003). Countries do not seem to report data for this indicator (or seem to skip it), and we did not find any data on homophobia in country reports.

Nonetheless, we found that discrimination based on sexual orientation and gender identity, related and not related to HIV/AIDS, exists in every region considered. These are not exceptional phenomena but consistent patterns of human rights violations that hamper the control of the HIV epidemic.

## B) Discrimination related or non-related to HIV/AIDS

Homosexuality, which can be defined as the tendency to seek sensual pleasure with persons of the same sex more than with persons of the opposite sex, constitutes practically everywhere a basis for discrimination, stigmatization and exclusion. Note that we simplify here practices and identities that have many meanings and denominations – some of them condemned, some of them “free” of social value, some of them accepted or even praised.

As Parker and Aggleton (2003) noted, stigma and discrimination should not be considered as entities or psychological dispositions on the part of individuals but as social processes linked to the structures and workings of power. In other words, stigma and discrimination are social relationships of subordination – domination and violence.

Discrimination exists when the state, society, a social group or an individual separates, excludes, expels or even wishes to destroy a person or a group, deny their rights or prevent the exercise of their rights, based solely on the belief that they or their practices deviate from social norms. Stigmatization is a specific form of discrimination, and exclusion is often the result of those processes.

HIV/AIDS-related stigma and discrimination are *part of a political economy of social exclusion*. A synergy exists between diverse forms of inequality and stigma: some directly related to HIV/AIDS (infection, illness, death) and others that are usually seen in association with HIV (e.g. poverty, gender subordination, homophobia, racism, stigma associated with drug use or sex work). These sources of stigma reinforce each other. In virtually every country and culture, stigma and discrimination have operated in relation to a series of pre-existing and/or independent forms of stigmatization and exclusion, reinforcing their impact and effects, and linking them to new reactions in response to the specific conditions of HIV/AIDS (Parker and Aggleton, 2003).

Nevertheless, the AIDS epidemic paradoxically helped redefine the subordinate status of homosexuality as a forbidden or stigmatized practice that had been relegated to secrecy or discretion. It precipitated the entry of issues of discrimination and sexual rights onto the public scene, both nationally and internationally (Pecheny, 2003; Bhattacharya, 2007).

The AIDS epidemic exposed the gap between formally declared equality for all citizens and the reality of rights for homosexuals. If a State demands from citizens a part of responsibilities and obligations toward the community, such as preventive behaviours, it should guarantee each person's rights in exchange. Rights and responsibilities in sexual and reproductive issues support the idea of “sexual citizenship”, i.e. citizenship that recognizes sexual differences and the legitimacy of different sexual orientations (Pecheny, 2007).

Because of their nature, data on stigma and discrimination may not be difficult to register, but are difficult to systematize and to reduce to a set of indicators. We attempted here to schematically

describe the situation of stigma and discrimination (either related to HIV/AIDS or not) affecting MSM across regions.

Family, childhood friends, neighbours and colleagues typically are non-homosexuals, i.e. they do not share the stigmatized condition. This situation differentiates them from other categories of discrimination. For example, if a boy is tormented at school, he will find support in his family and closest friends. But an adolescent who discovers desire for someone of the same sex and experiences the discovery with anguish not only may not find support in his family and friends but also may suffer precisely because of the possibility of being rejected by them. Homosexuality is not evident to others, so individuals can control the information about their sexuality depending on interlocutors, places and times. This feature also differentiates homosexuals from other stigmatized groups.

In most societies, homosexuality represents a secret (Pecheny 2002) even though homosexuals disclose their sexual orientation to others throughout their lives (and may adopt a positive identity). The question of secrecy, illustrated by the word "closet(ed)", does not stem from any universal homosexual essence but designates a common experience (Kosofsky-Sedwig 1993), a historical contingency: having been born in societies hostile to homosexuality, or "homophobic," homosexuals are forced to keep their sexual activity and live lives *in the closet* to a greater or lesser degree. Unlike people who present a visible stigma, "stigmatizable" persons are those whose stigma is not evident to the eyes of others, but may become known.

Stigma management differs depending on social settings and the historical moment. As Goffman (1989) showed, controlling communication and the secret is a fundamental resource of a stigmatizable individual.

In such different regions as the Mediterranean, South Asia or Latin America, men who display more 'feminine' behaviours than what is expected locally according to hegemonic gender norms are disproportionately harassed: is it their (supposed) homosexuality or their transgression of gender norms that become the target of stigmatization? Expressions of homoerotic love and public displays of affection are widely problematic, and social and political recognition in the form of same-sex marriage seems distant today in most countries.

Discrimination is usually subtle and poses challenges to systematization and reduction to indicators. For example, some people may experience as traumatic just walking down the street with someone who is obviously gay. Discrimination influences the way one organizes his or her domicile – there is tension around the issue of whom you live with as compared to living with a "family" or living alone. This can be seen as an indication of homosexuality and plays a role in choices around living in a city or in a town, or choosing an anonymous neighbourhood with large apartment buildings or single-family tract homes.

In countries that follow the Napoleonic Code, consensual same-sex intercourse has not been prohibited since the 19th century. However, they presuppose a double standard for private and public settings. Heterosexuality is permanently visible because it is the norm; no one notices that it is asserting itself into the public domain. But same-sex-practicing individuals should be discreet, meaning *invisible* (Pecheny 2001). Problems arise when private boundaries are violated and homosexuality becomes visible.

In the more conservative, religious and usually more authoritarian societies, homosexuality is explicitly condemned by the law so that its practice is less characterized by discretion and more by concealment

and secrecy. In repressive contexts, social hypocrisy is even more necessary to maintain homosexual practices secure. In those regions, repression of homosexuality renders subtle forms of stigma and discrimination just as secondary phenomena vis-à-vis most critical practices that affect the very rights to life and freedom.

In sum, both less liberal and repressive societies seem to tolerate homosexual behavior when practiced in private better than they accept open manifestations of homosexual love, as if in an implicit pact: social tolerance in exchange for discretion and invisibility. This stems from the fact that tolerance does not mean full social acceptance or recognition. However, within their families and social circles, as long as the public conventions of discretion or secrecy are respected, homosexual members usually have a social life without difficulty. Societies allow leeway for the “excesses” if homosexuals agree not to perturb social peace and the public sphere. This mode of (discreet, secret) social organization affects the modalities of same-sex courting, relationships and sex, for example the dissociation between sex and affection, and fosters risk related to HIV and violence.

Given the hetero-normative standard of public discretion and secrecy, most same-sex-practicing individuals have to lead double lives, adopting different identities depending on circumstances. In locations other than large cities, if homosexuals are visible, they are often forced to become scapegoats or town characters, or their secret practices may lead to blackmail and/or sexual migration.

Different treatments have been recorded also in terms of social class and gender identity. In some urban settings, for example in Latin America or South Asia, masculine homosexuals can lead more or less open lives, but the more effeminate men and transgendered persons are usually victims of harassment, domestic and street violence, and ill treatment at healthcare services (Sanders, 2006).

### *Forms of discrimination*

Discrimination can be exercised directly or indirectly. Discrimination is *direct* when norms or attitudes directly, openly target a type of acts or people, or categories are arbitrarily differentiated in terms of rights and recognition. But discrimination can also be *indirect*, for example when norms or attitudes appear to be universal, yet their discriminatory effects are suffered exclusively by a certain category of people. The right to marry a person of the opposite sex is universally accessible, so formally it is not discriminatory. But its effects are indirectly discriminatory for those who love a person of their same sex. The exclusion of the right to marriage means in most societies the exclusion of other basic rights: residence, social protection, property, housing, parenthood, etc.

### *Subjective experiences*

Discrimination can be *enacted* (also called “enacted stigma”) or *anticipated* (“anticipated stigma”). It is executed when it effectively takes place, and anticipated when an individual preempts rejection and discriminates against him or herself. According to Scambler (1989), anticipated stigma (e.g. shame and fear of discrimination) can prompt people to attempt to pass as a member of the non-stigmatized group to reduce the likelihood of experiencing enacted stigma (i.e. actual episodes of discrimination against people based solely on their socially unacceptable trait). As in every form of stigma and discrimination, structural and relational dimensions determine actual experiences: if stigma cannot be reduced to an individual’s attribute, discrimination cannot be reduced to an individual experience either; both are social phenomena that are structurally produced and reproduced. Enacted and anticipated discrimination are not exclusive categories, and in fact they are mutually reinforced.

When talking about homosexuality and HIV/AIDS, *indirect* and *anticipated* forms of discrimination are at least as extensive and painful as direct and enacted discrimination. Fear of being outed as a homosexual operates as an efficient cause for self-exclusion and personal mortification. Anticipated discrimination favours risking HIV/AIDS, deters access to health and legal services, and leads to withdrawal from loved ones. Phenomena of anticipated discrimination have been found widely in all regions considered in this report.

The phenomenon of anticipated discrimination associated with same-sex activities and homosexual identities has become evident with the HIV/AIDS epidemic. In a difficult, sometimes tragic, situation, people living with HIV all over the world refrain from seeking help, healthcare or affective and material support because of fear of rejection: HIV stigma and (homo)sexual stigma overlap. This is still the case in all regions considered where anticipated discrimination operates as one of the most difficult obstacles to prevention, treatment, adherence and well-being.

### *Settings of discrimination*

In the field of sexuality and affective relations, discrimination takes place in diverse settings, and is not solely effected by the government or the State. The subjective realm (an individual confronting him or herself), the intimate-private realm (the individual's loved ones) and the public-political realm, are all important, but neither coherent nor homogeneous in dealing with discrimination or recognition of same-sex sexual practices and LGBT identities.

Individuals often sense that homosexuality is something to be ashamed of long before they realize they are attracted by people of their same or different sex. Due to their socialization prior to becoming aware of their homosexuality, individuals' feelings usually remain contradictory and ambiguous. Later, feelings may evolve positively, but ambiguity seldom goes away completely. One's personal perception of social discrimination – the basis for anticipated discrimination – is very powerful in most societies; but AIDS has eventually operated as a revealing factor of hidden practices.

In both the conformation of the singular sexual identity as well as the group identity of collectives, homosexuality has become a difference whose denial appears as important as the positive affirmation in defining one's identity.

Within the family, anticipated discrimination appears more frequent than real discrimination. Once anticipated discrimination is overcome and what was hidden is revealed, family's attitudes may be accepting or tolerant, though not always. Being expelled from the household, the "silent treatment" and mutual accusations are common occurrences.

In the midst of the AIDS epidemic, AIDS stigma and homosexuality-related stigma were reinforced reciprocally, but at the same time the fight against stigma and the lives and experiences of people living with HIV and their loved ones helped to redefine both in a positive direction: HIV, paradoxically, encouraged individuals and collectives to overcome invisibility and fear and assume publicly and politically their erotic dispositions, their identities, their "hidden" lives. Costs were and still are sometimes very high, particularly in contexts of strong direct discrimination against same-sex practices and LGBT people. But everywhere, including the most hostile environments, things seem to be changing.

As far as friends are concerned, most same-sex-practicing males self-identified as gay or homosexual have a double life defined by those who share the secret of homosexuality and those who do not (some have same-sex practices with no special or identity meaning attributed to them); others participate in a world comprised exclusively of gays and/or lesbians (in the case of gay men, also by women who tend to befriend gay men), mostly in Western or Westernized urban settings; finally, a smaller group are completely integrated, as openly gays or lesbians, into their world of friends regardless of sexual orientation. Circles of friends have proved that supporting people living with HIV is crucial, particularly those marginalized or left alone, to deal with their illness.

As for neighbours and co-workers, the general rule is discretion and tolerance. In some professions, homosexuality is perceived as taboo. The predominant idea is that public knowledge of homosexuality could bring a professional career to an end. This is the case of teachers, military personnel, doctors, politicians, clergy, male athletes, referees, diplomats, judges, and policemen, among others.

Relationships with doctors and health professionals deserve particular attention. For lesbian women and homosexual men, there is friction in the relationship with their (male) doctor unless they find a doctor that specifically understands their situation. No prevention, treatment or adherence program could work without positively taking into account sexual specificities. Training and sensitization of professionals and services (on homophobia, but also on gender and other dimensions of the patient-user relationship) are a challenge in all regions considered, a challenge that became more evident since the advent of HAART.

The secret of homosexuality is protected with great care in environments formed by people of the same sex, e.g. teenage gangs, cliques, sports teams, bar patrons, or institutions such as the armed forces and religious orders.

According to public opinion surveys, in more liberal societies attitudes of "tolerance" or "indifference" are more popular than "total rejection" and "full acceptance" of homosexuality. In the more repressive societies, no surveys have been found that include questions on acceptance of LGBT rights.

Finally, laws, as both a legal regulator of behaviour and a message the state conveys to society, vary enormously, as we have seen above. Some countries condemn homosexual practices while others do not speak of homosexuals or homosexuality (in which cases, the legal inequality is derived mainly from the non-recognition of same-sex couples), and very few countries have taken steps toward legal equality.

### C) Data by region/country; analysis on the global level and by region

In Africa, thirty countries have repressive legislation against homosexuality, and some countries even ban gay marriage and public display of homosexual affection. In this continent, gay-identified men are a small subset of men who have sex with men; as Anyamele et al. point out, "most men who have sex with men are precisely and only that: men who have sex with men". Public hostility to homosexual relations is widespread in countries like Nigeria, where the proposed legislation tends to be even more hostile.

Little research is available on same-sex stigma and discrimination in Sub-Saharan Africa. In fact, data on AIDS, widely available in this region, rarely focus on non-heterosexual sexual transmission of HIV (Van

Griensven 2007; Caceres et al. 2006), even in Mauritius, a country with a concentrated epidemic (UNDP, 2007: 46).

In a small number of countries (Lesotho, Malawi), fuelled by the initiatives related to the AIDS epidemic, efforts to reduce stigma and discrimination have been launched. For example, the National HIV and AIDS Policy of Lesotho recommends that the government put in place mechanisms to ensure that HIV services “can be accessed by all without discrimination, including people engaged in homosexual relationships” (Bhattacharya 2008). But in Malawi, while there is a protective anti-discriminatory HIV framework, the revised Penal Code also includes criminalization of same-sex relationships of both males and females attracting as much as a 14-year penal sentence in some cases (UNDP, 2007: 42-43).

In Africa, only two countries have legal protections for non discrimination against LGBT people: Namibia (in the labour code) and South Africa (Constitutional protection).

According to Shivaji Bhattacharya (2008), Senior Policy Advisor at UNDP in Johannesburg, in Africa “HIV policy statements and frameworks pay lip service to the rights of sexual minorities and (...) in fact there is very little evidence of actions taken to ensure access to HIV-related services to members of sexual minorities. Most countries lack specific HIV-prevention, care and support services targeting members of sexual minorities”.

In *A Review of Regional and National Human Rights-Based HIV and AIDS Policies and Frameworks in Eastern and Southern Africa*, a systematic account of the African situation, the word “gay” is not mentioned and the word “MSM” appears only a few times in a list together with IDUs and other vulnerable categories. African countries do not seem to include “sexual orientation” in their accounts of human rights situations, even though they increasingly include a “gender perspective”. In most countries where homosexuality and sex work are criminal offences, as in Kenya, this represents “an obstacle to effective prevention, care and support” (UNDP, 2007: 34).

If governments are hostile or non-protective, traditional and religious leaders are not more supportive for the human rights protection of non-heterosexuals. A study conducted with 250 MSM in Dakar, Senegal, showed that their lives are characterized by rejection and violence; half of them had been verbally abused by family members, a quarter had been forced to move in the last 12 months, 37 percent forced to have sex in last 12 months and 13 percent said they had been raped by a policeman (quoted in Anyamele et al).

In several countries, these phenomena have been reported: State and community intolerance, State and community violence; State (police), community and peer (inmate) rape, sexual abuse, loss of livelihood, “thrown out of home”, evicted from housing, etc. High levels of these human rights violations have been denounced in countries as culturally and geographically different as Kenya, Senegal, Sierra Leone or Uganda. For sexual minorities, HIV/AIDS prevention programs and treatments are not available. The situation of MSM living with HIV is particularly grave: “Unless they successfully hide their sexual orientation and activities, they are not only stigmatized and discriminated against, but also at an exceptionally high risk of losing any social support and safety net from their families or society at large” (Anyamele et al.).

South Africa shows an apparently contradictory panorama: while the Constitution and laws protect sexual minorities, violence (including intentional rape of lesbians), stigma and discrimination are widespread. Discrimination is not easy to reduce to a set of indicators: some countries have protective

laws and violent / stigmatizing practices, while others have very strict laws and *de facto* tolerant attitudes.

Finally, it should be noted that, among all regions, Africa is the one with the weakest and most incipient sexual minority social movement.

The present context in the Middle East-North Africa region is similar to that in Sub-Saharan Africa: almost every country prohibits homosexuality; on civil as well as on religious grounds. Homophobic crimes have been denounced, as well as other severe violations of human rights, with no investigation. Migration to Western Europe allowed LGBT people from the Middle East and the Maghreb to live their sexuality more openly, but honour and family codes remain strong in the countries of migration too.

In Latin America, homosexuality is legal but stigmatised. In some countries, like Brazil and Mexico, governments – encouraged by civil society organizations – have launched policies against homophobia and to protect LGBT rights. Uruguay and some cities in different countries recognize civil unions for same-sex couples. Some countries, like the Dominican Republic or Chile, have been forced to acknowledge the reality of homosexual practices and groups in the face of the AIDS epidemic and implemented specific programs to reduce stigma and discrimination. Several countries have legal provisions against discrimination, but these laws usually do not include “sexual orientation” explicitly.

Unpunished homophobic and transphobic violence cases have been registered, in Central (El Salvador, Guatemala) and South America (Brazil, Argentina, Peru) as well as in the Caribbean (Jamaica).

The Caribbean deserves special attention, in a continent where homosexuality is not legally persecuted.

In South and East Asia, some countries prohibit homosexuality (Narain & Dutta, 2006), but not always enforce these provisions. Others have non-discrimination provisions, not always enforced. According to a UNAIDS report, for example, in Bangladesh the non-discrimination provision of the constitution is often violated in primary health care services, and many people with HIV hide their status, fearing social stigma or discrimination. The silence of the law on transgender issues allows many situations where transgendered people face multiple forms of discrimination (Bondurant et al., 2007). Involvement in prostitution and sex between men are criminal offences according to Bangladesh law. Another type of legal barrier against effective HIV prevention is the condom promotion policy that allows their use only by married couples. Shivananda Khan and other colleagues report that in India and Bangladesh, homophobic discrimination and violence hinder HIV prevention efforts. Obligatory heterosexual marriage, experiences of rape and gender violence, and forced migrations, are not exceptional in both countries.

In China, prevention efforts targeting “MSM” may be hindered because of the stigma associated with homosexuality in traditional Chinese culture. The stigma associated with homosexuality can be traced back to four culturally based factors: social status and relationships, the value of family, perceptions of immorality and abnormality, and gender stereotypes of masculinity. In particular, the centrality of the family and the importance of maintaining key relationships cause stress and anxiety, contributing to more frequent encounters with anticipated stigma. In response, MSM often evade the scrutiny of family members through various tactics, even prompting some to leave their homes (Liu 2006). China is one of the few countries which have laws that allow transsexuals who have undergone gender reassignment surgery to get their personal documents reflecting the “new” gender.

In the Pacific, Western categories are accused of being at the root both of prohibition (anti-sodomy laws are severe), stigma and discrimination (Matautia Phineas 2007), even with the best of intentions (for example, the category “MSM” applied with no consideration to local particularities). According to Phineas, sodomy laws justify discrimination through anti-homosexual interpretations of the law; they do not limit actual sexual behaviour but serve to “demonize and isolate, promote fear and suspicion, and promote ignorance by limiting access to safe-sex education”. For this advocate, it is necessary to redefine Western terms to suit Pacific cultures, with the inclusion of *Fa’afafine* and *Fakaleiti* and other uniquely Pacific minorities within their Constitutions and anti-discriminatory and Human Rights legislation.

Among the low and middle income regions, Eastern Europe/Central Asia is the only one with no “highly repressive” countries. The rule seems to be “neutrality”: no direct discrimination, but no recognition of rights either. Campaigns against stigma and discrimination usually target the issue of HIV infection rather than sexuality. Non-discrimination in employment is part of the legal protections of the workers in most countries (Waalwijk, 2007).

In all regions, critical discrimination and human rights violations in prisons and security institutions, both in relation to health and HIV/AIDS, sexual orientation and gender identity, have been denounced and registered. Condoms are very rarely distributed in prisons.

Additionally, armed and guerrilla/paramilitary conflicts are in some countries related to “social cleansing” of sexual minorities, like in Colombia.

#### D) Comparative analysis across regions and within regions

Latin America, Eastern Europe, Central Asia and East Asia share a common pattern of “double standard”: no illegality and even some non-discrimination provisions, matched with extensive fear of disclosure and enclaves of homophobia, including violence and direct discrimination. The AIDS epidemic accelerated movements towards non-discrimination and recognition of rights. As explained in section I, the non-Spanish speaking Caribbean region differs from Latin America in its being much more legally repressive, closer to the situation in other regions with a similar “anti-sodomy” law tradition.

In Africa, the Middle East and South Asia, regions where most countries consider homosexuality punishable, the few data available show a context of stigma and discrimination, under the form of invisibility. Ethnographic data and informal accounts report the existence of homosexual practices, including sex work, but these practices are often invisible to official statistics and other studies related to HIV/AIDS.

This report does not describe the situation within civil society movements against stigma and discrimination based on sexual orientation and/or gender identity. However, generally speaking, it should be said that in relatively more liberal contexts (as in most of Latin America), social movements are older and stronger than in more conservative and repressive contexts (as in most of Sub-Saharan Africa). For those who advocate for the human rights of LGBT populations in more hostile environments, this is an additional challenge.

A form of discrimination is homogenization of diversity. Categories and labels such as MSM, gay, homosexual, transvestites, transgendered and others, are questioned in most settings: in Latin America

(Caceres et al 2002), Central/Eastern Europe, Africa and Asia/Pacific (Matautia Phineas 2007). Local denominations and self-identification (sexual, gender-related, and cultural) should be taken into account to improve recognition and avoid discrimination. This is probably the biggest challenge in a global report, in which most (and the most important) nuances end up hidden under the veil of homogeneity.

**Table 3: LGBT Stigma and Discrimination per Region**

Discrimination based on sexual orientation		Region					
		Sub-Saharan Africa	Latin America & Caribbean	Middle East & North Africa	South Asia	East Asia & Pacific	Eastern Europe & Central Asia
Availability of data		Very poor	Fair	Poor	Poor/fair	Poor/fair	Poor/fair
Forms	Direct	+++ <i>Prohibition, religions, violence</i>	+ <i>Armed forces Legal prohibitions in the non Latin Caribbean</i>	+++ <i>Prohibition, religion, homophobic crimes</i>	+++ <i>Legal prohibitions</i>	++ <i>Legal prohibitions in some countries</i>	++ <i>Silence</i>
	Indirect	++ <i>Exclusion of basic rights</i>	+++ <i>Rights related to marriage</i>	++ <i>Exclusion of basic rights</i>	++ <i>Exclusion of basic rights</i>	++ <i>Exclusion of basic rights, Heterosexuality taken for granted</i>	++ <i>Rights related to marriage</i>
Subjective experiences	Executed / Enacted	+++ <i>Migration, judiciary</i>	++ <i>Healthcare, employment</i>	+++ <i>Family honor</i>	+++ <i>Family honor</i>	++ <i>Forced marriage</i>	++ <i>Healthcare, employment</i>
	Anticipated / Felt	+++ <i>Hidden, invisibility, healthcare</i>	++ <i>Not talked about healthcare</i>	+++ <i>Healthcare</i>	+++ <i>Heterosexual marriages "to pass", healthcare</i>	++ <i>Fear of disclosure, healthcare</i>	++ <i>Fear of disclosure; healthcare</i>
Levels	Intimate	++ <i>Practices dissociated from identities f.d.</i>	++ <i>Internalized homophobia</i>	++ <i>Internalized homophobia</i>	++ <i>According to gender roles</i>	++ <i>A "positive identity" as Western?</i>	++ <i>Internalized homophobia</i>
	Family and friends	++ <i>Verbal abuse f.d.</i>	++ <i>Double lives, machismo, violence</i>	++ <i>Hypocrisy, double standards</i>	++ <i>According to gender roles</i>	+++ <i>Tension, migration</i>	++ <i>Hypocrisy, double standards</i>
	Civil society	++ <i>f.d.</i>	++ <i>Jokes, stereotypes</i>	++ <i>Silence,</i>	++ <i>According to gender roles</i>	++ <i>Silence</i>	++ <i>Silence</i>
	Public	+++ <i>Public ban, repressive laws</i>	+ <i>Political correctness, unpunished violence</i>	+++ <i>Public ban, repressive laws</i>	++ <i>Silence, AIDS made MSM visible</i>	++ <i>Silence, AIDS made MSM visible</i>	++ <i>Influence of religion / Europe</i>
Related to HIV		+++ <i>f.d. Invisibility No access,</i>	++ <i>No specific programs, homo-</i>	+++ <i>No specific programs,</i>	+++ <i>Condom access, no programs,</i>	++ <i>No specific programs, homo-</i>	++ <i>Invisibility, migration</i>

	<i>no data</i>	<i>transphobia at health services</i>		<i>invisibility</i>	<i>transphobia at health services</i>	
Transgender - Gender identity	n.d	+++ <i>Violence, no basic rights</i>	+++ <i>Violence, no basic rights</i>	+++ <i>Violence, no basic rights</i>	+++ <i>Violence, no basic rights</i>	+++ <i>Violence, no basic rights</i>
Exceptions	South Africa (friendlier)	Non Latin Caribbean (legally more repressive)			China (transgender identity recognized)	
Overall discrimination	+++ <i>n.d., f.d.</i>	++	+++	+++	+++	++

- No discrimination
- + Low level of discrimination
- ++ Middle level of discrimination
- +++ High level of discrimination
- n.d. No data available
- f.d. Few data available

*The legend is an illustrative characteristic or examples*

## Conclusions and Recommendations for Action

A detailed comprehension of the historical dynamics which informs the development of the legal regulation of the sexual diversity, in global terms, regional or local is beyond the scope of the present report. Given the data available and the aim of this paper, it is important to stress some of the tendencies and challenges.

The legal regime governing sexual diversity in a country is related to historical traditions from which its national legal system arises as well as religious and consuetudinary influences<sup>25</sup>. As mentioned above, the Common Law tradition and the prevalence of religious dogma and local customs frequently are associated with the development of repressive systems regarding sexual diversity.

Secondly, repressive national legal systems constitute obstacles to the promotion of human rights related to sexual diversity.

Thirdly, the effort to combat such legal barriers to the enjoyment of these rights requires consideration not only of the features of each legal tradition with regard to sexual diversity, but also of the impact of such efforts in the context of the local culture, without which the development of solutions will be jeopardized.

Furthermore, the reality depicted suggests that the judicial path might be the least difficult alternative for the development of respect for human rights related to sexual diversity given that legislative action may tend to reinforce repressive elements in countries where cultural and religious hegemony may be expressed through legislative action. In these countries, the courts may provide the opportunity for a more open discussion.

The next step is to point to possibilities of overcoming the repressive situations and the denial of rights associated to sexual diversity.

Resistance and even hostility to the defense of human rights based on arguments of cultural exceptions are not new. Rights associated with sexual behavior and family structure are particularly sensitive given that they touch upon deeply held beliefs, often associated with religious tenets. One stumbling block for the advancement of rights associated with LGBT populations is the lack of knowledge and evidence about them in many countries of the world. Indeed, the mere proposal that the sexual practices of a country's inhabitants should be approached in a scientific spirit and explored dispassionately may awaken opposition.

At the same time, many countries are concerned with the health of their populations in the face of the HIV/AIDS epidemic as well as with citizens' access to a range of family planning methods in the exercise of their reproductive health decisions. To achieve these goals, scientific enquiry about sexuality and

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<sup>25</sup> This report does not take any position concerning the central issue; it is not aimed at developing arguments or inferences either concerning the nature or the theological content of any religious faith, as well as of the values, costumes and local traditions. The reference is made to the Islam Law, to the Christian tradition, or to local traditions and costumes, as important factors influencing the development of repressive, neutral or protective legal frameworks concerning sexual diversity

reproduction is required, including practices that remain clandestine or socially stigmatized. This is an area where the interests of defenders of human rights and leaders concerned about the well-being of their countries' inhabitants intersect.

Taking into consideration all the characteristics of the different legal traditions, as well as the factors which inform the genesis of the repressive, neutral, protective and supportive responses respectively, certain strategies are suggested: .

a) The use of judicial means in situations where the legislature is unlikely to support protective demands and the recognition of these rights;

b) In repressive national legal systems with religious or consuetudinary influences, promoting awareness that local traditions and religions are not homogeneous with respect to sexual diversity may lead to protective understandings of sexual rights;

c) In countries where the regimes are neutral, and where national legal systems are of mixed origin, the consuetudinary contents may be unfriendly to sexual diversity. In those cases, one possible approach is to emphasize the perspective of human and sexual rights, which are present in the current understanding of both Civil and Common Law;

d) Another possible strategy is to promote exchanges and training of legal professionals and scholars to increase their familiarity with the advances obtained in other jurisdictions;

e) The utility of a legal regime favoring sexual diversity for the effective development of public health policies aiming at HIV/AIDS epidemics may be demonstrated. The protection of human rights with regard to sexual diversity has a direct impact on both prevention strategies and in the promotion of the health of persons living with HIV/AIDS;

f) Joining demands for human rights based on sexual diversity with those based on other factors such as gender, race and ethnicity may promote solidarity and raise the chances for overcoming legal barriers;

g) The encouragement of the notion of sexual rights as part of human rights in any and all legal systems as consistent with our understanding of citizenship may be strengthened by broadening of participation by social actors, both collectively and individual ly;

h) In many countries, working with enforcement officials to enforce existing protective laws and create awareness in the general public and sexually diverse populations about their existence is necessary.

i) In countries whose national legal systems are repressive, regional and global courts may be used to propose the adoption of protective guidelines governing sexual diversity, which would create external pressure in favor of internal demands for the human rights;

j) The development of specific studies in the area of comparative law focusing on sexual diversity may encourage the dissemination of information concerning the barriers faced in each national and regional context, and promote the further identification of local, regional and global strategies for progress.

## List of Appendices

1. List of Key informants
2. List of National Legal Systems
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4. References cited in the text
5. Complementary Bibliography
6. Document database (accessible through a hyperlink)

## Appendix 1 - List of Key informants

We are pleased to acknowledge the support of a number of individuals and organizations, who kindly provided advice and shared their resources with us:

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APCOM

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Advisor  
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Rights  
Council of Europe  
HIV Center, Columbia University, New  
York, USA

HIVOS, The Netherlands

## Appendix 2 - List of National Legal Systems In relation to specific Legal Traditions

Legal Systems		Region						
		Sub-Saharan África (48)	Latin America (17)	Caribbean (16)	Middle East & North África (15)	South Ásia (08)	East Ásia & Pacific (24)	Europe & Central Ásia (27)
1. Repressive	1.1 Repressive in high intensity	Gâmbia - Muslim/Common Law/Customary Ghana - Common Law/Customary Guinea-Bissau - Civilist/Customary Ethiopia - Civilist/Customary Kenya - Civilist/Muslim/Customary Malawi - Common Law/Customary Nigéria - Common Law/Muslim/Customary São Tomé and Príncipe - Civilist/Customary Sierra Leone - Common Law/Customary Mauritânia - Muslim/Civilist Angola - Civilist Botswana - Civilist/Common Law Mozambique - Customary/Civilist Seychelles -		Antigua and Barbuda - Common Law Barbados - Common Law Belize - Common Law Guyana - Common Law/Civilist Dominica - Common Law Grenada - Common Law Jamaica - Common Law St. Kitts and Nevis - Common Law St. Lucia - Civilist/Common Law St. Vicent and Grenadines - Common Law Trinidad and	Iraq - Civilist/Muslim Iran - Muslim/Civilist/Common Law Lybia - Civilist/Muslim Saudi Arábia - Civilist/Muslim/Common Law Yemen - Muslim/Civilist/Common Law Egypt - Civilist/Muslim	Afghanistan - Muslim Bangladesh - Muslim/Common Law Índia - Common Law/Muslim/Customary Maldives - Muslim Pakistan - Muslim/Common Law Sri Lanka - Civilist/Common Law/Customar	Indonésia - Civilist/Muslim/Customary Kiribati - Common Law Malaysya - Muslim/Common Law/Customary Myranmar - Common Law/Customary Palau - Common Law Papua New Guinea - Customary/Common Law Solomon Islands - Common Law/Customary Tonga - Common Law	0

		Common Law/Civilist Sudan - Muslim/Common Law Tanzânia - Common Law/Customary Uganda - Common Law/Customary Zâmbia - Common Law/Customary		Tobago - Common Law				
	1.2 Repressive in lower degree	Benin- Civilist Cameroon - Civilist/Common Law/Customary Guinea - Civilist/Custody Eritrea - Civilist/Custody/Muslim Mauritius - Civilist/Common Law Senegal - Civilist/Custody Togo - Civilist/Custody Somália - Muslim/Common Law/Civilist Liberia - Common Law/Customary Lesotho Common Law/Civilist/Custody Zimbabwe - Civilist/Common Law/Customary	Nicarágua - Civilist Panamá - Civilist El Salvador - Civilist		Algeria - Civilist/Muslim Lebanon - Civilist/Muslim Morocco - Muslim/Civilist Oman - Muslim/Common Law Syrian - Muslim/Civilist Tunísia - Civilist/Muslim Djibouti - Civilist/Muslim/Custody	Bhutan - Customary/Common Law Nepal - Common Law/Custody	American Samoa - Common Law/Customary Marshall Islands - Common Law Northern Mariana Islands = Common Law Philippines - Common Law/Civilist Samoa - Common Law/Customary	Turkmenistan - Civilist Uzbekistan - Civilist

		y Swaziland – não consta		0				
2. Neutral	2. Neutral	Cape Verde - Civilist  Congo Dem. - Civilist/Custo mary  Congo Rep. - Civilist/Custo mary  Gabon - Civilist/Custo mary  Equatorial Guinea - Civilist/Custo mary  Chad - Civilist/Custo mary  Comoros - Civilist/Muslim  Madagascar - Civilist/Custo mary  Rwanda - Civilist/Custo mary  Mali - Civilist/Custo mary  Cote d'Ivoire - Civilist/Custo mary  Burkina Faso - Civilist/Custo mary  Burundi - Civilist/Custo mary  Central African Republic - Civilist  Niger - Civilist/Custo mary	Bolívia Civilist  Chile Civilist  Guatem ala Civilist  Hondura s Civilist  Paragua y Civilist	Haiti Civilist  Cuba Civilist  Dominica n Republic – Civilist  Surinam e - Civilist  French Guyanne - Civilist	Jordan - Common Law/Musli m/Custom ary	0	Cambodia – Civilist  Micronésia - Common Law/Customary  Mongólia - Customary/Civilist  Thailand - Civilist/Common Law  Timor-Leste - Civilist/Muslim/Cu stomary  Vanatu - Civilist/Customary/ Common Law  Vietnan - Civilist  Laos.- Civilist  China - Civilist/Customary	Albânia - Civilist  Armênia - Civilist  Azerbaijan - Civilist  Belarus - Civilist  Kazakhshyam - Civilist  Kyrgyz Republic - Civilist  Macedônia - Civilist  Moldova - Civilist  Tajikistan - Civilist  Turkey - Civilist  Ukraine - Civilist
3. Protective	3.1 Protection Measures	Namibia - Common Law/Civilist	Costa Rica – Civilist  Ecuador - Civilist	0	0	0	Fiji Common Law Korea South.Civilist/Cust omary	Bosnia and Herzegovina – Civilist  Bulgária - Civilist

			Peru - Civilist					Geórgia - Civilist  Latvia - Civilist  Lithuania - Civilist  Poland - Civilist
	3.2 Recognition Measures	South Africa - Civilist/Comm on Law	Uruguay - Civilist  Argentin a - Civilist  Brazil – Civilist  Colômbi a Civilist  México - Civilist  Venezue la - Civilist	0	0	0	0	Croatia - Civilist  Czech Republic - Civilist  Estonia - Civilist  Hungary - Civilist  România - Civilist  Russian Federation - Civilist  Serbia and Montenegro NÃO CONSTA  Slovak Republic - Civilist
N.D.		Mayota			West Bank and Gaza			
<b>TOTAL</b>	153 (consolidate d)  155 (general))	47	21	12	14	8	24	27

## Appendix 3 - Global Situation of Selected Human Rights in relation to Same-sex-practicing and Gender-variant Individuals

	Latin America and the Caribbean	Africa	Asia	Western Europe	Eastern Europe/former USSR	Middle East/North Africa	North America
(A) Civil and political rights							
Life	+++	++	+++	++++	+++	†	++++
Freedom from torture and cruel, inhuman, or degrading treatment or punishment/ Humane and dignified conditions of confinement for those deprived of liberty	++	++	++	++++	++	†	++
Liberty and security of person	+++	†	++	+++	++	†	+++
Freedom from arbitrary or unlawful interference with privacy	++	†	++	++++	++	†	++++
Freedom of thought, conscience and religion	++	†	†	++++	+++	†	++
Freedom of association/Freedom of opinion, expression and information	+++	†	+++	++++	+++	†	++++
Peaceful assembly	+++	†	+++	++++	++	†	++++
Equal treatment before the law	++	†	++	++++	+++	†	+++
Freedom from retroactive criminal prosecution	+++	†	+++	++++	++	†	++++
Freedom to marry and found a family	++	†	++	+++	++	†	++
(B) Economic, social and cultural rights							
Work/Just and favorable working conditions	++	†	++	++++	+++	†	++++
The highest attainable standard of physical and	+++	†	++	++++	++	†	+++

mental health							
Education	†††	††	†††	††††	†††	††	††††
A share in cultural life and enjoyment of the benefits of scientific progress	†††	†	††	††††	†††	†	†††

†††† -- significant progress in fulfilling rights

††† -- respectful of rights; some shortcomings or violations

†† -- both respect and violations of rights

† -- broad violations of rights

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## **Appendix 6: Document database**

Please visit the following link for a list of documents and hyperlinks to html or pdf versions thereof:

[http://200.37.88.4/BASE/BASE relación de documentos.xls](http://200.37.88.4/BASE/BASE%20relaci3n%20de%20documentos.xls)