

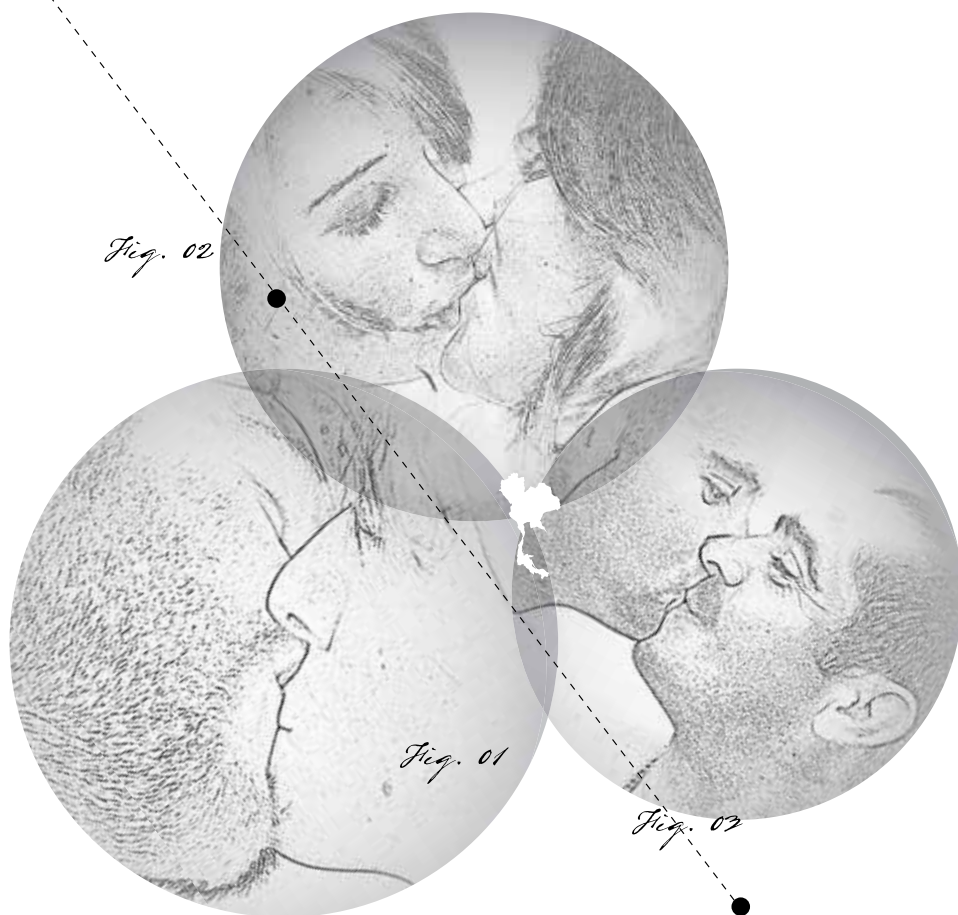
RECOGNIZING SAME-SEX RELATIONSHIPS IN THAILAND

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ABSTRACT

Scholars writing on South, Southeast and East Asia generally find, over time, more tolerance of sex and gender variation than in the West. This tolerance or acceptance was countered by colonialism, with anti-homosexual criminal laws enacted for all British colonies, and new German sexology accepted as modern science. Most of the time there was no aggressive enforcement of the criminal laws, but we have scattered reports of police harassment. Equality and non-discrimination features in a few laws and judicial decisions in the region, including two decisions in Chiang Mai relating to transsexuals participating in public parades and festivals. Gradually Western legal systems have given some legal recognition to same-sex relationships, whether by ascription, systems of registration or the opening of marriage. Some progress in considering such reforms has been occurring in China, Taiwan, Nepal, Vietnam and Thailand.

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LGBTI RIGHTS IN ASIA

To begin, we need to ask about the state of LGBTI rights in South, Southeast and East Asia. Academics writing on various parts of this region generally note more tolerant traditions than in the West, though there are historical shifts. A European academic writing on late imperial China commented:

...there rarely (if ever) was any categorical moral indictment or medical pathologization, or any strong legal or religious persecution, of homosexual behavior. This attitude offers a sharp contrast with the anti-sodomy fanaticism that so fatally characterized the Christian European cultures flourishing at the same time on the opposite edge of the Eurasian continent.²

A report by the Law Reform Commission in Hong Kong in 1983 recommended the decriminalization of homosexual conduct in private, citing Chinese traditions. The report, according to the Dean of the Faculty of Law, University of Hong Kong,

...found that homosexual activities were not an evil of the West. They existed and were well documented in classical literature in ancient China back to 3,000 years ago. They were indeed quite open and prevalent in the Tang

² Giovanni Vitiello, *The Libertine's Friend*, Chicago, 2011, at 13.

*Dynasty, which was about 1,000 years ago.*³

In pre-Meiji Japan, a wealth of fiction and commentary celebrated same-sex love, often involving Samurai.⁴

*Tokugawa-period (1600-1867) Japan has probably the best recorded tradition of male same-sex love in world history. Period novels, poetry, and art all provide extensive representations of the varieties of homosexual love practiced. Incidental information gleaned from biographies, news, scandals and official records as well as testimony from foreign visitors show how widely practiced was male-male eroticism through all strata of society. Tokugawa (homo)sexuality has recently been widely discussed in both English and in Japanese. These researchers amply illustrate the widespread prevalence of homosexual relations among men of the samurai class as well as among urbanites generally.*⁵

These Asian traditions of tolerance or acceptance were displaced by Western colonial expansion in the late 19th century. New German sexological studies were exported to Asia as part of Western science, generally seeing

³ Johannes Chan, Dean, Faculty of Law, University of Hong Kong, UNDP, Punitive Laws, Human Rights and HIV prevention among men who have sex with men in Asia Pacific: High Level Dialogue Report, May 17, 2010, 5, referring to the Law Reform Commission, Report on Laws Governing Homosexual Conduct, 1983.

⁴ See, for example, Saikaku, *The Great Mirror of Male Love*, Stanford University Press, 1990 (a translation of Nanshoku Okagami of 1687).

⁵ Mark McLelland, *Male Homosexuality in Modern Japan*, Curzon, 20-21 (references omitted).

sexual variation as an illness. The *Indian Penal Code* of 1860 criminalized homosexual acts. It was copied for other British colonies in Asia, Africa, the Caribbean, and Oceania.⁶

Dr. Ruth Vanita comments for India:

*Notwithstanding some scholars' discomfort with ascribing to colonialism the modern erasure of earlier homoeroticisms (and other eroticisms), evidence so far available indicates overwhelmingly that a major transition did indeed occur at that historical moment.*⁷

The High Court in Delhi ruled in 2009 that the colonial-era criminal law against homosexual acts violated the *Constitution of India*. In the appeal before the Indian Supreme Court some history was canvassed:

The Court was quick to pick up on the argument of homophobia as a colonial legacy, and expressed a big appetite for historical material on pre-colonial acceptance of sexual and gender diversity. All of a sudden the right-

⁶ See Douglas Sanders, 377 and the Unnatural Afterlife of British Colonialism in Asia, *Asian Journal of Comparative Law*, Volume 4, 2009, 165-206. The adoption of the Napoleonic code decriminalized homosexual acts in half of Europe, with the result that prohibitions were enacted for British colonies, but not those of France, the Netherlands, Portugal or Spain. A criminalization of homosexuality in the Qing Dynasty in China lapsed in the Republican era.

⁷ Ruth Vanita, *Queering India*, Routledge, 2002, 4. The industrial revolution began in Europe around 1750. It created, over time, a great technical, economic and intellectual advantage for European powers. The result was the European led globalization and colonialism of the last half of the 19th century. German 'sexology' and British criminal law spread in this context. Commentators in Korea however attribute the shift in tolerance or acceptance to the rise of neo-Confucianism, not Western 'science'.

*wing claim to 'tradition' was unhinged.*⁸

Thailand shares the sense that sexual and gender diversity have generally been tolerated here, certainly more than in the West. A range of bars, discos, restaurants, saunas, and publications now function openly in Thai cities, catering to locals, Asian tourists and visiting Westerners.⁹ Bangkok is the leading gay tourist destination in Asia for Asians. The government's Tourist Authority has begun to court the gay market in its advertising and outreach. When the government of Taksin Shinawatra instituted a "social order" campaign in 2001, gay venues were not targeted.¹⁰ Gay public figures, past and present, are known, including two or three prime ministers, with little comment or concern. Recently three or four well-known Thai pop singers have come 'out of the closet'. The leading transgender beauty contest is given extensive television coverage, and excellent cabaret performances entertain tourists in purpose-built theatres.

CRIMINAL LAWS

Criminal prohibitions survive in the region only in former British colonies. A British criminal prohibition was repealed in Hong Kong in 1991, in advance to reversion to China. The Delhi High Court in 2009 ended the criminalization of consensual adult male-male sexual acts that dated back to the famous *Indian Penal*

⁸ Aksay Khanna, activist and commentator, SOGI-List, June 8, 2012.

⁹ Only in the last decade have a set of Thai language magazines with mainstream circulation been available, notably *Attitude* (linked to the UK publication), *Glow*, *Solid*, and *Tom Act*. In addition there are free small format English magazines for tourists, such as *Out in Thailand*, *Desire*, *Thai Puen*, and *Max*.

¹⁰ Douglas Sanders, *Colorful Shows and Social Order: Host bars and moral campaigns in Bangkok*, International Convention of Asia Scholars, National University of Singapore, August, 2003.

Code of 1860 (but the matter is currently before the Supreme Court). In 2013 a trial court in Singapore upheld a British era criminal prohibition. That decision is under appeal. China, on its own, prohibited sodomy in the early 18th century, but there is no history of enforcement.¹¹ The law did not survive the ending of the imperial period. In the post-war period, homosexuals, cruising for partners in public parks, were sometimes arrested and charged with ‘hooliganism’. In 1993 a decree said that this charge could not be used simply because someone was homosexual. The offence itself was repealed in 1997.

Japan and Thailand both copied British prohibitions in the course of introducing European-style legal codes around the turn of the twentieth century. In both cases the sections were dropped and have no known history of enforcement.¹²

Even in the West, the export center for such laws, there is generally little or no history of enforcement. We know of certain untypical periods of active enforcement – the Netherlands, 1730-1733, when several hundred offenders were executed¹³ – Britain in the immediate post-war years – in parts of the US in the 1960s. But we lack any account of a serious history of sustained enforcement anywhere in the West. The lawyers defending Georgia’s sodomy law in the U.S. Supreme Court in *Bowers v Hardwick* in 1986 conceded that the last prosecution occurred in the 1930s.¹⁴ Similar histories of non-enforcement were in evidence before the European Court of

¹¹ Vitiello, 10.

¹² The law existed in Japan from 1878 to 1881, and in Thailand from 1908 to 1956. Some writings say that Thailand decriminalized homosexual acts in 1956, which is technically true, by fails to recognize that the law was never enforced.

¹³ Helmut Puff, *Sodomy in Reformation German and Switzerland*, Chicago, 2003, 5.

¹⁴ William Eskridge, *Dishonorable Passions*, Viking, 2008, 241-2.

Human Rights in *Dudgeon v UK* (1981) and the UN Human Rights Committee in *Toonen v Australia* (1994). The criminal laws kept people ‘in the closet’ but rarely put them in jail.

There seems no literature describing active enforcement of anti-homosexual criminal laws in Asia. There is a documented Indian case of police entrapping an individual, forcing him to identify others, arranging a meeting of the individual and his friends, and arresting the others. This occurred in Lucknow in January, 2006. It is a unique picture of proactive strategies on the part of the police. The report also notes the arrest of AIDS outreach workers in Lucknow in 2001, who were accused of promoting homosexual acts. The AIDS workers were jailed for 47 days. Charges were dropped in both cases.¹⁵ The publicity of the police behavior in the two cases may have deterred police from repeating such actions. We have no later accounts of similar attempts at enforcement.

Singapore is the only jurisdiction anywhere in the world to both retain a prohibition and have a stated official public policy of no ‘proactive enforcement.’ No ‘proactive enforcement’ actually means no enforcement, for the only cases that will come to police attention without special police activism are those involving (a) sexual assault, (b) public activity, or (c) incidents involving underage males. These three situations all involve breaches of specific laws, and can be prosecuted without reference to any general anti-homosexual prohibition. Most prosecutions anywhere have always been about these

¹⁵ Human Rights Watch, *This Alien Legacy*, New York, 2008, 28.

three kinds of incidents.¹⁶

Most arrests are not about sexual acts, but about public soliciting by prostitutes (again, something regulated separately from homosexual acts themselves). In Thailand police activity is identified in public media accounts as saving young women who have been coerced into sex work, or controlling street prostitution by transsexual sex workers.¹⁷ No other kinds of stories are current in the English language press in Bangkok. Male and female ‘service workers’ in mainstream bars and massage parlors are not being either ‘saved’ or ‘harassed’ these days. Thailand probably has the safest arrangements for sex work of any country in the world, with its system of ‘host’ bars and massage parlors. These provide some health and personal security for both the sex workers and the clients. Condom use is routine.

Reports of police harassment of transgender sex workers in Mandalay on July 6th, 2013, followed the pattern of earlier Indian police violence against transgender sex workers in Bangalore.¹⁸ In the Mandalay case, twelve people were detained, stripped naked, mocked and beaten. Three

¹⁶ Authorities argued in India that they needed the general prohibition for they had no specific law to use for cases of underage homosexual acts. As a result the litigation against the criminal provision only asked that it be “read down” to exclude consenting adult activity in private.

¹⁷ See Chaiyot Yongcharoenchai, Prejudice in Pattaya, Bangkok Post Spectrum, Sunday, February 3, 2013, 6, a rare account of police actions in Pattaya against transgender street prostitutes.

¹⁸ People’s Union for Civil Liberties, Karnataka, Human Rights Violations against the Transgender Community: A Study of Kothi and Hijra Sex Workers in Bangalore, India, September, 2003, foreword by Upendra Baxi (who has written widely on human rights issues). The publication reworks an earlier report published in pamphlet form in 2000. This documentation and publicity apparently largely ended the patterns of harassment that the report described.

were charged with disturbing the public, and all were forced to sign an undertaking that they would not dress in public as women or go near the Sodona Hotel area, a popular area for transgenders and gay men.¹⁹ While there are some complaints of police harassment of transgender sex workers in Pattaya in Thailand, there are no allegations of the beatings and abuse that characterized the accounts of police actions in Bangalore and Mandalay. The identical British era anti-homosexual criminal laws in India and Myanmar may have the effect of making the police feel they have impunity in any mistreatment of gays and trans people who are publicly gathering, cruising or soliciting. Such police actions typically do not result in charges under the criminal law. Instead they may involve charges of loitering, public nuisance, or public disturbance, or, in the end, no charges at all.

ANTI-DISCRIMINATION LAWS

A central theme of international human rights principles is universality. Famously, the *Universal Declaration of Human Rights* opens with the words “All human beings are born free and equal in dignity and rights.” The first major human rights treaty to be approved by the UN General Assembly in 1965 was against racial discrimination. It was the issue of racial discrimination that opened up the UN system to activism in the 1960s, with investigative systems never envisaged in 1945. For the first time independent experts were named to investigate and report, and expert committees established to monitor state compliance with their human rights treaty commitments. The women’s convention of 1979 called for the ending of traditional cultural patterns that subordinated women. The Committee on the Elimination of Discrimination against Women is perhaps the most active

¹⁹ Derek Yu, Gays in Burma allege sexual abuse by police, *GayStarNews*, July 13, 2013.

of the UN treaty committees. The classic general formulation of equality rights is found in article 26 of the *International Covenant on Civil and Political Rights* approved by the General Assembly in 1965. That treaty has been widely signed by states in Asia, including by Thailand.

Probably all constitutions in South, Southeast and East Asia now have a general prohibition of discrimination and a promise of equal rights. The only constitutions that expressly prohibit discrimination on the basis of sexual orientation (and some times now gender identity as well) are in Europe, South Africa, and parts of Latin America. Activists in Thailand, helped by the National Human Rights Commission, lobbied for express recognition in the equality provisions of the Thai constitution during a revision process in 2007. They achieved a partial victory when the constitutional drafting assembly issued an interpretation of the existing wording that said it already protected homosexuals and transgendered individuals.²⁰ Activists sought an express reference in the *ASEAN Declaration on Human Rights* in 2012. They did not gain that wording, but the equality provision is broad and ‘open-ended.’

We have a few judicial decisions extending equality rights to homosexuals. Hong Kong courts ruled against inequality in (a) the age of consent, and (b) different definitions of private space in laws for homosexual and heterosexual sexual activity.²¹ A decision in Japan ruled against the City of Tokyo for refusing to grant a gay youth group access to a publicly owned residential conference center. Two decisions in Thailand ruled against the City of Chiang

²⁰ See Douglas Sanders, *The Rainbow Lobby*, in Jackson, *Queer Bangkok*, Hong Kong, 2011, 229.

²¹ *Leung v. Hong Kong*, August, 24, 2005, High Court, Judge Michael Hartmann; *Secretary of Justice v Yau Yuk Lung Zigo, Lee Kam Chuen*, Hong Kong Court of Final Appeal, 17 July 2007.

Mai for barring transgender women from full participation in government organized parades and festivals.²²

In Asia anti-discrimination laws prohibiting discrimination in employment in the private sector are in place only in Taiwan, Timor Leste, and in three jurisdictions in the Philippines. A non-discrimination law was proposed in Korea, but never enacted.

The legislative mandate of the National Human Rights Commission in Korea specifically directs the body to address discrimination on the basis of sexual orientation. While other national human rights commissions lack such an explicit mandate, they now support LGBTI rights. The Asia Pacific Forum of National Institutions for the Promotion and Protection of Human Rights commissioned a background study on LGBTI issues in the region and a report from its expert advisory panel.²³ The National Human Rights Commission of Thailand was active within the Asia Pacific Forum in promoting the initiatives and supporting a proactive policy.

THE PUBLIC SPHERE

LGBTI non-governmental organizations function in most parts of the region. They are not legally allowed in Singapore, but some function nonetheless. With the democratic opening in Myanmar, we now have non-governmental LGBT organizations functioning in the country, including the continuation of the Human

²² For these and other Asian decisions see International Commission of Jurists, *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, 2011. The ICJ maintains an on-line data base on judicial decisions and legislation on issues of sexual orientation and gender identity.

²³ These documents are available on the website of the Asia Pacific Forum. See www.asiapacificforum.net.

Rights Education Institute of Burma, which was previously based in exile in Chiang Mai. That leadership has also established a new NGO, Color Rainbow, with offices in Yangon. NGOs tend to be small in the region. Generally, the only organizations with offices and paid staff are involved in HIV/AIDS health programs.

Public ‘pride parades’ occur in many parts of the region – Hong Kong, India, Japan, Korea, Philippines, Taiwan, Thailand. An LGBT film festival was allowed to function in Beijing in July, 2013 with no curtailment or police harassment, the first time in its history. The large Q Film Festival in Indonesia now has showings in perhaps four cities. Films with LGBT themes are being produced in a number of countries, with recent examples securing regular commercial public showings in Indonesia, Malaysia, Myanmar, Thailand, and Vietnam. Demonstrations are sharply curtailed in Singapore, but gatherings are allowed at speakers’ corner park. In 2013 21,000 people gathered for the now-annual “pink dot” event – showing support for LGBT rights, and there were corporate sponsors for the first time. An evening photograph shows the huge pink dot – people wearing pink and carrying candles – observed from space, with the city skyline in the distant background. Singaporeans call their small city state the “Red dot” in an interestingly boastful way, for they talk of it ‘punching above its weight’. “Pink dot” certainly delivers a visual punch.

THE RISE OF RELATIONSHIP RECOGNITION INTERNATIONALLY

The goal of “marriage for all”, as the government of French President Hollande phrased the issue, or “genderless marriage” as spoken of in Sweden, is now, unavoidably, the goal of most LGBTI activists in all parts of the world.

We have gotten to this moment in stages. The initial goal in many countries,

and in United Nations rulings, has been equal rights and benefits on specific issues, such as pensions, inheritance, health insurance, hospital visitation rights, immigration sponsorship, and the custody and adoption of children. The recognition of such rights was initially on an ad hoc basis, issue by issue. Substantive equality was put in place in this way, bit by bit. Northern European countries, Canada, Australia and New Zealand were the leading examples. The UN’s *International Covenant on Civil and Political Rights* was held to require equal pension rights for same-sex couples in *Young v Australia* in 2003 and *X v Colombia* in 2007. The European Court of Human Rights upheld equal rights in relation to adoption in *EB v France* in 2008 and *X v Austria* in 2013.

The next step was registration systems for same-sex couples, which confirmed a package of rights for couples who registered. As time went on, many countries, such as the United Kingdom, extended all the rights and obligations of legal marriage to registered same-sex couples. When that level of legal recognition had been obtained, the achievement led to a surprisingly simple question. If equal rights were recognized, why was the state supporting a ‘separate but equal’ system by withholding the important symbolism of the word ‘marriage’? And for countries that had not gone through the incremental steps of piece meal recognition of rights, why not recognize that opening marriage was logical and (increasingly seen as) inevitable?

The developments on (a) ad hoc recognition of rights by ascription, (b) registration systems, and (c) the opening of marriage have come very recently. We can date the ad hoc recognition of same-sex relationships to regulations on rent controlled apartments in the Netherlands in 1979. Registration systems begin with pioneering legislation in Denmark in 1989. The Netherlands was the first jurisdiction to open marriage in 2001.

In July, 2013, marriage was open in Argentina, Belgium, Canada, Denmark, France, Iceland, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, and Uruguay. Marriage was in the final stages of recognition in Brazil, Colombia, Mexico and the United Kingdom. Twelve or more US states have now opened marriage, as well as the District of Columbia.

Many couples have become marriage tourists. At least 2,700 Australians have entered into same-sex marriages overseas, according to census data released in June, 2012. Most have married in Canada, where there is no residency requirement (except in Quebec). In late 2012, Ian Hunter, the Minister of Social Affairs of the state of South Australia, married his partner of 20 years in Spain. The ceremony was broadcast live back to Australia.²⁴ A documentary has been screened at some film festivals, *Different Path, Same Way*, on the marriage of two Hong Kong men in Vancouver, Canada.²⁵

We see a ‘bounce-back’ effect, when couples come back home and seek recognition of their foreign legal marriages, in the same way that foreign heterosexual marriages are routinely recognized. Israelis who married in Canada won recognition of their marriages back home in Israel. New Yorkers won recognition of their Canadian marriages well before marriage was opened in their home state. UK law treats foreign marriages as civil unions (which give the same rights as marriage, without the name). In response, a Canadian court has recognized a UK civil partnership as a marriage, and granted a divorce.²⁶

²⁴ Matthew Jenkin, Aussie MP's gay marriage in Spain broadcast live, *GayStarNews*, December 6, 2012.

²⁵ Nigel Collett, Hong Kong gay couple shares “wedding video” with the world, *fridae.asia*, February 22, 2013.

²⁶ Ray Filar, Judge says UK civil partners can divorce like married Canadian couples, *GayStarNews*, January 14, 2013.

We have reached a tipping point. Major changes in policies and laws continue with some regularity. In June, 2012, Denmark, which had pioneered ‘registered partnerships’ in 1989, moved on to full marriage. Australian Prime Minister Kevin Rudd in July, 2013, indicated his support for marriage. In Germany, the opposition Social Democratic Party supports marriage. The leading candidate for president in Chile, Michelle Bachelet, supports marriage.

Many have commented on the speed of reform, on an issue that seemed impossible only fifteen years ago. President Obama has referred to an “incredibly rapid transformation in peoples’ attitudes around LGBT issues.”²⁷ Time magazine called it the “swiftest change in public opinion in U.S. history.”²⁸ A scholar said that popular support for LGBT rights “appears to grow at almost miraculous speed.”²⁹ Another scholar called the pace of change “extraordinary”, noting that in 2004 Americans opposed gay marriage by roughly two to one, but by 2010 supported it by 52 percent. Linked to this shift was a new visibility of gay and lesbian people:

*By 2000, the number of Americans reporting that they knew somebody who was openly gay had tripled to 75 percent [since 1985]. The percentage who reported having a gay friend or close acquaintance increased from 22 percent in 1985 to 43 percent in 1994 to 56 percent in 2000.*³⁰

In June, 2013, the US Supreme Court ruled that the national government

²⁷ Greg Hernandez, President Barack Obama reflects on progress, *GayStarNews*, December 21, 2012.

²⁸ David Von Drehle, We Do, *Time magazine*, Asia edition, April 8, 2012, 2 and 32.

²⁹ Nan Hunter, Reflections on Sexual Liberty and Equality: “Through Seneca Falls and Selma and Stonewall, (2013) 60 *UCLA Law Review Discourse*, 172 at 175.

³⁰ Michael Klarman, *From the Closet to the Alter*, Oxford, 2013, 197-8.

had to give the same recognition to legal same-sex marriages as to legal heterosexual marriages, striking down the key section of the 1996 *Defense of Marriage Act*. In a second case, on procedural grounds, it restored a lower court judgment extending marriage in California. President Obama took the somewhat unusual action of intervening in the California appeal (though it was about a state law). His government's submission included the following statements:

*Tradition, no matter how long established, cannot by itself justify a discriminatory law. Prejudice may not be the basis for differential treatment under law. ... The designation of marriage, conveys a message to society that domestic partnerships or civil unions cannot match.*³¹

SOME PROGRESS IN ASIA

In Central, South, Southeast and East Asia there are no examples of registration systems or of an opening of marriage to same-sex couples. In the Middle East, part of Asia for many purposes, we see developed patterns of ad-hoc recognition only in Israel. Foreign same-sex marriages are also recognized as legally valid in Israel.³² But the issue of some form of legal recognition for same-sex relationships is increasingly discussed in parts of Asia, and there have been some small preliminary innovations.

³¹ Greg Hernandez, President Obama speaks out on getting involved in Prop 8 gay marriage case, *GayStarNews*, March 1, 2013.

³² Israel does not have civil marriage, only religious marriages, with the result that there is a common pattern of Israeli nationals getting married outside the country, and those marriages being recognized in Israel.

CHINA

Li Yinhe is a sociologist and a professor at the prestigious Chinese Academy of Social Sciences. She submitted draft legislation to the National Peoples Congress to open marriage to same sex couples in 2003, 2005, 2006, 2008, and 2013. Each time the proposal lacked sufficient sponsors to get on the legislative agenda. Thirty sponsors are required.

In 2013 over one hundred parents of lesbian and gay children sent an open letter to the National Peoples Congress supporting the opening of marriage:

*"The fact that they can't legally marry puts them in a difficult situation when they try to adopt children, sign for their partners' operations, inherit assets from a deceased partner or even buy a flat," the letter said.*³³

There is growing awareness of problems created by the present system. The First Intermediate Court of Beijing in 2012 called for legislation that would allow people who discover that their spouses are homosexual to avoid divorce by filing for an annulment instead. As a result, the individuals would be legally listed as single, instead of divorced. That would improve the marriage chances of the women affected.

...most gay men force themselves to marry women. In some cases a gay man will marry a lesbian friend, allowing both to live their lives as they see fit while satisfying their families' desire to see them hitched. For those who

³³ Amy Li, Chinese parents of gays and lesbians demand equal marriage rights, February 27, 2013. See also Chris Luo, Activist's plan to legalise gay marriage submitted to NPC, *South China Morning Post*, March 6, 2013.

*can't find a willing matrimonial co-conspirator, there's now a website, chinagayles.com, that offers to match marriage-minded gay men and lesbians.*³⁴

TAIWAN

When Chen Shui-bian was mayor of Taipei, he sent a representative to the same-sex wedding of the famous author Hsu You-sheng and his partner Gary Harriman in November 1996. When Chen Shui-bian was president, in 2001, the Ministry of Justice drafted legislation recognizing marriage and adoption rights, which went to the cabinet for review.³⁵ In 2003 there seemed to be movement on the issue:

*United Daily News, a local newspaper quoted the Presidential Office as saying: "The human rights of homosexuals have been gradually recognised by countries around the world. To protect their rights, people [of the same sex] should have the right to wed and have a family based on their free will," it added.*³⁶

In Taiwan's campaigns for international recognition, it had become important to stress that Taiwan, unlike the mainland, had democracy and supported human rights. This led Chen Shui-bian to actively support the

³⁴ Chinarealtime, <http://blogs.wsj.com/chinarealtime/2013/01/22/a-proposal-for-unwitting-wives-of-gay-men-in-China>.

³⁵ Taiwan may legalise same-sex unions, fridae.com, March 12, 2002; Taiwan considers gay "marriages", child adoption, fridae.com, June 27, 2001.

³⁶ Taiwan moves to recognize gay marriages, fridae.com October 28, 2003; Taiwan's proposed same-sex marriage legislation delayed, fridae.com, December 10, 2003.

ending of the death penalty, reforms of aboriginal policy and homosexual equality rights. All of these made Taiwan worthy of respect and recognition. But the marriage bill was put on hold.

In a televised debate between candidates for the presidency in March, 2008, Ma Ying-Jeou, who won the subsequent election, noted that he had allocated funds for gay pride events in Taipei when he had been mayor of the city, a policy that started in 1999. He boasted that "Taipei is the freest city to live in if you're gay." He stated that "sexual orientation is inborn and needs to be both respected and tolerated." He said "gay rights are part of human rights." On marriage, he planned to engage in public dialogue on the issue to generate understanding and consensus, saying he was "respectful but cautious..." The candidate of the Democratic Progressive Party, Frank Hsieh, said that problems, such as joint tax filings and adoption should be resolved "step by step" before marriage would be considered.³⁷

At the end of 2009 a set of organizations and individuals formed TAPCPR, the Taiwan Alliance to Promote Civil Partnership Rights. They developed a proposal for both same-sex marriage and a civil partnership system, rejecting an approach that focused on resolving individual issues one-by-one, issues such as taxes, medical coverage or insurance beneficiaries.

An editorial in the English language China Post in Taipei in September, 2011, was entitled "Taiwan could lead Asia with full recognition of gay rights:

...as [President] Ma once noted, "Gay rights are a part of human rights." The fight for equal rights for gays has

³⁷ Philip Hwang, Taiwan presidential elections candidates discuss same-sex marriage in televised debate, fridae.com, March 17, 2008.

been described as “the last major human rights struggle.” How a nation treats its gay citizens is a good indicator of the general progressiveness of its society. It would likely cost President Ma a little political capital to directly call for legalizing gay marriage in Taiwan, but the overall benefit to the nation and the region could be worth it. Taiwan’s people for the most part do not have strong religious objections to homosexuality and there is little organized opposition to gay rights here. All that’s needed for this nation to become a bellwether for Asia is a nudge in the right direction from those in power.”³⁸

In August, 2012, the Deputy Director-General of the Centers for Disease Control in Taiwan publicly called for opening marriage. His argument for equal treatment was based on concerns with encouraging stable relationships for health purposes.³⁹ In October, at the annual Taiwan Pride day, the new leader of the opposition Su Tseng-chang stated support for legalizing same-sex marriage.⁴⁰ The government has studied reforms in Germany, France and Canada.⁴¹

The first legislative hearing on same-sex marriage was held in December, 2012. It considered a proposal to remove references to “male” and “female”

³⁸ Taiwan could lead Asia with full recognition of gay rights, *China Post*, Taipei, September 10, 2011.

³⁹ Lung Rei-yun, Elizabeth Hsu, Health official calls for legalization of same-sex marriage, Focus Taiwan News Channel, August 20, 2012.

⁴⁰ Anna Leach, Taiwan government to study same-sex marriage in Asia, *GayStarNews*, December 19, 2012.

⁴¹ Ibid.

in the Civil Code section on marriage.

Deputy Justice Minister Chen Ming-tang told [the legislative committee] that it wasn’t just the Civil Code that would have to change, but also laws regarding parentage, taxes or health insurance. That meant that the Justice Ministry couldn’t do it alone, he said. Meanwhile Chen Wei-lien, director of the Ministry of Justice’s Department of Legal Affairs suggested they would invite a scholar specializing in the Civil Code to look at Taiwanese attitudes to same-sex marriage early next year. A poll in September [2012] by United Daily News showed 55% approval of gay marriage laws with only 37% against.”⁴²

NEPAL

The Nepal Supreme Court in 2008 gave a judgment broadly upholding gay, lesbian and transgender rights, and instructing the government to proceed with the drafting of legislation to implement the decision. Opening marriage was to be considered. The process of drafting a new constitution continued through two formal extensions of the mandate of a drafting commission. The process has stopped, and an election will be held probably in late 2013. Full implementation of the Supreme Court decision has not yet occurred, but there have been some administrative reforms. Sunil Pant, founder of Nepal’s Blue Diamond Society,

⁴² Tris Reid-Smith, Taiwan moves on gay marriage, *GayStarNews*, January 1, 2012; Didi Kirsten Tatlow, Hints of Taiwan leading the way on same-sex marriage in Asia, *New York Times*, January 8, 2013.,

and a member of the legislature, has expressed confidence that Nepal would be the first Asian country to give legal recognition to same-sex relationships either through civil unions or marriage.

The developments in Nepal reflected the reformist possibilities created by the ending of the civil war. The commitment to draft a new constitution was part of that transition. The Blue Diamond Society had emerged over the previous decade as the largest and best organized LGBT organization in Asia. It gained financial support from Norway, and in the court case was assisted by the International Commission of Jurists. The judicial breakthrough was possible because of an activist Chief Justice and the leadership of Sunil Pant and others.

In November, 2012, the Nepal Supreme Court dealt with a wife who had initiated a divorce from her husband, but faced his claims for her return and a lower court order placing her in a rehabilitation centre. The Supreme Court ordered her release and her reunion with her female partner.⁴³

VIETNAM

In 2012, the government of Vietnam began the process of drafting a new law on marriage and family. Discussions and consultations were to result in draft legislation to go to the legislature in 2013 or 2014. Eight different matters are under consideration: same-sex relationships, surrogacy, separation, de facto marriage and other issues.⁴⁴

In July, 2012, the Minister of Justice said it was time to consider a

⁴³ Ananta Raj Luitel, SC allows live-in lesbian relationship, *Himalayan Times*, November 5, 2012.

⁴⁴ Anna Leach, Vote on same-sex marriage in Vietnam likely to be delayed until 2014, *GayStarNews*, February 20, 2013.

legal framework for same-sex couples – giving very practical reasons for such a reform:

The Justice Ministry now says a legal framework is necessary because the courts do not know how to handle disputes between same-sex couples living together. The new law would provide rights such as owning property, inheriting and adopting children. "I think, as far as human rights are concerned, it's time for us to look at the reality," Justice Minister Ha Hung Cuong said Tuesday [July 24th] in an online chat broadcast on national television and radio. "The number of homosexuals has mounted to hundreds of thousands. It's not a small figure. They live together without registering marriage. They may own property. We of course, have to handle these issues legally."⁴⁵

In May the [Justice] Ministry sent out a consultative letter to concerned agencies to seek their opinions on same sex relationships. The letter described same-sex marriage as being inevitable according to human rights principles. However, it also said that "given the sensitivity of homosexuality and unforeseen consequences of same sex marriage on cultural and traditional family

⁴⁵ Margie Mason, AP, Unlikely Vietnam considers same-sex marriage, *Jakarta Post*, July 30, 2012, 2. Of course the numbers of homosexuals would not have increased. What has changed is their visibility and an evolving public recognition of the realities of sex and gender diversity.

values, it is too early for Vietnam to legalise same sex marriage.” ...

*The representatives from the ministry of justice expressed their desire to have a dialogue with LGBT communities in Hanoi and Ho Chi Minh City, organize meetings between LGBT and same-sex relationship with experts from Vietnam and other countries, and educate the public on same-sex relationships.*⁴⁶

The Committee of Social Affairs of the National Assembly, as part of their consideration of possible revisions to the law on marriage and family, invited LGBT activists to make a presentation on same-sex marriage on October 8th, 2012. Professor Cees Waaldijk, who holds a chair in sexual orientation law at the University of Leiden in the Netherlands and Professor M V Lee Badgett, an economist at the University of Massachusetts, Amherst, in the United States, were invited to Hanoi in December, 2012, to discuss the international patterns on the recognition of relationships and the extension of marriage.

⁴⁶ Sylvia Tan, Will Vietnam become the first Asian nation to legalise same-sex marriage?, fridae.com, August 1, 2012, www. fridae.com, accessed August 6, 2012.

Both had written widely on issues of recognizing same-sex relationships.⁴⁷ They spoke at conferences organized jointly by the government and the UN Development Programme.

In April, 2013, the Deputy Minister of Health spoke out. Thanh Nien News reported on a speech in which he was to say that “gay people have the same rights as everyone else to love, be loved and marry.” A leading NGO activist said that while the Ministry of Justice and the Ministry of Health were both supportive of same-sex marriage, there was still a question whether there would be enough votes in support when new legislation was submitted to the National Assembly, probably in 2014.⁴⁸ A bit earlier, the Ministry of Justice announced that fines would no longer be imposed on same-sex couples who got married.⁴⁹

THAILAND

In 2012 long-time Thai gay activist Natee Theerarojanapong and his partner of 20 years applied for a marriage license in Chiang Mai. As expected, the license was refused. He took the issue to the National Human

⁴⁷ Dr. Cees Waaldijk authored Sexual Orientation Discrimination in the European Union, TMC Asser, 2006; Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries, 2004, New England Law Review, 569-589; Same-Sex Partnerships, International Protection, in R. Wolfrum, Max Planck Encyclopedia for Public International Law, Oxford, 2009. Dr. M V Lee Badgett authored When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage, NYU Press, 2009; Money, Myths and Change: The Economic Lives of Lesbians and Gay Men, Chicago, 2001; and was a co-editor of Sexual Orientation Discrimination: An International Perspective, Routledge, 2007.

⁴⁸ Anna Leach, Vietnam’s Ministry of Health recommends gay marriage is legalized without delay, *GayStarNews*, April 16, 2013.

⁴⁹ Anna Leach, Vietnam government scraps gay wedding fines, *GayStarNews*, April 12, 2013.

Rights Commission of Thailand, asking them to initiate proceedings in the Constitutional Court. Dr. Tairjing Siripanich, the Commissioner who handles LGBT issues, accepted the complaint. He said:

*In human rights point of view, a decision to live together should be allowed by law whatever sex the persons had.*⁵⁰

Rather than go to court, the issue was taken up by a committee of the Thai Parliament. The House of Representatives Committee on Legal Affairs, Justice and Human Rights engaged with three representatives of LGBT organizations (a striking procedural innovation). The result has been a series of drafts of legislation extending the rights and obligations of marriage to same-sex couples through a system of ‘civil unions’. Four community seminars have been held by the legislative committee to discuss the drafts in different parts of the country. A fifth took place at the Thai parliament on April 19th, 2013. The Committee is chaired by Police General Viroon Phuensaen, a party list member of parliament for the Pheu Thai Party, the governing party of Prime Minister Yingluck Shinawatra.

*Opinions from the public will be gathered and used to amend the bill before being proposed to the cabinet for further consideration. If the cabinet rejects the bill, the supporters have pledged to collect 10,000 names of eligible voters or at least 20 members of the House of Representatives to forward to parliament for consideration.*⁵¹

⁵⁰ Out in Thailand, November, 2012, 16; Anna Leach, Thai government drafting same-sex civil partnership law, *GayStarNews*, December 17, 2012.

⁵¹ Hundreds back civil unions for gay couples, *Bangkok Post*, February 9, 2013, reporting on the Bangkok consultation.

Meanwhile the government, in its ongoing promotion of tourism, announced that during February, honoring Valentine’s day, couples entering the country could use the “premium” immigration lane. Same-sex couples were included in this special privilege.⁵² The government’s tourist promotion organization had already begun targeting gay tourists with a special campaign out of its New York office. They were following the lead of a dozen western states, but perhaps it was a first for Asia.

OTHER JURISDICTIONS IN ASIA

In Hong Kong immigration officials have been quietly handing out special “relationship visas” for partners of gay professionals coming from overseas.⁵³ Singapore, it seems, does something similar for the same-sex partners of expatriates entering on a work permit. Thailand does as well, at least for partners of diplomatic staff.

In 2009 Hong Kong allowed victims of domestic violence in same-sex relationships to seek an order prohibiting perpetrators of violence from entering or remaining in their residences. Legislators reached consensus only after the government agreed to rename the law as the *Domestic and Cohabitation Relationships Violence Ordinance*, so as not to be perceived to be conferring any marriage-like legal status to same-sex relationships.⁵⁴ The first openly gay lawmaker elected in Hong Kong, in September, 2012, said he would work for a

⁵² Thailand welcomes same-sex couples, *fridae.asia*, February 5, 2013.

⁵³ Kent Ewing, In Hong Kong, a quiet advance for gay rights, *Asia Times*, July 15, 2011.

⁵⁴ John Godwin, Legal environments, human rights and HIV responses among men who have sex with men and transgender people in Asia and the Pacific: An agenda for Action, UNDP, 2010, 61.

non-discrimination ordinance and for same-sex marriage.⁵⁵

Japan asks any Japanese citizen who is entering into a foreign marriage to obtain, in advance, a certificate from the Japanese government indicating basic information about both parties, including marital status, age, sex and nationality. In March, 2009, Japan began issuing such documents in cases where the foreign marriage was to be a legal same-sex marriage. The certificate is designed to facilitate the future residence of the foreign spouse in Japan with the Japanese national.⁵⁶

Japan has had a lesbian and a transgender individual elected to local or prefectural governments. The first openly gay man was elected to a ward in Tokyo in April, 2011, and promised to work for a partnership ordinance that would cover all unmarried couples, giving equal rights to marriage.⁵⁷

In 2011, Judge Vimal Kumar in Gurgaon Sessions Court, close to Delhi, gave a same-sex couple the same protection from harassment and violence from family members that Indian courts have extended to heterosexual couples who were persecuted for inter-caste or inter-religious relationships.⁵⁸

CURRENT DIRECTIONS

There are obstacles to progress on LGBTI rights in Asia, particularly from religious conservatives. Evangelical Christians are new active groupings in

⁵⁵ Hong Kong's first openly gay lawmaker: Raymond Chan Chi-chuen, www.fridae.asia, September 12, 2012.

⁵⁶ Japan OKs same-sex marriages abroad, *Wockner International News* No.780, April 6, 2009, copy in possession of author.

⁵⁷ Japan Times, First openly gay candidate wins in Tokyo ward, April 26, 2011.

⁵⁸ Gurgaon court recognizes lesbian marriage, *Times of India*, July 29, 2011.

Korea, Taiwan, Hong Kong and Singapore, and have blocked certain reforms, such as the proposed anti-discrimination law in Korea and public consultations on an antidiscrimination ordinance in Hong Kong. The government of India indicated that it would not appeal the 2009 decision of the Delhi High Court decriminalizing consenting adult male-male sexual acts. Conservative Hindu groupings ensured there would be an appeal to the Supreme Court, taking on the task themselves. The Islamic Defenders Front in Indonesia closed down an Asian regional conference of the International Lesbian and Gay Association in Surabaya in 2011 with threats of violence. The Surabaya police chief personally guaranteed the safety of the conference participants, from a dozen countries, as they dispersed.

Yet is fair to say that nowhere in South, Southeast and East Asia does this opposition have active majority public support. The threats in Indonesia were a major embarrassment to the national government, which promotes the image of Indonesia as representing moderate Islam. Evangelicals are an active force in Singapore, but are represented in the legislature in greater numbers than their percentage in the population.

At this point in time, it is possible for Thailand – and Nepal, and Taiwan, and Vietnam – to play leadership roles in Asia on the recognition of same-sex relationships. Social obstacles are few here in Thailand. Tolerance and acceptance of sex and gender diversity are seen as traits of society in this Kingdom. ๕