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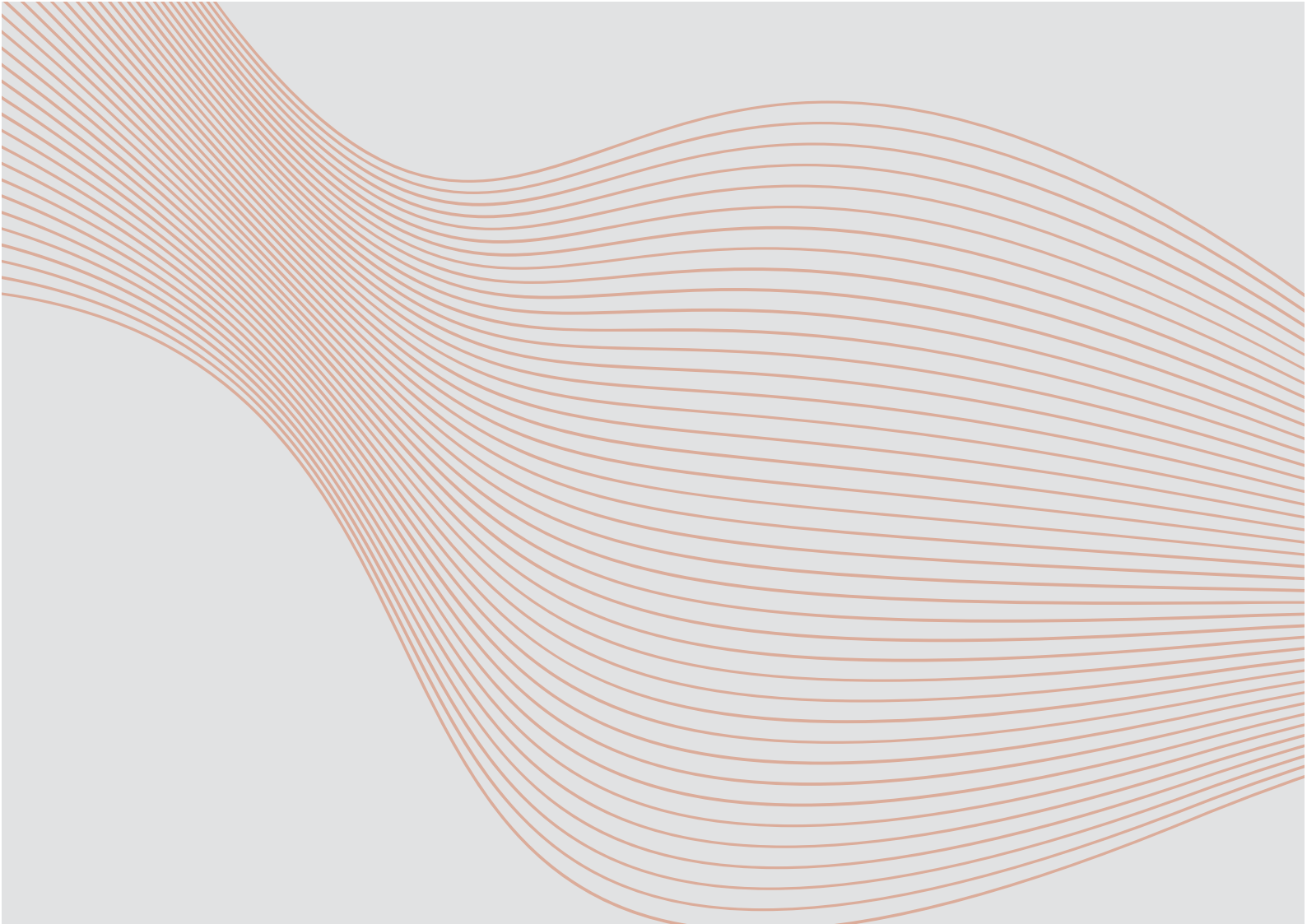
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## FACING 377


Discrimination and Human Rights Abuses Against Transgender, Gay and Bisexual Men in Myanmar



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The primary objective of this study was to identify and document instances of discrimination and human rights abuse of transgender, gay, and bisexual men living in Myanmar.





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## Executive Summary

Following military coups in 1962 and 1988, multiple military regimes have ruled over Myanmar (formerly known as Burma). Widespread human rights abuses conducted by police and military against the general public and ethnic minorities are well known and documented. The year 2008 saw the creation and adoption of a new constitution through a controversial referendum followed by a flawed parliamentary election held in 2010. By-elections held in 2012 saw the opposition party, the National League of Democracy (NLD), enter Parliament for the first time, though with continued reports of election irregularities. Despite significant political change in Myanmar, legal reform, especially in the sectors of human rights protection and limits to police and military power, has been slow in development and implementation. Legal reform, judicial review, and military and police limitations on power and authority have yet to occur in a systematic and comprehensive way. As a result of slow reform, entrenched homophobic social attitudes, and unrestrained police authority to arbitrarily arrest and detain, members of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community human rights abuses and discrimination are rampant.

This study was carried out in the second half of 2012 and supplemented by an extensive desk study in 2013. The primary objective was to identify and document instances of discrimination and human rights abuse of LGBT individuals living in Myanmar. The secondary objective of this study was to evaluate how the continued existence of Myanmar's anti-sodomy law (Myanmar Penal Code Section 377) and other laws used to target LGBT individuals contributes to harmful social discrimination, impunity for law enforcement agents who abuse LGBT people, and the repression of sexual orientation and gender identity in the Myanmar LGBT community. A qualitative study of 25 individuals in Myanmar's LGBT community was conducted to document their stories of discrimination and abuse, and to determine how Myanmar Penal Code Section 377 and other vaguely formulated laws are used in an abusive fashion to extort and justify verbal, physical, and sexual abuse of the LGBT community. Access to Myanmar's LGBT community was highly limited in this study, due in large part to the sensitivity of the topic, the pervasive fear of abuse, and social ostracization of the community.

This study documents widespread instances of discrimination in education and employment, and verbal, physical, and sexual abuse by family members, community members, and law enforcement agents discriminatory and criminal acts against LGBT. They are victims of numerous discriminatory acts, committed both by ordinary citizens as well as law enforcement and state agents. Myanmar Penal Code Section 377 legally sanctions the punishment of homosexuality and therefore contributes to a culture of impunity that when used together with other sections of the Penal Code, Criminal Code, and Police Act allows for wide discretionary powers for the police to make arrests on the grounds of suspected criminal acts that are vaguely defined in the provisions. Police officials can perpetrate not only discriminatory and abusive acts like name-calling and ridiculing, but also physical violence, bribery, and extortion. The criminalization of an act pertaining to a specific group of individuals sanctions and legitimises already existing prejudicial attitudes towards LGBT. Public discrimination and stigmatization prevent the majority of LGBT in Myanmar from fully enjoying their human rights, while limiting access to remedy or legal protection.

The political and legal climate in Myanmar is ripe for change. Based on interviews conducted with legal experts familiar with LGBT issues during this study, there is a consensus that full repeal of Myanmar Penal Code Section 377 could be feasible. Despite this optimistic outlook, there is also concern that promoting the repeal of Myanmar Penal Code Section 377 could inflame fundamentalist religious groups who see homosexuality as incompatible with traditional Myanmar culture. Therefore, one of the primary recommendations of this study is that advocacy efforts focus their energy on strengthening anti-discrimination and equal rights protection efforts in current legislation under consideration by parliament, in a joint effort with organizations working towards equal rights for all Myanmar citizens. Adoption of international treaties such as the Convention Against Torture (CAT), the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights would enhance human rights protection for all citizens of Myanmar, not just those of the LGBT community. Additionally, efforts to limit the powers and oversight of the police and military would also serve to further protect the lives of LGBT people. It is important to note that any legal reform or effort to promote legislation on the protection of LGBT rights must be supported by a strong advocacy and grassroots movement. This is also supported by similar movements to repeal homophobic and transphobic laws in India, Singapore, and Nepal, where strong social and community advocacy formed the basis successful steps towards full repeal of sections of penal and criminal codes criminalizing same-sex relations and the implementation of additional legal protection for LGBT living in these three countries.

With state-sponsored homophobia and transphobia, social attitudes, and law enforcement with unmonitored and unlimited power, Myanmar's LGBT population, especially those who are physically and visibly distinguishable as LGBT, are highly vulnerable, and have been shown to suffer from high instances of depression, psychological trauma, self-censorship, and repression of sexual orientation and gender identity. Notably, this study found that many individuals have been encouraged to alter their "behavior." This perception of sexual orientation and gender identity as a chosen behavior rather than an inherent attribute of someone's physiology and identity is common amongst family, friends, communities, and police in Myanmar. This contributes to and supports an already common belief that LGBT people are criminals, thieves, and second class citizens. As the first of its kind, this study documents and finds a culture of fear, shame, and human rights abuse that surrounds the daily lives of LGBT individuals living in Myanmar.

Based on the findings of this study including extensive focus group discussions in three of the five geographical areas from which this study drew respondents, the following are the most significant recommendations: The government of Myanmar should adopt an anti-discrimination and equal opportunity law and incorporate equal protection measures on the basis of gender identity and sexual orientation into existing laws during reform efforts, such as the 2008 Constitution; additionally, Section 377 of the Penal Code should be removed from law. Avenues for complaints of discrimination should be introduced and / or the Myanmar Human Rights Commission's mandate expanded. Advocacy by LGBT rights groups should be targeted at achieving the above listed recommendations, in addition to lobbying for the full implementation of the National Strategic Plan on HIV and AIDs. LGBT rights groups should also continue to provide legal assistance to victims of abuse and continue documenting all instances of human rights violations. Finally, LGBT rights groups should work to increase their networks by liaising with other minority rights groups to help promote the need for rights protections to include sexual orientation and gender identity.



2012 Human Rights Day, Yangon, Myanmar



## 7 Key Recommendations

### The Government of Myanmar should

- Repeal Myanmar Penal Code Section 377 which criminalize consensual same-sex activities.
- Adopt a broad anti-discrimination law that includes a mechanism for redress.
- Protect the rights to freedom of assembly, association, and expression for all persons including those who identify as same sex oriented or transgender, or those who wish to discuss sexual orientation and gender identity.
- Investigate and prosecute law enforcement personnel who commit human rights abuses against LGBT individuals.
- Provide sensitivity and human rights training on sexual orientation and gender identity for police, prison and judicial officials at all levels to prevent further discrimination and abuse.

### LGBT rights groups should

- Seek dialogue meetings with Government officials, Myanmar National Human Rights Commission officials, and Members of Parliament on sexual orientation and gender identity issues.
- Advocate for the adoption of a broad anti-discrimination law that includes mechanisms for redress.
- Document cases of abuse, including arbitrary arrest, violence and abuse by the police.
- Submit strategically selected cases to the Myanmar National Human Rights Commission.
- Provide legal assistance and advice to victims of abuse by law enforcement to enable redress and set precedence for limitation of police powers.
- Carry out strategic litigation at the Supreme Court on breach of constitutional guarantees on the basis of discrimination based on sexual orientation and gender identity.
- Liaise with mainstream media on balanced reporting on issues relating to LGBT people.

*For more detailed explanations and further recommendations, please see Part Four: Conclusions and Further Recommendations.*

# Part One: Methodology, Background, ┌ and Context

## 1.1 Background

As Myanmar emerges from five tumultuous decades of military dictatorship, economic isolation, and ethnic civil war, the rights of citizens and the government's obligation to protect these rights is also slowly changing. Following the controversial adoption of the 2008 Constitution, protections of privacy and security, equality under the law, and equal access to education and employment became law. However, Myanmar citizens are still experiencing an egregious abuse of their basic human rights due to the continued existence and enforcement of laws from previous dictatorships and the colonial era despite the many promised protections set forth by the 2008 Constitution. Furthermore, knowledge about the protections afforded by the 2008 Constitution has yet to fully permeate Myanmar society or be respected by many law enforcement agents and courts.

At this time, the rule of law in Myanmar fails to meet most standards set forth by international institutions.<sup>1</sup> This is resulting in the continued violation of many of Myanmar citizens' domestic and international rights. More specifically, failure to recognize and protect Myanmar's LGBT community, in addition to a general failure of the government and the police force in recognizing the existence of protective laws in the Constitution, is resulting in significant rights abuses against this minority community. The following sections on the current legal and political climate in Myanmar, Myanmar's legacy as a British colony, and relevant domestic laws help to situate the experiences of Myanmar's LGBT community in the greater discussion surrounding Myanmar's transition to democracy.

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<sup>1</sup> The World Justice Project *What Is The Rule of Law?* 27 August, 2013. <http://worldjusticeproject.org/what-rule-law>; and United Nations Rule of Law. *What is the rule of law?* 27 August 2013. [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3)



2012 Transgender Day of Remembrance for the Myanmar community living in Chiang Mai, Thailand

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## 1.2 Research Question

For gay, bisexual, and transgender people living in Myanmar, what aspects of their daily lives do they perceive to be negatively impacted by the existence of anti-sodomy laws and homophobic social attitudes?

## 1.3 Research Objectives

1. To examine the experiences of discrimination, harassment, and abuse of gay, bisexual, and transgender people in Myanmar by members of society.
2. To examine the experiences of discrimination, harassment, and abuse of gay, bisexual, and transgender men in Myanmar by law enforcement agents.
3. To determine what knowledge, if any, gay, bisexual, and transgender people in Myanmar have of anti-sodomy or discriminatory laws; and
4. To determine if knowledge about the existence of anti-sodomy and discriminatory laws in Myanmar changes the behavior of gay, bisexual, and transgender people living there.
5. To examine the perceptions of gay, bisexual, and transgender people living in Myanmar regarding the existence of anti-sodomy and discriminatory laws and homophobic social attitudes.

## 1.4 Methodology

### Process

This study was initiated by HREIB under its LGBT rights program, Colours Rainbow, in 2012. An internationally experienced researcher was contracted to develop the research framework and tools, which were finalised in the first half of 2012. A Myanmar researcher was subsequently contracted for translation of the research tools, recruitment and training of research assistants, and

overseeing the qualitative research in Myanmar. The data was translated to English, and the analysis of interview data and the material collected for the desk study was carried out jointly by an external researcher / editor and HREIB / Colours Rainbow staff.

### Choice of Method

This report is based on data gathered through qualitative research and a desk study of existing research on LGBT rights and issues relating to discriminatory laws in the region and internationally, Myanmar's legal framework and material relating to the LGBT community, and societal attitudes in general in Myanmar. The qualitative research mainly relied on individual interviews as well as focus group discussions. In the design of the study, qualitative methodologies were deemed more appropriate for capturing personal experiences of human rights abuses and perceptions of the existing law and law enforcement agents. The primary concern was to document cases of individual circumstances, and their relation to existing law. While quantitative methods would have contributed to document the extent of the issues concerned in this study, the focus area is still sensitive in Myanmar, and it is uncertain to what extent a larger quantitative sample would have been possible to obtain under the scope of this project.

### Selection of Target Areas and Groups

Twenty-five victims of human rights abuses perpetrated by police, judicial, and prison officials from five geographical locations were interviewed for this study. Additionally, information was sourced from three focus group discussions each examining different LGBT-related areas of civil society. Individuals who gave full length interviews were not included in focus group discussions.<sup>2</sup> Finally, it is important to acknowledge that the circumstances surrounding the experiences of one respondent, Case Study number 4 from Yangon, are extremely unclear.

<sup>2</sup> In two of the areas it was not possible to identify an adequate number of respondents to carry out both individual interviews and focus group discussions.



The interview and subsequent language-edited case study are both used in the final version of this study; however, it should be noted that verifying the veracity of the statements by the respondent was not possible. At the time of the interview, no additional information was obtained by the researcher or research assistants.

Respondents who had experienced verbal, physical, and/or sexual abuse at the hands of police, judicial and prison officials, and other community members in positions of leadership, such as teachers, were specifically sought out for an interview. Selecting respondents who had experienced some form of abuse as a direct result of their sexual orientation or gender identity and documenting the abuses against them was a primary focus of this study.

The following five locations were selected:

1. **Yangon** is Myanmar's most populated city, with a significant LGBT community. Many gay and transgender migrants are attracted to Yangon because of its large networks and opportunities not found elsewhere in Myanmar. Five respondents were selected for interviews in Yangon and a focus group discussion with six participants was held.
2. **Mandalay** is located in the center of upper Myanmar, a hub for traditional culture and home to a large gay and transgender community with a strong network of gay and transgender civil society organizations (CSOs). Five respondents were selected for interviews in Mandalay and a focus group discussion with six participants was held.
3. **Monywa** is located in the dry zone and was included for geographic diversity. There have been regular reports on violence against LGBT persons in this location. Five respondents were selected for interviews in Monywa and a focus group discussion with six participants was held.

4. **Kyauk Pa Daung** was included to represent a central town in the dry zone with a large population. There have been continued reports of police harassment in the evenings. Five respondents were selected for interviews in Kyauk Pa Daung.<sup>3</sup>

5. **Mawlamyine** is the capital of Mon state with a large ethnic minority population. There have been reports of police abuse against transgender individuals. Five respondents were selected for interviews in Mawlamyine.<sup>4</sup>

Snowball sampling was used through peer education networks to identify victims of abuse. While this limits the sample to those reached by peer education networks, these networks are comprehensive and cover a wide geographic and class range. The respondents who consented to interviews also agreed to serve as entry points to help identify other LGBT persons to be included in the sample.<sup>5</sup> This helped expand the recruitment chains and increased the 'reach' of the sample into more hidden pockets of LGBT communities. Ultimately, no lesbians and very few gay and bisexual men were interviewed.

The majority of respondents identified themselves as male to female transgender, *apwint*, making them an obvious police target due to their physical appearance. A minority of respondents identified as *apône*, or having a female gender identity but presenting as male and attracted to men. Several respondents also noted that they identified as *apwint*, but would often present themselves publicly as *apône* in order to avoid discrimination or abuse.

Finally, a range of self-help group members and peer educators were included in the three focus group discussions. These members were selected from HREIB's network and other Community Based Organizations (CBOs) and Self Help Groups (SHGs) in order to gain a wider variety of viewpoints and experiences.

<sup>3</sup> It was decided not to do a focus group discussion in Kyauk Pa Daung due to limited access to LGBT communities.

<sup>4</sup> It was decided not to do a focus group discussion in Mawlamyine due to limited access to LGBT communities.

<sup>5</sup> The 'entry points' would recommend a maximum of two LGBT people in order to minimize their influence on the final sample composition.

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## The Research Team and Tools

Research assistants who had prior experience collecting qualitative data were selected from the LGBT community in Myanmar by the research team leader.<sup>6</sup> Before collecting data in the field, the researcher trained the research assistants on how to conduct qualitative semi-structured interviews and focus group discussions, and introduced the research framework and the instruments. The research assistants were also introduced to the ethical protocol for the research and the consent and confidentiality forms.

The primary tools used in this study were semi-structured questionnaires consisting of open-ended and closed questions (please see the annexed questionnaire for further details).<sup>7</sup>

The questionnaire included questions relating to the following elements:

- Socio-Demographic Characteristics
- Sexual Orientation and Gender Identity
- Criminalization and Identity
- Punishment and Harassment by Police
- Defense at Court
- Imprisonment

## Data Collection Process

Data was collected by personal interviews administered by two research assistants. Myanmar language LGBT slang language was used by the interviewers to achieve accurate answers, to build trust, and to relate with the respondents. Through the peers that helped identify the respondents, the research assistants were aware of

<sup>6</sup> The research assistants were recruited from the following local organizations: 4 from Equality Myanmar (Yangon and Mandalay); 2 from KhaingHnin Si (Monywa); 2 from MeeEain Shin Lay Myar (Kyauk Pa Daung); 2 individuals from Mawlamyine.

<sup>7</sup> The questionnaire was designed in English and subsequently translated to Myanmar and checked against the English version. Any discrepancies were discussed and agreed upon. Most discrepancies relate to translations of LGBT slang language.

past abuse and trauma of the respondents prior to the interview. The interviews lasted between one and a half and two hours. The importance of establishing a safe environment and listening to the stories of the victims limited the possibility of inquiring about technical details, such as legal references used by the police, and more details about the incidents of abuse.

Each participant was provided with a written consent form that explained the reasons, benefits, and risks associated with their participation. It emphasized that the interview was anonymous, confidential and that the information collected was for the sole use of the study. It was made clear that respondents took part on a voluntary basis, and could withdraw at any time. They were also given free access to additional information and clarification if needed. Upon acceptance to participate, the respondent was asked to sign the consent form prior to beginning the interview. The signature was not associated to the questionnaire in order to protect the confidentiality of the interviewee's responses.

Focus group discussions were held in Yangon, Mandalay, and Monywa, and facilitated by the Team Leader and two research assistants. The purpose of the study was explained and the participants were encouraged to share their views and experiences. The focus group discussions lasted one and a half hours.

## Data Entry and Data Analysis Process

The research team leader and two research assistants translated and entered the collected data in a preliminary report to HREIB. Case studies were edited for clarity by a multilingual team at HREIB. Language editing was done as minimally as possible and care was taken to keep the edited case studies as close as possible to the original interviews. In some instances, case studies were reorganized so that the process of events was presented in a way that made logical sense to the reader. The study has been edited by HREIB, and discussions of the legal framework for LGBT persons and regional experiences with discriminatory laws have also been included. The conclusions and recommendations have been developed jointly by the whole team. Finally, a network of lawyers



and legal experts within Myanmar who have been working with Myanmar's LGBT community for many years were consulted at various stages of the research and analysis, and all findings were cross referenced with these legal experts in an effort to provide an accurate and comprehensive analysis of the current situation in Myanmar.

Special acknowledgement and thanks are given to David Gilbert, a Ph.D candidate at the Australian National University, for his help in designing this study and providing invaluable insight and feedback as the research and writing took place, and to Alyssa Paylor as the editor of the published study.

### Limitations of the Study

There were various limitations that influenced the result of this study. Although it focused on LGBT people, it lacks the viewpoint and personal experiences of some of the groups in these communities, such as lesbians. The research team found, in all five areas, that lesbians were less willing and interested in taking part in the study.

This study was limited to only five geographical areas. This was largely due to the limited timeframe of the investigation, sensitivity of the topic, and financial constraints. The study was delayed in the start-up, which limited the time for data collections. Finally, it was time and resource consuming to identify qualified research assistants and willing participants in a society where LGBT individuals are socially, culturally, and politically discriminated against.

The study focuses on the accounts of only 25 male to female transgender and gay male persons in five areas, and 18 LGBT individuals who participated in the focus group discussions in three areas. The limited sample size of this study cannot accurately reflect Myanmar's LGBT community as a whole. Perhaps due to their highly visible physical features, or because they are disproportionately discriminated against, or because of how respondents were selected, male to female transgender individuals were the primary respondents in this study. As a result of this, the final recommendations of the study, along with

the analytical conclusions, are directed primarily at the male to female transgender subset of the greater LGBT community in Myanmar.

Following the initial data collection process, it was clear that the analysis and discussion of the findings would benefit from further data on the case studies from the court and police. Although researchers were able to obtain permission from some of the respondents to inquire about case documents with the police and at court, numerous attempts over several months at gaining access to these were in vain. With limited funds and available time for this study, the necessary follow-up in a context where access to information is frequently denied and not without risk for those pursuing it has simply not been possible to supplement the interviews with findings from official documents.

Finally, it became clear after the editing and translation of the case studies that some of the details regarding the names or codes of laws used in arrest, the reason for arrest, and the respondents perceptions of specific situations and actions were not always followed up on or clarified during the interview process. In an effort to establish trust with the respondents, the research assistants were selected from within the LGBT network and community, and thus were not fully trained in research and human rights documentation techniques.

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### 1.4.1 Operational Definitions and LGBT Terms in a Cultural Context

#### Operational Definitions

The following are definitions to a number of words used throughout this study. Terms describing sexual and gender identity and orientation, along with terms relating to forms of abuse described by the respondents, are defined as follows:

**Gender** – socially constructed identities, attributes, and roles that a given society considers appropriate for men and women, which results in hierarchical relationships and unequal distribution of power and resources.

**Gender identity** – is a person's inner sense of being male or female, usually developed during early childhood as a result of parental and societal influences and strengthened during puberty by hormonal changes.

**Sex** – is the biological and physiological characteristics that define men and women.

**Sexual abuse** – is any type of non-consensual sexual contact. Sexual abuse can happen to men or women of any age. Sexual abuse can include derogatory name-calling, refusal to use contraception, deliberately causing unwanted physical pain during sex, deliberately passing on sexual diseases or infections, and using objects without consent and to cause pain or humiliation. Sexual violence can thus be physical, verbal, or emotional.

**Sexual orientation** – is the gender to which an individual is sexually attracted.

**LGBT** - an acronym for Lesbian, Gay, Bisexual, and Transgender. This acronym is used to refer to a group of individuals that exhibit non-normative gender identities and sexual orientations.

**MSM** - men who have sex with men.

**Gay** - used to describe homosexual individuals, typically men, but occasionally women as well.

**Lesbian** - describes a homosexual woman.

**Bisexual** - is a person who is emotionally, physically, and/or sexually attracted to both males and females.<sup>8</sup>

**Transgender** - is used as an umbrella term to refer to all people who deviate from their assigned gender at birth or the binary gender system. This includes transsexuals, cross-dressers, genderqueers, drag kings, drag queens, two-spirit people, and others. Some transgender people feel they exist not within one of the two standard gender categories, but rather somewhere between, beyond, or outside of those two genders.<sup>9</sup>

#### LGBT Terminology in a Cultural Context

Throughout this study, Myanmar language terms are used to describe the gender identities and sexual orientations of the respondents. These terms are used purposefully as an alternative to commonly understood Western terminology for two reasons. First and foremost, these are the terms used by the respondents themselves to locate their own identities within Myanmar language and cultural contexts. Additionally, common Western terms such as gay or bisexual are not translatable into Myanmar language, nor are they understood conceptually in Myanmar or carry the same connotation as in Western countries. As a result, Myanmar language terms and slang language was used while conducting interviews and within the written portion this study.

Over time, members of the LGBT community living in Myanmar have created and employed a type of slang language in order to remain hidden and to create a level of privacy when discussing their lives and relationships in the public sphere. This slang language is also empowering; it allows members of the LGBT community to self-identify using their own terms in a language that is both lacking the terminology and is often pejorative towards individuals that do not conform to socially

<sup>8</sup> *LGBT terms and definitions* LGBT terms and definitions International Spectrum University of Michigan 19/11/12

<sup>9</sup> *ibid*



accepted norms in behavior, gender identity, and sexual orientation. The following is a short glossary of terms employed by members of the LGBT community living in Myanmar.

**Apwint** - meaning *open*, are biological males who appear as and acts as females. *Apwint*, in their mind and heart, identify as women.<sup>10</sup> Several respondents in this study self-identify as *apwint* and may or may not have breast implants or have undergone other surgeries to alter their genitalia. *Apwint* are sexually oriented towards men and are generally the receptive partner during sexual intercourse with other men. *Apwint* is a gender identity, not a sexual orientation, and is all encompassing of biological males who dress and/or act as women in public spheres to those in various stages of transitioning their biological sex.

**Apône** - meaning *hider or hiding*, are biological males who are passing as men in public and in other spheres of their lives.<sup>11</sup> The cultural connotation of *apône* is a man who is *not ready to open* or appear in public as a woman; however, *apône* are understood to have the heart and mind of a woman, and desire to have a female gender identity. *Apône* are also sexually oriented towards men and are typically the receptive partner during sexual intercourse with other men. Similar to *apwint*, *apône* is a gender identity and way of presenting one's gender in different spheres of life; it is not a sexual orientation.

**Thu nge** - meaning *guy*, is a male and is most comparable to the Western conception of a male bisexual. *Thu nge* have a sexual preference for *apwint*, and *apône* prior to, or alongside heterosexual sexual encounters. *Thu nge* is a sexual orientation not a gender identity. An important distinction between bisexuals and *thu nge*, however, is that *thunge* do not identify with the Western conceptualization of gay, nor would they consider themselves men having sex with other men, as the gender identity of their partners is female. *Thu nge* take the penetrative role during sexual

encounters.<sup>12</sup>

The remaining terms contained in this glossary are Myanmar language terms used to describe individuals who do not conform to gender norms or heteronormative sexual behavior. These terms are included in an effort to illustrate the complexities of describing gender identity and sexual orientation in Myanmar language and culture.

**Gyi-pôn** - means the same as *apône*, or *hider*. *Gyi-pôn* is used outside of the LGBT community, often in a derogatory way, and is not slang.

**Achaut** - meaning *dry*, has through recent research shown *achaut* to be a derogatory way of describing homosexual intercourse as 'dry' intercourse. *Achaut* thus are men who do not have semen and have sex with other men.<sup>13</sup>

**Meinmalya** - is translatable to a man acting as a woman. This term is employed outside of the LGBT community and is not slang language.<sup>14</sup>

10 Gilbert, David, 'Categorising Gender in Queer Yangon' in *Sojourn: Journal of Social Issues in Southeast Asia*, vol. 28, no.2, 2013.

11 Gilbert, David, 'Categorising Gender in Queer Yangon' in *Sojourn: Journal of Social Issues in Southeast Asia*, vol. 28, no.2, 2013.

12 Gilbert, David, 'Categorising Gender in Queer Yangon' in *Sojourn: Journal of Social Issues in Southeast Asia*, vol. 28, no.2, 2013.

13 Interview with David Gilbert, PhD candidate at the Australian National University

14 Gilbert, David, 'Categorising Gender in Queer Yangon' in *Sojourn: Journal of Social Issues in Southeast Asia*, vol. 28, no.2, 2013.





## 1.5 Legal and Political Context

### 1.5.1 The Current Legal and Political Climate in Myanmar

Myanmar has been under military rule since 1962 when General Ne Win seized power from the democratically elected government. Following the nationwide protests in 1988, another coup saw a new military regime take power. This regime was initially called the State Law and Order Restoration (SLORC), with a subsequent name change to the State Peace and Development Council (SPDC). SPDC initially promised democratic change and elections, but refused to hand over governing powers to the winning National League for Democracy (NLD) party in 1990. Instead a National Convention was established to draft a new constitution. The new draft was not completed until 2007 in the aftermath of a violent crackdown of peaceful protests by Buddhist monks and ordinary citizens against a dramatic increase in fuel and commodity prices. The new Constitution was adopted through a controversial referendum in 2008 with the promise of democratic elections two years after. In 2010 elections were held, however, they were deemed neither fair nor free. Currently, a nominally-civilian government holds power in Myanmar. Over the past eighteen months, Myanmar's government, led by President Thein Sein, has instituted a series of reforms that have been heralded as the beginning of a new era in the country's development. Among other changes, 2012 saw the release of a number of political prisoners, Daw Aung San Suu Kyi's entry to parliament through the largely free by-elections, and some relaxation of media and press censorship. Countries including the U.S. and members of the European Union have restored diplomatic relations and suspended the majority of sanctions. Exiles from different sectors have returned for visits to test the solidity of reforms and the validity of the government's promises.

A multitude of political and legal problems still exist in Myanmar today. The current constitution continues to provide significant protection and impunity to the military. The military remains extremely powerful in both the government and economy. Promises of constitutional reform have yet to be met, and the adoption of the 2008

Constitution has left a lack of law reform in its wake. Reform of the penal code, which still includes provisions that are clearly in violation of fundamental human rights as well as remaining out of touch with other developments in Myanmar society and recent legal reform also remain unchanged and unchallenged. There are currently no formal proceedings for changing the 1945 Police Act, the 1899 Rangoon Police Act, the Penal Code, or the Criminal Procedure Code, but a number of MPs have raised the issue of brutality in relation to police abuse and abuse of the Police Act. This indicates a greater likelihood of judicial review and police reform in the near future. In a meeting with a youth delegation on 6 April, 2013, parliamentary speaker, Thura Shwe Mann, said he is totally against discrimination, violence, the misuse of power, and the abuse of citizens' rights, indicating a positive direction towards reforming laws which violate human rights by some MPs.<sup>15</sup> Additionally, out of more than 3000 cases received by the Myanmar National Human Rights Commission (MNHRC), some complaints pertain to police abuse.

Human rights organizations have raised allegations of police abuse with Lt. Col. Win Naing Htun, Chief of the Anti-Trafficking Division of the Myanmar Police Force. He admitted cases of abuse, including arbitrary arrest and the misuse of power at lower levels by the local police divisions. Ultimately, through interviews with legal professionals in the Myanmar legal community, there is a feeling that greater advocacy is needed to ensure reform to both of the Police Acts, the Penal Code, and the Criminal Procedure Code is undertaken and successful.<sup>16</sup>

Issues of equal rights for women and minorities are also being discussed and addressed, though reform is slow to take place. On 6 March, 2013, Daw Khin Saw Wai raised the question of the need for a quota of women in leadership positions in government and parliament. The ministers concerned, the Attorney General and the Chair of Parliament, replied that there is currently no plan for quotas. Myanmar's first women's protection law is being

<sup>15</sup> Interview with legal resource persons (names withheld for personal safety reasons)

<sup>16</sup> *ibid*



drafted at present. The drafting of a law for the protection of ethnic nationalities was proposed to parliament by Daw Aung San Suu Kyi in July 2012. The law is still being drafted.<sup>17</sup> Specially recognized rights for women and ethnic minorities could pave the way for further reform that recognizes the fundamental human rights for the expression of gender identity and sexual orientation. Overall, the legal and political reform that has taken place has proved to be limited in both scope and dependability, and human rights continue to be violated frequently while Myanmar remains one of the most challenging environments for conducting human rights education. Further, there has been no effort yet to commence a much needed reform of the penal and criminal procedures codes and of the criminal justice system in general.

## A British Colonial Legacy

Myanmar (formerly known as Burma) became a colony of the British Empire in 1885 following three highly contested Anglo-Burmese wars (1824-1885). On 1 January, 1886 Burma became an annexed province of British India and was ruled through the British Raj.<sup>18</sup> Many political, social, economic, and judicial reforms were enacted to assimilate the country with the British Empire. Included in these reforms was the implementation of the Indian Penal Code. The Indian Penal Code was subsequently imposed upon each British colony, including Burma, regardless of national and societal interests. Independence from Britain and over four decades of military dictatorship has not significantly altered large portions of the Indian Penal Code in Myanmar. Today, the people of Myanmar are still subject to many of the laws and penalties outlined by the Indian Penal Code, which is now referred to as the Myanmar Penal Code (MPC) and has been retained as an active law used by law enforcement and courts.

The British colonial legacy continues to impact many groups in Myanmar society, including those who identify as LGBT. One of the remaining provisions of the Myanmar Penal Code, Section 377, implicitly prohibits homosexual

behaviour throughout Myanmar. Section 377 reads as follows:

*"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to 10 years, and shall be liable to fine."<sup>19</sup>*

Section 377 is an active law criminalizing buggery,<sup>20</sup> and it is understood to be a prohibition against homosexuality.<sup>21</sup> Despite current law reforms and the adoption of a new Constitution in 2008, the Myanmar Penal Code and its Section 377 still remains in effect today. Myanmar is one of seventeen former British colonies in the Asia-Pacific region that maintains a criminalization of homosexuality.<sup>22</sup> Throughout former British colonies and members of the British Commonwealth, Section 377 and other similarly worded statutes are being challenged in an effort to expand the rights of the LGBT community. Further discussion of the theoretical impacts of Section 377 can be found in the section on Impacts of Domestic Laws on LGBT.

<sup>19</sup> Text of the law is available at: <http://www.blc-burma.org/html/Myanmar%20Penal%20Code/mpc.html>.

<sup>20</sup> Itaborahy, Lucas Paoli "State Sponsored Homophobia" International Lesbian, Gay, Bisexual, Trans and Intersex Association, [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf). Accessed 9 May 2013.

<sup>21</sup> Sanders, Douglas E. "377 and the unnatural afterlife of British colonialism in Asia", *Asian Journal of Comparative Law* 4(1), 2009. Article 4. And Human Rights Watch, "This Alien Legacy: Origins of 'sodomy' laws in British colonialism". 2008.

<sup>22</sup> *ibid*

<sup>17</sup> *ibid*

<sup>18</sup> U-Myint, Thant "The Making of Modern Burma", 2001, Cambridge University Press.



## Challenging the Colonial Legacy: Myanmar Penal Code Section 377

Questions regarding the feasibility of challenging the existing Indian Penal Code now known as the Myanmar Penal Code (MPC) Section 377 also still remain. As the regional case studies from India, Singapore, and Nepal show, there must be both political and social willingness for reform and repeal of homophobic and transphobic laws to occur.

***According to legal experts in Myanmar, Challenging Section 377 is feasible in the current political and legal climate.***

Since Section 377 is rarely used in court, it is relatively easy for the Union Government to repeal the law, without the need for a replacement act and without significant administrative implications. However, as it stands, Section 377 is the only statute currently offering protection from same-sex rape (though other statutes offer protection for heterosexual rape and incest), and the section has also been used in some instances of child sexual abuse. A simple solution to this issue of a law both serving as a tool of protection and a tool of discrimination would be to enact laws that protect from all types of sexual assault and abuse, regardless of the sexual orientation of the victim and perpetrator, and to enact laws specifically for the protection of children, as Singapore and India did when Section 377 was challenged in each respective country.

Additionally, it could be argued that the Union Government could benefit from international, positive publicity if they chose to repeal Section 377, improving their human rights standing internationally and within ASEAN. There are, however, some risks involved in challenging Section 377. There is risk that with growing nationalist movements in the country, moves to repeal 377 could spark a conservative opposition, and inflame homophobic views that homosexuality is incompatible with Myanmar culture.<sup>23</sup> A similar reaction occurred in Singapore, led by fundamentalist Christian groups. This reaction, while not derailing the anti-377 movement, did make reform much more difficult. In a legal system that is

comparatively stronger and more established, Singapore still found success in using legal methods, propelled by social support, to challenge Section 377 and 377A. However, should inflamed reactions to a 377 challenge in Myanmar occur, legal avenues may be much less successful due to the overall weakness of the Myanmar legal and political system. Finally, mobilizing legal and human rights networks for the repeal of 377 would be challenging, as there is a view within some legal networks that as Section 377 is rarely applied it is not legally significant, and should therefore not be prioritized.<sup>24</sup>

Comparative studies of India, Singapore, and Nepal show that there are several possible avenues that legal reform of Section 377 could follow. With sufficient social support and grassroots advocacy, repeal of Section 377 and a greater institutionalization of rights pertaining to gender identity and sexual orientation, could occur in Myanmar. Further discussion of India's, Singapore's, and Nepal's challenges of Section 377 can be found in Part Three.

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*



## 1.5.2 The Impacts of Domestic Laws

Several collections of law govern the daily lives and bodies of LGBT individuals in Myanmar. As discussed above, the Myanmar Penal Code contains the most overt criminalization of homosexuality and homosexual relationships. However, Section 377 is rarely enforced by police or used in criminal cases against LGBT individuals. As this study shows, gay and transgender individuals are targeted by police in a discriminatory manner, which frequently results in mental, physical, and sexual abuse. The police are able to target gay and transgender individuals by using vaguely defined and broadly formulated laws, such as the 1899 Rangoon Police Act, the 1945 Police Act, and the Criminal Procedure Code. These three bodies of law contain numerous provisions which make arresting, detaining, jailing, and extorting gay and transgender individuals extremely easy.

### The Myanmar Penal Code

Looking first at the Myanmar Penal Code, there are a number of sections that directly impact or can be used against the LGBT community in Myanmar. First and foremost is Section 377, Myanmar's anti-sodomy law, which although rarely used, greatly impacts the daily lives of LGBT. Section 377 is a looming factor in police harassment of LGBT. This study did not document any instances of arrest under Section 377 of the Myanmar Penal Code; however, the overarching threat of 377 makes LGBT more compliant in interactions with police, less likely to report police abuse, and vulnerable to extortion, including payment of bribes or so-called fines. As will be discussed further in Part Three, the existence of anti-homosexuality laws leads not only to abusive applications of other laws, but also to social and state-sponsored homophobia, discrimination, and human rights abuses against LGBT.

Additionally, Section 290 of MPC can be used to arrest, detain, or threaten LGBT, as it contains a broadly worded 'public nuisance' clause. It can be applied for anyone the police deem to be a public nuisance, which could be the simple presence of a transgender individual on the street

## Legal References and Texts of Relevant Domestic Laws Used Against LGBT

### Myanmar Penal Code of 1861 (India Act XLV) Section 377

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years and shall also be liable to a fine"

### Myanmar Penal Code of 1861 (India Act XLV) Section 290

"Whoever commits a public nuisance in any case not otherwise punishable by this code shall be punished."

### Myanmar Penal Code of 1861 (India Act XLV) Sections 292 and 294

292: "Whoever

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purpose of sale, hire, distribution, public exhibition or circulate on, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever,

294: "Whoever, to the annoyance of others,

(a) does any obscene act in any public place... shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both."

### Myanmar Penal Code of 1861 (India Act XLV) Sections 269 and 270

"Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both."

### Myanmar Penal Code of 1861 (India Act XLV) Section 496

"Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven-years, and shall also be liable to fine"

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or in front of their home. Other problematic and frequently used sections of the MPC are Sections 292 and 294, which make it a crime to make, sell, or distribute 'obscene' material or songs to adults or minors and to engage in any obscene acts in public. 'Obscene' materials are not defined, making these provisions broadly applicable. For example, should police discover informational materials on an LGBT rights group, or HIV/AIDS awareness, they could easily apply Sections 292 and 294 to arrest someone. If an individual is perceived as being LGBT or is obviously transgender and condoms are found on their person, this law could theoretically be applied. Engaging in obscene acts in public could be as simple as two males holding hands or kissing in public. The nature of the extremely vague wording of these four sections makes them easily applicable to LGBT who already experience significant social stigma and discrimination in all strata of society. In combination with entrenched homophobic attitudes towards LGBT, a law of this nature allows police to arrest, detain, and threaten individuals for any reason.

There are two additional sections of the Myanmar Penal Code that infringe upon the basic human rights of LGBT and conflict with rights protections built into the 2008 Myanmar Constitution. Section 269 and 270 make it a crime for a person to negligently spread a sexually transmitted disease. A common negative stereotype of *apwint* and *apone* is that the community as a specific group are carriers and spreaders of sexually transmitted infections (STIs) and HIV/AIDS. This misconception creates not only social discrimination but also makes LGBT more vulnerable to being charged under Section 269 and 270. The final relevant section of the Myanmar Penal Code is Section 496 which prohibits engaging in any marriage ceremony absent of a legal marriage. Since same sex marriages are illegal in Myanmar, ceremonies recognizing the relationship or union of a same-sex couple are punishable by law.

#### Rangoon Police Act 4/1899 Section 30 (d)

"(d) any person found within the precincts of any dwelling-house or other building whatsoever [or in a back-drainage space] or on board any vessel, without being able satisfactorily to account for his presence therein;

may be taken into custody by any police officer without a warrant, and shall be liable to imprisonment which may extend to three months."

#### 1945 Police Act Section 35

(a) Any person found armed with any dangerous or offensive instrument whatsoever, who is unable to give a satisfactory account of his reasons for being so armed;

(b) any reputed thief found between sunset and sunrise remaining or loitering in any bazaar, street, road, yard, thoroughfare or other place, who is unable to give a satisfactory account of himself;

(c) any person found between sunset and sunrise having his face covered or otherwise disguised, who is unable to give a satisfactory account himself;

(d) any person found within the precincts of any dwelling-house other building whatsoever, or in any back-drainage space, on board any vessel, without being able satisfactorily to account for his presence therein ; and

(e) any person having in his possession, without lawful excuse, any implement of house-breaking,

may be taken into custody by any police-officer without a warrant, and shall be punishable on conviction with imprisonment for a term which may extend to three months.



## The 1899 Rangoon Police Act and the 1945 Police Act

Other bodies of law commonly used to persecute the gay and transgender communities are found in the 1899 Rangoon Police Act and the 1945 Police Act, which covers every part of Myanmar other than Yangon. Known as the 'Shadow Law(s)' or 'hiding in the shadows,' they are the laws most frequently applied by the police to harass, arrest, detain, imprison, and extort gay and transgender individuals living in Myanmar. Section 30 (d) and Section 35 share similar meaning and both carry a three month prison sentence, and they are documented in this study to be the sections of law most frequently applied against gay men and transgender persons in Myanmar for arbitrary arrests, abuse, and extortion.<sup>25</sup>

In a recent spate of arrests directed at Mandalay's transgender and gay communities, Section 35 was used to arrest 11 transgender and gay individuals over the course of one night. The law, applied that night to "save the public from moral deviance,"<sup>26</sup> as noted by a law enforcement spokesperson, stipulates that should a person be in an area of shadow or darkness, without a reason satisfactory to the questioning law enforcement agent, that person is subject to arrest. The arbitrary nature of this law lends itself to substantial abuse by police, who are able to harass, arrest, and detain gay and transgender individuals with impunity. These two commonly used laws can make walking a street at night or sitting in front of one's own house a situation for potential arrest. Laws such as these threaten not only human rights but also conflict with the legal rights afforded by the 2008 Constitution to all citizens of Myanmar, not just gay and transgender individuals.

Finally, in addition to the abusive use of Section 30 (d) and 35, lawyers working within LGBT legal networks have noted that gay and transgender persons are vulnerable in relation to other criminal cases, and there have been

reports of arbitrary arrests and torture when police pursue criminal cases where the perpetrator is believed to be from the LGBT community.<sup>27</sup> Documenting the exact laws used to arrest and charge gay and transgender respondents in this study was extremely difficult, due in part to the broad power under which police in Myanmar can operate. Respondents and legal experts have both experienced being or having a client arrested using one section of a Police Act only to have the charges at trial be something completely different. The rule of law is very weak in Myanmar, and this helps to create a situation where transgender and gay individuals are vulnerable to arrest, detention, and extortion using vague, broad, and often amorphous laws.

## The Criminal Procedure Code

Section 54 of the Criminal Procedure Code (CPC) is the final body of law that this study has identified as being used in an abusive way towards the gay and transgender communities. The Criminal Procedure Code can be used in tandem with other laws, such as the Police Acts or a section from the Myanmar Penal Code and it allows for arrest without a warrant. Section 54 is known as the 'cognizable offences' law, wherein if a police officer suspects someone of committing a cognizable offence, they can arrest that person for the crime they suspect them of, regardless of evidence and without a court issued warrant.

As the gay and transgender communities in Myanmar are already targets of police abuse, CPC Section 54 makes it even easier for police to legally carry out what we consider arbitrary arrests. Several respondents in the study were charged under both CPC 54 and a section of the Police Act. Section 54 creates a situation where simple suspicion of a homosexual relationship can compromise a person's ability to go about their daily lives without fear of police harassment, abuse, and arrest.

<sup>25</sup> Interview with legal resource persons (names withheld for personal safety reasons)

<sup>26</sup> Gilbert, David. "Queer Burma". *Overland*. 26 July, 2013.

<sup>27</sup> Interview with legal resource persons (names withheld for personal safety reasons)

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## The Negative Impact of Domestic Laws on LGBT

Through the experiences of the respondents in this study, and in interviews with members of Myanmar's LGBT legal networks, this study has identified a total of twelve provisions in the Myanmar Penal Code, the 1899 Rangoon Police Act, the 1945 Police Act, and the Criminal Procedure Code that must change in order for the LGBT community living in Myanmar to live free from the abusive powers of the police. In addition to being able to live without fear of abuse, arrest, or detention, the laws identified in this study conflict with both international human rights standards and the protections provided by Myanmar's own 2008 Constitution. The final section of the *Background* chapter will discuss the 2008 constitutional sections that conflict with other bodies of law and that theoretically provide protection to Myanmar's LGBT community.



2012 Transgender Day of Remembrance for the Myanmar community living in Chiang Mai, Thailand

### Criminal Procedure Code Chapter V B-Arrest Without Warrant Section 54

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest-

first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking,

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the President of the Union;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing;

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody;

sixthly, any person reasonably suspected of being a deserter from [the Burma] (Note) Army, Navy or Air Force;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of the Union of Myanmar which, if committed in the Union of Myanmar, would have been punishable as an offence, and for which he is, under any law relating to extradition [ \* \* \* ] (Note) or otherwise, liable to be apprehended or detained in custody in the Union of Myanmar;

eighthly; any released convict committing a breach of any rule made under section 565, sub-section (3),

ninthly, any person for whose arrest a requisition has been received from another police officer provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears there from that the person might lawfully be arrested without a warrant by the officer who issued the requisition.



## Protections Provided By the 2008 Constitution

In theory, Myanmar's 2008 Constitution provides several measures of protection for gay and transgender persons living in the country. Unfortunately, either because education regarding these protections is low, and / or because the police and judicial system disregard these protections, the laws discussed in the previous section used to harass and abuse Myanmar's LGBT community continue to exist today. *Apwint* and *apone* individuals should be able to find protection under the Constitution's equal protection guarantees, privacy and security guarantees, and equal opportunity guarantees. A summary of these constitutional guarantees and a brief discussion of how they conflict with other existing bodies of law currently in use will conclude this section.

### Equal Protection before the Law

Section 347 of the 2008 Constitution provides equal rights and protection before the law, yet gay and transgender citizen of Myanmar face prosecution under Myanmar Penal Code Section 377. As illustrated by the experiences of the respondents in this study, gay and transgender individuals are restricted in their access to equal rights and protection by both the structural homophobia created by MPC 377 and the social stigma expressed by police and society in general. Theoretically, continuing to keep MPC Section 377 as an active law makes a guarantee of equal protection void for gay and lesbian individuals, and possibly for transgender individuals as well. The use of laws such as 1899 Rangoon Police Act Section 30 (d) and 1945 Police Act Section 35 also violate the constitutional guarantee to equal protection, as does Criminal Procedure Code 54, since these laws are applied in a discriminatory manner. There is a need for greater legal education and access to support networks so that individuals experiencing abuse and harassment at the hands of police due to their sexual orientation or gender identity may seek redress and the protection afforded them by the Section 347 of the 2008 Constitution.

#### 2008 Myanmar Constitution Section 347

The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection.

#### 2008 Myanmar Constitution Section 357

The Union shall protect the privacy and security of home, property, correspondence and other communications of citizens under the law subject to the provisions of this Constitution.

#### 2008 Myanmar Constitution Section 349

Citizens shall enjoy equal opportunity in carrying out the following functions: (a) public employment; (b) occupation

#### 2008 Myanmar Constitution Section 366

Every citizen, in accord with the educational policy laid down by the Union: (a) has the right to education.

#### 2008 Myanmar Constitution Section 375 and 376

375: An accused shall have the right of defense in accord with the law

376: No person shall, except matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquility in accord with the law in the interest of the public, or the matters permitted according to an existing law, be held in custody for more than 24 hours without the remand of a competent magistrate.

### The Guarantee of Privacy and Security

The Constitution guarantees the protection of privacy of citizens under Section 357 and thus ensures that the State will not interfere in citizens' private affairs. Included in one's privacy are a citizen's relationships and sexual activities. With whom a citizen has private, consensual sexual intercourse, regardless of the type, cannot be determined by the State. It is a private matter that only concerns the individuals involved. Section 377 of the Penal Code prohibits any form of sexual contact or intercourse, with the exception of heterosexual penetrative sex which is violation of rights entrenched in the 2008 Constitution. Furthermore, the choices an individual makes with regards



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to their gender identity and its physical expression also represents a private choice, which should be protected as well.

### Social Stigma and Equal Opportunity

*Apwint* and *apone* experience severe stigma in their pursuit of employment and education. Sections 349 and 366 should provide for equal opportunities in employment and education, yet most respondents in this study indicated that they have had difficulty obtaining and keeping a job, and some respondents reported experiencing severe discrimination in institutions of education. Section 349 provides for equal opportunity in employment, yet we see some transgender (*apwint*) individuals forced to seek work as either prostitutes or spiritual mediums as their only avenues to gainful employment. Other respondents noted being denied employment, or forced to pay additional bribes when running their own business, due to their gender identity and/or sexual orientation. Section 366 provides for the right to education, yet some respondents reported being abused in school by teachers, classmates, and administrators; or denied a certificate of completion due to their SOGI. These instances indicate that knowledge and enforcement of constitutionally protected rights such as equal opportunity to employment and education is low in regards to the gay and transgender communities in Myanmar.

### The Right of a Defense and Limited Detention without Charge

Finally, Sections 375 and 376 should provide protection to the gay and transgender communities in Myanmar by protecting them from arbitrary and sustained detention, and to guarantee their right to a defense; however, rather than offering protection, these sections can also negatively affect the LGBT community for the following reasons. Mistakenly, police believe that in order to comply with Section 376, they must present a full case to the courts following an arrest. This belief sometimes leads to coerced confessions, torture, and often changes or additions to the charges from the original arresting charge. This so called

protection can also lead to extortion of victims in order to avoid being formally charged and possibly jailed. Police may also detain, assault, torture, and humiliate victims for almost the full 24 hours they are legally allowed to detain them, and then demand a bribe for release just before the 24 hour mark. Rarely do the detainees or accused have access to legal advice or a defence. Due to low levels of civil and human rights education in the country, a victim may therefore not be aware that they are legally allowed to be released if they are not brought before a court after 24 hours.

### Constitutional Protections

Overall, despite the numerous guarantees of constitutional protection, Myanmar's gay and transgender communities remain deeply discriminated against socially, and have their, constitutional, and human rights violated on a regular basis. The political climate in Myanmar is ripe for change in some of these areas, and strengthening already existing protections, in parallel with review and challenging laws that violate fundamental rights, could add significant protection for and improve the livelihoods of the LGBT communities within the country.

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28 The Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity (2007), Introduction, p. 6 [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf)

29 See for example discussions and positions taken on the 2008 / 2011 Statement in UN General Assembly that human rights include protection regardless of sexual orientation; the 2011 UN Human Rights Council Resolution (A/HRC/17/L9/Rev.1 (June 2011); the UN General Assembly Resolution on Summary, Arbitrary and Extrajudicial Executions; and the 2012 UNGA Resolution on Summary, Arbitrary and Extrajudicial Executions.



### 1.5.3 LGBT Rights in International Law and Myanmar's International Obligations

*"Sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender."*

*"Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."*

- The Yogyakarta Principles <sup>28</sup>



The understanding and definition of sexual orientation and gender identity remains contested in the international community. In reporting on the gendered impact of counter-terrorism measures, UN Special Rapporteur on promoting and protecting human rights while countering terrorism, Martin Scheinin offers perhaps the most far-reaching definition so far of gender that continues to be debated among UN member states in relation to inclusion of LGBT rights in relevant statements and resolutions<sup>29</sup>: *"Gender is not synonymous with women but rather encompasses the social constructions that underlie how women's and men's roles and functions and responsibilities, including in relation to sexual orientation and gender identity are defined and understood. (...) As a social construct, gender is also informed by, and intersects with, various other means by which roles, functions and responsibilities are perceived and practiced, such as race, ethnicity, culture, religion and class. Consequently, gender is not static; it is changeable over time and across contexts. (...)"*<sup>30</sup>

State obligations under human rights treaties are three-fold <sup>31</sup> – to respect, protect and fulfill. The obligation to *respect* means that States must refrain from interfering or hindering anyone's enjoyment of human rights, which would entail repealing discriminatory laws, such as laws criminalizing homosexual acts. The obligation, however, goes further, and it obliges the state to ensure that LGBT persons have to same rights as other persons, including being free from discrimination and being free to assemble, associate with others, and to express themselves. The obligation to *protect* requires States to protect individuals and groups against human rights abuses. Meaningful protection requires that the obligation to respect is fulfilled, i.e. with continued criminalization LGBT persons remain unprotected by the law in many ways. The issue at stake is equal protection of the rights of LGBT persons, although equal protection may still not be adequate protection,

<sup>30</sup> UN General Assembly Sixty fourth session: promotion and protection of human rights <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/437/55/PDF/N0943755.pdf?OpenElement> para 20

<sup>31</sup> Office of the High Commissioner for Human Rights <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>

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due to available resources of the state, etc. which may hinder special protection of vulnerable groups, such as LGBT persons. Special protection would be required under this obligation as it is with other vulnerable groups, for example in relation to hate crimes, homophobic bullying, and certain economic, social and cultural rights. Lack of adequate documentation and under-reporting makes it difficult to assess the extent of violations faced by LGBT persons as compared to other (vulnerable) groups. The obligation to *fulfill* means that States must take action to facilitate the enjoyment of basic human rights. Laws and state institutions will not alone improve the respect of the rights of LGBT persons, and the obligation to fulfill thus requires the state to address social attitudes that enable discrimination.<sup>32</sup>

The respect, protect and fulfill framework also provides a lens for the examination of a number of economic, social and cultural rights of LGBT people from an equality and non-discrimination perspective, such as the right to the highest attainable standard of health (and HIV / AIDS); the right to education; the right to housing; and the right to employment, and issues relating to recognition of relationships and related access to State and other benefits, and recognition of gender in relation to official documentation. The 2011 report of the UN High Commissioner for Human Rights highlights the practice of the Committee on Economic, Social and Cultural Rights in affirming the obligations of the states to ensure non-discrimination on the basis of sexual orientation in relation to economic, social and cultural rights—and gender identity in relation to health.<sup>33</sup>

### Non-Discrimination and Equality

The fundamental principles of universality and non-discrimination are guiding the application of international human rights law, and are embodied in the Charter of

32 For a more extensive discussion of the respect, protect and fulfill framework and a human rights based approach see F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013.

33 UN High Commissioner for Human Rights Report to the Human Rights Council, UN Doc. A/HRC/19/41 (November 2011).

the United Nations, the Universal Declaration of Human Rights (UDHR) and core human rights treaties. All people are entitled to enjoy the protections in international human rights law, including respect of the right to life, the right of security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression – all rights that are frequently violated for LGBT people across the world.<sup>34</sup>

While sexual orientation and gender identity, like age, disability and health, are not referred to as specific grounds of discrimination in international human rights treaties, they have been included in the interpretation of either “sex” or “other status”, which was an intentional opening left in the drafting of the treaties to enable inclusion of other prohibited grounds of discrimination as the human rights framework developed.

In the 1994 *Toonen v. Australia* case, the Human Rights Committee for the first time interpreted “sex” to include “sexual orientation” as a prohibited ground of discrimination, relying on non-discrimination and equality grounds with respect to the right to privacy protected in the International Covenant on Civil and Political Rights (ICCPR). The Committee explicitly rejected health concerns related to the threat of HIV / AIDS as well as an argument for protection of “public morale” as justifications for a criminalization of private homosexual acts.<sup>35</sup> According to the Committee, it is irrelevant whether laws criminalizing such conduct are enforced or not; their mere existence continuously and directly interferes with an individual’s privacy.<sup>36</sup> Many States where homosexual sex is still penalized have ratified the first Optional Protocol to the ICCPR, which allows for the submission of individual complaints to the UN Human Rights Committee. The *Toonen* case can therefore be used for advocacy purposes, despite the non-binding nature of the Human Rights Committee decisions, but the context of a specific country of course determines whether a

34 *Ibid.*

35 A/HRC/19/41, para 41

36 CCPR/C/50/D/488/1992, para 8.2.



decision from the Committee would help support calls for decriminalization, or if it would create adverse reactions from conservative religious and traditional powers in the country. Myanmar has unfortunately not signed and ratified the ICCPR and the first Optional Protocol yet, but decision on other countries in the region could perhaps be used as advocacy tools in Myanmar as well.

In 2005 a coalition of human rights NGOs under the supervision of the International Service for Human Rights and the International Commission of Jurists created the Yogyakarta Principles to address the inconsistency in approach to sexual orientation and gender identity in international law and practice. These principles underscore the legal obligations of States to protect the rights of all people, regardless of sexual orientation or gender identity, under accepted international human rights treaties. They have not been adopted in a treaty, but instead serve as a supplement for interpreting existing treaties and emphasizing the need for greater cooperation in articulating LGBT rights in International Law.<sup>37</sup> Indeed, the Yogyakarta Principles rest on the understanding that the protection of LGBT people does not require the creation of new rights, but rather the effective implementation of the two fundamental principles of international law: equality and non-discrimination.<sup>38</sup>

A framework that applies international human rights law standards to human rights abuses against LGBT around the world, the Yogyakarta Principles consists of 29 principles, each followed by a statement of international human rights law, its precise application to a given situation and the obligation of the State to enforce it.<sup>39</sup> The dissemination of the Principles was met with notable success at international, national and local levels. Within UN mechanisms, the Principles were praised as 'ground-breaking', 'legally-binding international standards that all States must respect'<sup>40</sup> and continue to be cited in the

proceedings of the Human Rights Council<sup>41</sup>. Moreover, some States have affirmed willingness to use the Principles as a blueprint in national policy making.

The issue of gender identity remains critical to human rights violations, and indeed UN human rights mechanisms have been voicing concerns about sexual orientation and gender identity based human rights violations since the early 1990s and substantial development in the understanding of SOGI in relation to international human rights law and the UN system has taken place in particular within the last decade.<sup>42</sup> International human rights law, including the Convention on the Elimination of All Discrimination Against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention of the Rights of the Child (CRC), thus requires States to ensure non-discrimination and equality (in law and practice) on the basis of gender, sex, sexual orientation and gender identity<sup>43</sup> as well as in situations where gender inequality intersects with other prohibited grounds of discrimination, such as race, color and religion.<sup>44</sup> Also the UN treaty body on the Convention

40 ARC International, 'Recognizing Human Rights Violations Based on Sexual Orientation and Gender Identity at the Human Rights Council, Session 4', April 2007; and ARC International, 'Report on Launch of Yogyakarta Principles', June 2007.

41 O'Flaherty, M. and Fisher, J. 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles', *Human Rights Law Review*, 2008 vol. 8 Issue 2, p. 207-248

42 It is important to emphasize though that concepts of sexual orientation and gender identity always contain cultural specificities that may not be applicable in all situations. While Human Rights Law places the foundation of non-discrimination on the idea of a fixed identity based on the gender of the person that one is attracted to, these constructions are not just a reflection of an identity but can constitute some identities, while displacing others. For a discussion of this see for example F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013.

43 CEDAW (General Assembly Resolution 34/180); ICCPR (A/63/16); Committee on ESCR General Conclusion 20 (E/C.12/GC/20); Committee on the Rights of the Child CRC/GC/2003/3; and the Yogyakarta Principles on the application of human rights law in relation to sexual orientation and gender identity (2007).

44 Committee on Elimination of all Forms of Racial Discrimination (A/59/38, A/55/18, E/C.12/2005/4).

37 O'Flaherty, M. and Fisher, J. 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles', *Human Rights Law Review*, 2008 vol. 8 Issue 2, p. 207-248

38 *Ibid.*

39 *Ibid.*

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Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Committee Against Torture (CAT), has included protection of all persons regardless of sexual orientation and gender identity under State obligations.<sup>45</sup> As of yet, Myanmar has only signed CEDAW and the CRC.<sup>46</sup>

The Committee on the Elimination of All Forms of Discrimination Against Women has been particularly active in protecting the rights of lesbian and bisexual women and in focusing on intersectional aspects of discrimination. For the past 18 years<sup>47</sup>, the Committee has acknowledged sexual orientation issues and addressed the criminalization of sexual relations between women and discrimination against lesbians and bisexual women in its state examinations, but with its General Recommendation 28, for the first time it explicitly affirms the link between discrimination of women based on gender and sex and factors such as sexual orientation and gender identity in relation to state obligations, saying: *“The discrimination of women based on sex and gender is inextricably linked with other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, caste and sexual orientation and gender identity. Discrimination on the basis of sex or gender may affect women belonging to such groups to a different degree or in different ways to men. States parties must legally recognize such intersecting forms of discrimination and their compounded negative impact on the women concerned and prohibit them.”*<sup>48</sup> In the field

45 CAT/C/GC/2/CRP.1/Rev.4

46 Myanmar has also signed the Optional Protocol to the Convention of the Rights of the Child on the sale of children, child prostitution and child pornography, in 2012; Convention on the Rights of Persons with Disabilities, in 2011; Charter of the Association of the Southeast Asian Nations (ASEAN), in 2008; Human Rights Declaration of the Association of the Southeast Asian Nations (ASEAN) in 2012 (which has been criticized for lack of conformity with international human rights standards, also in relation to women and SOG).

47 Committee on the Elimination of Discrimination Against Women No. 38 General Assembly Official Records - Forty-ninth Session Supplement No. 38 (A/49/38)12 April 1994 < <http://www.un.org/documents/ga/docs/49/plenary/a49-38.htm>> 22 November 2012

48 General Recommendation No. 28 forty-seventh session, 2010 - The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women (para. 18).

of gender and human rights it is particularly important to highlight that under international law the State is obliged to prevent, investigate, and punish human rights violations committed by both state and non-state actors.

As Myanmar is legally bound to the principles of CEDAW, the State must therefore protect its women from all discrimination including that against sexual orientation. Mentions of sexual orientation and gender identity were notably absent from CEDAW’s concluding observations on Myanmar in 2008 and the follow up in 2011.<sup>49</sup> This may, however, be due to the fact that it is not until the adoption of its General Recommendation 28 in 2010 that CEDAW explicitly defines sexual orientation and gender identity in relation to state obligation in addition to the substantial underreporting on the issue in Myanmar. The Committee does, however, raise in the 2008 observations the problematic nature of many gender stereotypes, stating: *“The Committee is concerned about the persistence of adverse cultural norms, practices and traditions as well as patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life, especially within some ethnic groups.”*

And while not directly addressing sexual orientation and gender identity, the Committee also acknowledged the culture of silence and impunity in Myanmar, where cases of gender based violence and discrimination go unreported: *“The Committee is also concerned that such violence appears to be socially legitimized and accompanied by a culture of silence and impunity, that cases of violence are thus underreported and that those that are reported are settled out of court”.*

Such underreporting is relevant for the LGBT community as well, as its hidden members are potentially even less likely to feel able to take action. The 2011 UN High Commissioner for Human Rights’ report to the Human Rights Council explicitly highlights a lack of monitoring, recording, and reporting systems for incidents of violence

49 Committee on the Elimination of All Forms of Discrimination against Women, Forty-second session, 20 Oct – 7 November 2008, Concluding Observations on Myanmar, and Fiftieth session 3-21 Oct 2011, Information provided in follow up to the concluding observations of the Committee.



based on sexual orientation and gender identity in most member states, and even in countries where such systems exist there is still a high level of under-reporting due to fear of repercussions and abuse, in particular in countries that still penalise homosexual acts.<sup>50</sup>

Article 2 of the Convention of the Rights of the Child ensures non discrimination towards a child regardless of the child's or his or her parent's status. In 2003 the Committee stipulated that these grounds also include sexual orientation<sup>51</sup>. This pertains to discrimination based on a child's sexual orientation or that of his or her parent and the Committee on the Rights of the Child has raised the issue in its concluding observations on some states. However, mentions of LGBT issues have been absent from the Committee's reports on Myanmar from 1995 to 2011.<sup>52</sup>

### Criminalization of Same-Sex Conduct

Kerrigan, in a report on LGBT rights and discrimination in Africa, argues that the prohibition of consensual homosexual acts can be seen as one of few remnants of western legal systems build on religious notions. The word "unnatural" in legislative prohibitions of unnatural acts cannot be taken to mean "not occurring in nature", as examples of same-sex sexuality in nature are abundant. "Natural" and "unnatural" have normative rather than descriptive meanings based on a Christian idea of natural law and of sodomy as a sin.<sup>53</sup> Legislation in most common law countries with criminalization provisions prohibits both "unnatural acts" and "indecent" or "gross indecency", to cover sexual behavior that does

not amount to intercourse / penetration. The vague and general wording of the law makes it easier to prosecute and convict in courts, on sometimes questionable evidence, such as allegedly having worn women's clothes. This means where prosecution is pursued there is a greater danger of successful prosecutions and convictions under "indecent type" provisions than for "unnatural acts". It is therefore important that LGBT rights defenders when campaigning for decriminalization do not ignore "indecent" provisions.<sup>54</sup>

A recent report by HRW<sup>55</sup> highlights additional problems with both sodomy and indecency provisions: there is often no complainant in prosecution under these provisions. This means that provisions of criminal procedure law that call for the dropping of a case where a complaint is withdrawn do not apply. An additional problem is the lack of criminal law provisions against same-sex rape in some countries. If police prosecute same-sex rape under provisions on homosexual behavior, there is a conflation of these two entirely different acts, and same-sex rape is treated differently than rape of someone of the opposite sex.

Even where same-sex sexual behavior is not criminalized, there are often legal provisions that could be used against LGBT persons by police, prosecutors and judges, such as criminalization of acts contrary to morality that take place in public or in a private place open to public view.

Human rights developments in the last decade have focused less on whether an argument can be made on the necessity for criminalization, e.g. based on protection of public morale or health concerns, and the Human Rights Committee has in many of its concluding observations expressed a "deep concern" about criminalization and called for its removal, as have a number of other treaty

<sup>50</sup>UN Doc. A/HRC/19/41 (2011)

<sup>51</sup> Committee of the Rights of the Child 33rd Session 19 May – 6 June 2003 para 6(a)

<sup>52</sup> Sexual orientation was first explicitly mentioned in a CRC General Comment in 2003. Committee on the Rights of the Child, General Comment No. 3 (2003): HIV/AIDS and the rights of the child, U.N. Doc. CRC/GC/2003/3, 17 March 2003

<sup>53</sup> These ideas sit uneasily in a Burmese context where sodomy is not necessarily perceived of as a sin and which is heavily influenced by Theravada Buddhism rather than Christian norms as discussed for example by David Gilbert. <http://www.dvb.no/news/the-battle-for-gay-rights-in-burma-myanmar/34765>

<sup>54</sup> F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013, p. 104-105.

<sup>55</sup> Human Rights Watch, *Guild by Association* (March 2013) – discussed further in F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013.

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bodies and special mandates of the UN system. Of notable importance is also the 2011 resolution of the UN Human Rights Council on sexual orientation and gender identity and the subsequent report by the UN High Commissioner for Human Rights documenting discriminatory laws and practices and violence against LGBT people, which with its unequivocal call for de-criminalization reinforce the legal basis for considering criminalization a human rights violation.

The Special Rapporteur on health has noted, *“sanctioned punishment by States reinforces existing prejudices, and legitimis community violence and police brutality directed at affected individuals.”*<sup>56</sup> The Working Group on Arbitrary Detention (WGAD) has taken the Toonen case to mean that criminalization is a violation of human rights, and considers arrest for homosexual conduct arbitrary per se, and a violation of the right to liberty and security of the person as guaranteed in ICCPR. This is regardless of any national legislation criminalizing homosexual conduct.<sup>57</sup>

The right to privacy has in many contexts taken center stage in the definition of criminalization as a human rights violation, but there has been increasing discussion of the limitations of this approach, in particular in relation to the notion that LGBT persons should keep expressions of this part of their identity to the private sphere. As some scholars have pointed out: *“Invoking the right to equality as the basis for recognizing rights related to sexual orientation, by contrast, affirms the entitlement of a minority group to full and equal respect.”*<sup>58</sup>

56 A/HRC/14/20, para. 20.

57 UN WGAD No. 7/2002 U.N. Doc: E/CN.4/2003/8/Add.1 at 68 (2002) quoted in F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013.

58 Murray and Viljoen quoted in F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013, p. 100

## Life, Liberty and Security of the Person and Bodily Integrity

In regard to the rights of LGBT persons, UN resolutions and the UN High Commissioner for Human Rights place an immediate focus on rights related to physical security. In some States consenting same-sex conduct carries the death penalty. The UN General Assembly, the Human Rights Committee and the Human Rights Council have all take a clear position on the death penalty only applying to the most serious of crimes under the ICCPR, and obliges States not to apply the death penalty for homosexual acts to fulfill their obligation to respect the right to life for LGBT persons as equal to other persons.

Under its obligation to protect, the State is obliged to show diligence in preventing, investigating, prosecuting, and judging killings of LGBT persons, including activists and human rights defenders, as well as LGBT persons in general. With regards to non-lethal homophobic violence, a report examining LGBT rights and discrimination in Africa<sup>59</sup> finds that even the most conservative opposition to decriminalization of homosexual conduct are against violence, and the issues of violence by state agents, and private violence with a failure to protect may be one of the best issues on which to make human rights progress for LGBT people.

Existing documentation, although the reported incidents are arguably limited across the world, indicates that incidents involving violations by the police, including illegal arrest and detention, extortion and homosexual rape, and other forms of sexual violence is widespread in many countries. This is also evident from the case studies included in this study report. Non-state perpetrators of violence include right-wing, nationalistic and anti-LGBT organizations of various kinds; religious and community leaders through incitement and threats, as well as ordinary members of the public. It takes the form of hate crimes and mob violence (police protection or the lack

59 F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013.



thereof is an issue in relation to many of these incidents, and often the survivors of the attacks are arrested as well). It is also not uncommon that local officials are involved in such campaigns or at least part of the incitement leading up to them.<sup>60</sup>

Articles 1(1) and 2(1) of the CAT protect citizens from torturous treatment based on sexual orientation. The Committee Against Torture states, “both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.”<sup>61</sup> The UN Special Rapporteur on Torture has highlighted the risks that LGBT persons in detention and imprisonment face and the particular vulnerability of transgender persons. There are numerous accounts of sexual minorities being subjected to degrading treatment during arrest and / or detention, and such accounts were also found in this study.

With regards to liberty and security of the person, and freedom from arbitrary arrest and detention, arrests for homosexual conduct is, by the UN WGAD as mentioned above, considered arbitrary per se and a violation of the right to liberty and security of the person as guaranteed by Article 9 of the ICCPR and stated in Article 9 of the UDHR. Although few arrests and prosecutions may actually take place in practice due to the private nature of the concerned acts and the issues relating to proof, the fact that they can take place puts homosexual persons under threat, as this can change, and arrests and prosecutions also do take place in countries considered more tolerant and moderate.

In addition to LGBT persons in general, state agents in some countries deliberately target LGBT human rights defenders and activists, and criminalization can be seen as the umbrella that allows state agents to repress

these groups. LGBT organizations and activists are often deliberately targeted and repressed under the same vague laws that can be used against political activists and opposition in general. Issues relating to the use of very vaguely formulated provisions in the penal code in Myanmar are also relevant in relation to the LGBT community in general and are discussed in the preceding section.

### Freedoms of Expression, Association and Assembly

The increasing openness in the UN human rights system towards LGBT rights over the last decades has also meant a shift in interpretation of permissible limitations to particular freedoms, such as limitations on freedom of expression under Article 19 (3) of the ICCPR. Freedom of association is crucial in the establishment of movements for LGBT rights, and it is guaranteed under Article 22 of the ICCPR, with the right to peaceful assembly recognized under Article 21 of the ICCPR, and also under the Covenant subject to permitted limitations, but only if provided for by law and necessary to protect rights of others, national security, or public safety, order, health and morals – and is not discriminatory. While justifications based on public order, health, and moral was in early decisions by the Human Rights Committee permitted as exceptions in relation to homosexual persons, its 2012 decision in the *Fedotova v. the Russian Federation* effectively overturned previous decisions and rejected a public morals exception as it discriminated against homosexual persons’ freedom of expression.

Various UN bodies have addressed restrictions on the right of people advocating on sexuality and gender issues, such as deregistration or rejection of applications for registration where this is required; police raiding of offices of LGBT organizations; challenging and maligning of LGBT activists personal reputations; and particular risks faced by women human rights defenders based on “accepted socio-cultural norms, traditions and perceptions and stereotypes about femininity, sexual orientation, and the role and status of women in society” as highlighted

60 See for example the UN High Commissioner for Human Rights Report to the Human Rights Council, UN Doc. A/HRC/19/41 (November 2011) and F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights (2013).

61 Committee against Torture, General Comment No. 2, para. 22.



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by UN special procedures.<sup>62</sup> Restrictions on freedom of association potentially undermines the establishment of strong movements as it may limit the participation and leading of these movements by LGBT activists, which by many is seen as crucial for successful advocacy.<sup>63</sup>

The UN High Commissioner for Human Rights 2011 report highlight how LGBT rights defenders and activists are often subject to violence and harassments in relation to public events, but also how they may be denied police protection and permits under references to threats to the public morals or safety. This tendency effectively privileges the antagonists rather than the people seeking their rights. In many countries it is particularly the use of vague national laws to repress LGBT rights advocacy that presents an issue in relation to the freedom of expression, association and assembly of LGBT persons.<sup>64</sup>

### International Human Rights Law and Myanmar?

While much of the work necessary in Myanmar to protect LGBT people from human rights violations relate to the changing of attitudes and social practices, the signing and ratification of core international human rights treaties would offer substantial protection and ensure an international obligation on the Myanmar state to respect, protect, and fulfill the rights of LGBT people in the country. Signing and ratifying international human rights instruments such as the CAT, ICCPR, and ICECSR will strengthen the State obligation to protect life,<sup>65</sup> liberty and personal security, individual privacy<sup>66</sup> and will guarantee non-discrimination.<sup>67</sup>

If Myanmar ratifies the CAT, the State will therefore be required under international law to prohibit and punish torturous acts and ill treatment of all individuals. As indicated in our case studies, members of the LGBT community in Myanmar continue to face various acts of ill treatment such as sexual and physical violence. The Report of the Special Rapporteur on Torture states that "Sexual violence may constitute torture when it is carried out by, or at the instigation of, or with the consent or acquiescence of public officials"<sup>68</sup>. These types of acts are not uncommon in Myanmar society, but ratifying the CAT would make the State's failure to prevent these acts and to provide redress to victims of torture a breach of international human rights law<sup>69</sup>, including when committed by non-state actors.

As reforms in Myanmar progress, the State is expected to adopt international human rights standards and international customary law. International pressure coupled with civil society mobilization will likely be crucial to facilitating this movement. During his recent visit to Myanmar, the UN Special Rapporteur on the situation of human rights in Myanmar met with LGBT rights groups and victims of police abuse in the wake of mass arrests of transgender people in Mandalay, and for the first time specifically mentioned issues relating to sexual orientation and gender identity issues in his report to the General Assembly.<sup>70</sup>

62 UN High Commissioner for Human Rights Report to the Human Rights Council, UN Doc. A/HRC/19/41 (November 2011), p. 20

63 F. Kerrigan, *Getting To Rights: The Rights of Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Africa*, Danish Institute for Human Rights, 2013, p. 122

64 UN High Commissioner for Human Rights Report to the Human Rights Council, UN Doc. A/HRC/19/41 (November 2011), p. 20

65 UDHR art 3, ICCPR art 6

66 UDHR art 12, ICCPR art 17, Human Rights Committee, General Comment No. 16

67 UDHR, art 2 and 7, ICCPR art 2(1) and 26, ICESCR art 2; Gender Identity: Committee on Economic, Social and Cultural Rights, General Comment No. 20 (Non-discrimination in Economic, Social and Cultural Rights), para 32.

68 Report of the Special Rapporteur on torture (A/HRC/7/3), para 34.

69 Human Rights Committee, General Comment No. 31, para 18

70 UN General Assembly A/68/397 Report by Special Rapporteur on the situation of human rights in Myanmar, 23 September 2013, p. 11 [http://www.ohchr.org/Documents/Countries/MM/A-68-397\\_en.pdf](http://www.ohchr.org/Documents/Countries/MM/A-68-397_en.pdf)

## Part Two: Living in Myanmar as Transgender, Gay, and Bisexual

The Myanmar state has consistently shut off LGBT culture, and there has been limited social toleration of the LGBT community within the country. The state maintains a prohibition on homosexuality and overlooks the abusive application of laws such as the Shadow Law and others that are used to harass and persecute gay and transgender individuals. Socially, LGBT individuals experience limited acceptance in their families and close social circles, and on the whole, social stigma towards the LGBT community is high. Scholarship on the subject of LGBT culture and community within Myanmar has been extremely limited, as has documentation of rights abuses against this community.

In an effort to understand the lack of social acceptance towards the LGBT community, and specifically towards transgender and gay males, it is helpful to understand how Myanmar Buddhists conceptualize the relationship between being transgender or gay; and cycles of birth, death, rebirth, and *karma*. As a Buddhist majority country, most people in Myanmar believe in the Buddhist notions of reincarnation and *karma*. *Karma* determines how an individual is reincarnated, and why they are reincarnated in a specific form, be it human or something else, and as a male or female. The social position of a person is determined by their *karma* at birth. A person's *karma* is determined through acts of the mind/heart, tongue, and body in the previous life.<sup>71</sup> Whether or not an individual is *apwint* (open, or wants to be a woman; transgender) or *apone* (a male who is in hiding and not ready to be an open; is sexually oriented towards men; gay), is also determined by *karma*. It is believed that if a boy has committed sexual sins in a past life, which include adultery or sexual action with a monk, whether it be it fantasy, seduction, or intercourse, that boy will be born as an *apwint*.<sup>72</sup> The *karma* of an individual cannot be changed in that life, so as a punishment for the sins of a previous life, it is believed that a person can be born as transgender or gay. The concept of *karma* and its elements of fate and punishment help to illustrate why *apwint* and *apone* are often considered to be lower members of society.

While *karma* applies elements of fate and punishment to the lives of *apwint* and *apone*, Buddhism in Myanmar also emphasizes one's ability to change their *karma* through acts of the mind/heart, tongue, and body. Good deeds, both active and verbal can influence one's *karma* in the next life. Working on the mind and heart through meditation is another way to improve one's *karma*. This ability to change and improve *karma* is reflected in the treatment of transgender individuals and the pressure their family, friends, and society places upon them to change their behavior. Many respondents in this study stated that they were pressured to conform to socially accepted forms of dressing, to present themselves as heterosexual males, and to have only heterosexual relationships. Some of the respondents noted that while they considered themselves *apwint* in their minds and hearts, they altered their appearances for both reasons of safety and to please their family and friends.

Sexual orientation is more often associated with gender identity, behavior, and choice, rather than a biological or genetic expression. Through changes to one's behavior, positive *karma* may be accumulated for the next life, thus ensuring that an individual is not reborn as an *apwint* or *apone*, and thus avoiding a low social position.

Finally, both currently and historically, transgender individuals have found niche communities where they are accepted, particularly within the spirit medium community as *nat kadaws*, or spirit wives. During festivals and special ceremonies, Buddhists in Myanmar believe that spirits enter the bodies of these mediums. When the mediums are entered by a female spirit, it is believed that the medium is a woman. Often these mediums are male to female transgender individuals. *Smile as They Bow*, a novel by Nu Nu Y offers a fictional account of the life of one *nat kadaw*. The novel was only recently published in Myanmar after over 12 years of censorship. A film adaptation of the book was also planned, but the Motion Picture Censorship Board, while allowing the book to be made into a movie, limited the content to a point where producing a film was no longer true to the story and thus the project was ended. Many transgender individuals find limited financial security and social acceptance within the *nat* community, and traditionally Myanmar society

71 Gilbert, Davik, 'Categorising Gender in Queer Yangon' in *Sojourn: Journal of Social Issues in Southeast Asia*, vol. 28, no.2, 2013.

72 *ibid*

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has accepted transgender individuals within this context, though as demonstrated through the censorship of *Smile as They Bow*, broad social acceptance of the LGBT community has yet to permeate Myanmar society.

## 2.1 Overview of Findings

This study found that discrimination towards LGBT, especially those who are visibly transgender or have a gender orientation that is not the same as their biological gender, is pervasive throughout all sectors of Myanmar society. Respondents experienced discrimination in education, in obtaining and maintaining employment, and from members of their families, friends, and peers. The level of social discrimination experienced by individuals who are visibly part of the LGBT spectrum spans from denial of participation in social and educational activities to verbal denigration, and physical and sexual abuse. Additionally, harassment, verbal abuse, physical abuse, and sexual abuse are commonly experienced when interacting with law enforcement. Bribery, poor conditions of imprisonment, and a lack of access to legal counsel were also experienced by respondents in this study. A widespread atmosphere of fear is a commonly noted feeling, and many respondents in this study have gone as far as to hide physical and behavioral attributes that identify them as gay or transgender, so as to avoid harassment and abuse within their communities and from authorities.

## 2.2 Findings Related to Gender Presentation and Gender Identity

One notable finding of this study pertains to those individuals who have physical attributes identifying them as outside of the traditional gender norms or categories. Physical traits and mannerisms of gay and transgender individuals make them especially vulnerable targets for harassment and abuse.

Respondents cited effeminate mannerisms, the presence of breasts, clothing styles typically worn by women, and the use of makeup as reasons for harassment by family, peers, teachers, public officials, and members of

law enforcement. Furthermore, as a way of protecting themselves, LGBT in Myanmar have developed a form of slang language to use within their own community. This slang language was developed so that LGBT individuals could have personal discussions while avoiding other people listening in on their conversations, and as a way to warn each other, for example, to the presence of police. Unfortunately, many police have learned to recognize this slang and often use it as a way to identify and then target LGBT for harassment, bribery, verbal, physical, and sexual abuse both in public areas and within police stations and prisons. The following sections discuss the variety of harassment and abuse that respondents have experienced in the public sphere and from members of the Myanmar Police Force; and the respondents' understanding of and feelings about the arbitrary application of laws towards them.

### 2.2.1 A Note on Pronoun Usage

The following pronouns were selected to reflect 1) the transgender identity of the majority of respondents, and 2) the lack of clear lexical categories for gender identity and sexual orientation in Myanmar.

**Ze:** Used as a replacement for 'he or she'; ze is a male to female transgender individual who self identifies as *apwint*. This individual may or may not publically identify as transgender.

**Hir:** Used as a replacement for 'him or her' hir is a male to female transgender individual who self identifies as *apwint*. This individual may or may not publically identify as transgender.

**He/him/his:** A male individual who identifies as a male and may or may not consider themselves to be *apone*, which carries with it the suggestion that the individual desires to be female but is not ready to express that.

**I:** First person is used throughout the following sections; however, it is important to note that many case studies and direct quotes from individual case studies have been translated from Myanmar language to English and edited for coherence. Thus, while first person is used, the



quotation may or may not use the exact same words used the respondent during their interview. Great care was taken in editing the case studies to preserve the meaning and context of what each respondent said.

## 2.3 Featured Case Studies

### Zaw <sup>73</sup>

Zaw is a 27 -year old Muslim from Myanmar who lives with his aunt in Mandalay. He works as a transporter of purified drinking water and receives an income of 76,000 kyat <sup>74</sup> per month. He identifies as *apone* [male appearance, MSM/homosexual]. His family and friends are aware that he is *apone*.

Zaw has faced multiple accounts of violence and sexual abuse from the police, and also direct discrimination from family and friends. At work, he has faced general discrimination from his colleagues for being gay. In the past, when his family noticed his sexual orientation, his uncle struck him with an iron chain, but this has since stopped. His family has threatened to kick him out of the house if he does not change what they perceive to be his chosen 'behavior'. His uncle is a high level administration officer in the quarter, and his family is afraid that his LGBT status will damage their reputation. Some of his friends have disowned him and prohibit him from visiting their homes. They stigmatize him and suspect him of being a thief. He has faced violence at the hands of the police on one instance for using LGBT slang to alert his friends.

Zaw was arrested by the police while walking around the moat of the city. He was taken to Police Station No. 5, and the officers instructed other prisoners at the station to hit him. While in custody prior to facing trial, he was forced to sleep near a toilet, and had to use his own belongings under the stigma that he would spread infectious diseases

to the other prisoners. If the police sensed a problem with the prisoners, he was the first person to be suspected of wrongdoing, and they would force him to strip and subject him to a full body search. They threatened him with violence and prohibited him from even speaking to other prisoners. Sometimes police would inflict pain on his calves with a wooden stick. The officers also forced him to strip and struck him on his back and buttocks. One officer forced the respondent to perform oral sex on him, and then handcuffed him to a motorcycle and anally raped him.

The court sentenced Zaw to three months imprisonment, applying the 1945 Police Act Section 35 after he had spent only one day in custody without access to a lawyer. At the time of his arrest, he was waiting for his friend on a bench at night around the moat, but he was charged and sentenced for working as an MSM sex worker. This caused him deep pain and sorrow, and he cried every day and every night because of this sentence. After five days in prison, he was put in the group board to harvest and clean the office apartment and outdoor area. He was struck by the officer in charge if he did not finish his assigned work.

If he was found talking to other prisoners, the officer would make him strip and strike him on the buttocks in front of the other prisoners because the officers accused him of trying to persuade men to have sex with him. He received even more egregious treatment if the officers were drunk. The officer in charge of the prison forced other prisoners to rape him, and he was forced to perform oral sex on the head of the quarter in the prison. He was also raped by other prisoners while taking a shower. There were many instances of rape by both the officers and other prisoners.

Zaw believes that police strongly hate gays. He is aware of anti- LGBT laws such as Myanmar Penal Code Section 377, 1945 Police Act Section 35, 40(D) <sup>75</sup>, and 420 <sup>76</sup>, but he cannot change his sexual orientation and identity.

<sup>73</sup> Respondents real names were not used to protect their safety and privacy. In some cases pseudonyms were assigned.

<sup>74</sup> Approx. USD 85 (according to official exchange rate of 890.5 MMK to 1 USD)

<sup>75</sup> Unable to find a record of a law with this number

<sup>76</sup> Unable to find a record of a law with this number

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Aung Aung <sup>77</sup>

Aung Aung 36-year old Buddhist from Myanmar who lives in Ka Mar Yout Township. Ze works as a beautician and has an income of approximately 25,000 kyat <sup>78</sup> per month. Aung Aung identifies as *apwint* [MSM, female appearance]. Hir family, close friends, and colleagues know ze is *apwint*. The people in hir community are not aware of anti-LGBT laws or provisions and do not treat hir differently because of hir sexual orientation and gender identity.

Aung Aung has experienced direct discrimination from family and friends. Hir friends look down on hir and discriminate against hir. Some have cut contact with hir and avoid hir altogether because they are afraid of being arrested under the anti-LGBT laws. Ze was also fired from hir work because of what is determined 'hir behavior'.

Aung Aung was arrested by police officers with hir friend while coming back from hir community's pagoda [temple]. They were buying betel to chew and two police officers came on motorcycles and took them to the police station. The officers told them they were arrested because there were condoms found in their bags. Aung Aung explained that the condoms were not for sex and they took them from the health care center, but the officers did not listen to them and physically assaulted them. After that, ze was taken to court and forced to admit to a crime and then sentenced to one month of imprisonment under Rangoon Police Act 1899 Section 30 (d). Aung Aung suffered from depression and wanted to commit suicide. In prison, ze had to stay with other men and had to do cleaning and gardening to what perceived to be to an unfair and discriminatory extent.

Aung Aung believes that police officers always see LGBT persons as bad, and are always looking for problems with LGBT persons. Ze believes that police officers do not like the use of LGBT slang language and will arrest LGBT individuals if they need money. Aung Aung also believes

that government organizations hate LGBT persons and ze feels that LGBT persons are not afforded the same rights as other people.

Aung Aung is aware Myanmar Penal Code Section 377, Myanmar Penal Code Section 376, Rangoon Police Act Section 30 (d), and 1945 Police Act Section 35. Ze is afraid of these laws, and has even tried to hide hir LGBT identity and change hir *apwint* appearance to a more masculine expression.

Min Min <sup>79</sup>

Min Min is a 33-year old Buddhist who lives alone in Kyauk Pa Daung. Ze works as a spiritual medium [*nat ka daw*] and earns an income of about 25,000 kyat per month.<sup>80</sup> Min Min identifies as *apwint* [MSM, female appearance] and hir family, friends, and those around hir know ze is *apwint*.

One night, Min Min was waiting for hir friend on a bench near a hospital when ze was arrested by the police. They charged hir with violating 1945 Police Act Section 35. In custody, Min Min was forced to sleep near the toilet. The police forced hir to strip and to shout "I am a man." They then raped hir. In order to avoid the court and further abuse, ze had to bribe the officers. After this incident of police abuse, ze feels traumatized and is constantly on alert. Furthermore, hir family kicked hir out of the house after hir arrest. Hir partner, who is *tha nge* [MSM, bisexual, male appearance], left hir because he did not want to be persecuted under anti-LGBT laws.

Min Min was denied necessary certification to apply for a national ID card by hir local government. has been scolded and verbally abused for using LGBT slang language by police officers and other government officials. Min Min believes the police will not harass hir if they receive bribes, but if they do not, they are abusive.

<sup>77</sup> Respondents real names were not used to protect their safety and privacy. In some cases pseudonyms were assigned.

<sup>78</sup> Approx. USD 28 (according to official exchange rate of 890.5 MMK to 1 USD)

<sup>79</sup> Respondents real names were not used to protect their safety and privacy. In some cases pseudonyms were assigned.

<sup>80</sup> USD 28 (according to official exchange rate of 890.5 MMK to 1 USD)



MinMin is aware of anti-LGBT laws such as Myanmar Penal Code Section 377, 1945 Police Act Section 35, and Rangoon Police Act 1899 Section 30 (d). Ze hides hir *apwint* appearance for fear of police and persecution under these laws. Because of these experiences, ze suffers from depression, but feels people in the society empathize with hir.

## 2.4 Social Discrimination, Harassment, and Abuse

### 2.4.1 Overview of Social Discrimination, Harassment, and Abuse

One of the primary reasons gay and transgender individuals are vulnerable to harassment and abuse by police and often experience discrimination, harassment, and abuse by their friends and family is due to homophobic and transphobic social attitudes. Police and society in general are often able to violate the rights of gay and transgender people because public opinion does not condemn them for doing so. Similarly, the continued existence of homophobic laws act as state sanctioned homophobia and transphobia. The following section discusses the study respondents' experiences with discrimination and verbal, physical, and sexual abuse by their friends, family members and various elements of society.

### 2.4.2 Discrimination by Family, Friends, and Peers

Over 75% of the respondents in this study (19 of 25) expressed feeling discriminated against by friends, family, classmates, and peers due to their sexual orientation or gender identity. Several respondents also reported instances of physical and sexual abuse by friends and family members. Zaw has experienced discrimination and physical abuse by his family members. He was struck with a chain by an uncle upon discovery of his sexual orientation, and his family has continued to stigmatize and discriminate against him. His family expressed concern not for him or his safety, but only for their own

reputation and standing within their community.

Additionally, Zaw's friends and peers have prohibited him from visiting them on the suspicion that his sexual orientation means that he is also a thief, which is a common stereotype and historical transphobic and homophobic reaction to gay and transgender individuals. Some respondents were prohibited by their family members from socializing with other gay and transgender individuals, were verbally abused, and given suggestions on how they should change their 'behavior,' including changing their style of dress, who they socialize with, how they portray their gender, and who they are oriented to sexually.

Some respondents had family members encourage them to change their behavior, the people with whom they socialize, and their style of dress to one which is more masculine style out of concern for their safety. However, most respondents expressed that their families encouraged them to change not as a safety measure, but because their families perceived their 'behavior' to be unnatural or wrong.

Respondent number four from Mandalay was forbidden by hir family from expressing hir *apwint* or feminine identity, from wearing women's clothes, and from seeking out a lover. Being discriminated against by family and friends often leads the respondents to self-censor and to publicly repress their identities. The majority of respondents self-identify as *apwint*, while some also simultaneously stated in their interviews that they conform to more socially accepted norms of dressing and 'behavior' while in public. This is usually due to pressure from their families or as a safety measure against abuse from peers, friends, and police.

Physical abuse was articulated by several respondents as well. One respondent from Mawlamyine was struck by his father and had his head shaved after his parents discovered that he was attracted to men. Respondents stated that their parents and other family members such as their siblings would both verbally and physically abuse them.

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Table of Perceived Social Discrimination

Case studies	Sexual Orientation	Gender Orientation	Education	Employment	Family and Friends
Yangon 1	<b>MSM</b>	Apwint	Experienced discrimination	Experienced discrimination	Experienced discrimination
Yangon 2	<b>MSM</b>	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Yangon 3	<b>MSM</b>	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Yangon 4	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced discrimination
Yangon 5	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced discrimination
Monywar 1	<b>MSM</b>	Apwint	Experienced discrimination	Experienced discrimination	Experienced discrimination
Monywar 2	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced discrimination
Monywar 3	<b>Bisexual/MSM</b>	Apone	Not specified	Not specified	Experienced discrimination
Monywar 4	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced discrimination
Monywar 5	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mandalay 1	<b>MSM</b>	Apone	Not specified	Not specified	Experienced discrimination
Mandalay 2	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mandalay 3	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mandalay 4	<b>MSM</b>	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Mandalay 5	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced discrimination
Mawlamyine 1	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced discrimination
Mawlamyine 2	<b>MSM</b>	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Mawlamyine 3	<b>MSM</b>	Apwint	Experienced discrimination	Not specified	Experienced discrimination

Note: Not Specified means that the respondent did not explicitly state or discuss personal experiences with discrimination in the areas of Education and Employment, or from Family and Friends.



Table of Perceived Social Discrimination (cont'd)

Case studies	Sexual Orientation	Gender Orientation	Education	Employment	Family and Friends
Mawlamyine 4	MSM	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Mawlamyine 5	MSM	Apwint	Not specified	Not specified	Not specified
Kyauk Pa Daung 1	MSM	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Kyauk Pa Daung 2	MSM	Apwint	Not specified	Experienced discrimination	Experienced discrimination
Kyauk Pa Duang 3	MSM	Apwint	Not specified	Not specified	Not specified
Kyauk Pa Duang 4	MSM	Apwint	Not specified	Not specified	Experienced discrimination
Kyauk Pa Duang 5	MSM	Apwint	Experienced discrimination	Not specified	Not specified
Total			4	9	19

Note: Not Specified means that the respondent did not explicitly state or discuss personal experiences with discrimination in the areas of Education and Employment, or from Family and Friends.

Respondent number two from Kyauk Pa Daung said,

**I have suffered verbal and physical abuse from my family. My sister constantly scolds me with rude words, and my brother has physically assaulted me. My family forbids my gay friends from visiting the house, and sometimes they lock me in my room. My friends implore me to change and become a heterosexual man. I face constant discrimination, and I am suffering.**

Familial support and respect were not common experiences for most of the respondents in this study. Many of the respondents who did not experience discrimination from family members felt it was mainly because they were able to provide monetary support to their families through income from their jobs. Therefore, their families tolerated their sexual orientation and or gender identity

for the sake of economic stability in the family. Unable to feel safe or free in their sexual and gender orientation, many of the respondents noted that the discrimination and abuse that they feel from their families has resulted in psychological trauma and depression.

I have also experienced verbal and physical abuse from family and friends. I have been struck by family members, and even kicked out of the house. Although I am the eldest of my siblings, I receive no respect because of my sexual orientation and gender identity.  
 -- Respondent Number One from Kyauk Pa Daung

Discrimination from family members is but one form of social discrimination that respondents in this study experience. They also experience discrimination by friends, classmates and peers. Respondents are commonly



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pressured to conform to heteronormative lifestyles and behavior by their friends and peers. Respondent number four from Monywa experienced this with hir classmates: **“My classmates implore me to change and behave as a heterosexual man. I feel no one from my environment will help me if I need it.”** Furthermore, sexual abuse and exploitation by peers and classmates was documented in this study. Respondent number one from Kyauk Pa Daung was sexually abused by hir friends after they encouraged hir to change hir appearance and “behavior”. Ze said that at first, hir friends tried to offer hir positive criticism regarding hir feminine appearance and transgender expression, but eventually some of them just used hir for sex.<sup>81</sup> Respondent number one from Monywa reports being sexually assaulted by hir classmates.

**My classmates discriminate against me and verbally abuse me, and are embarrassed to be seen with me in public. On more than one occasion, classmates have forced me to perform oral sex, and raped me.**

Not all respondents reported discrimination, harassment, or abuse by family or friends. Numerous respondents do have supportive friends within the LGBT community, but many feel that those living outside of the community are discriminatory in their feelings and actions towards those who are identifiable as LGBT.

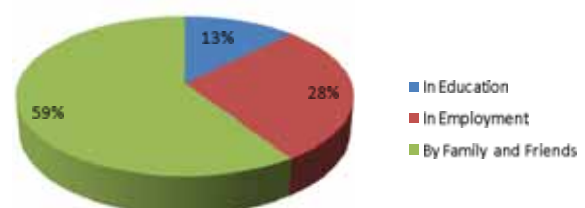
### 2.4.3 Discrimination in Education

Discrimination experienced in educational settings, and perpetrated by teachers or school administrators was less commonly shared by respondents; however, four of 25 respondents shared with the interviewer in this study an experience of discrimination in an educational setting. Aung Aung from Yangon was discriminated against in school from a young age. As a child, ze expressed hir gender identity by wearing *thanaka*, a traditional makeup product traditionally worn by women. Due to this, hir teachers would ask hir to leave their classrooms, segregated hir from other students, and treated hir as if ze

had an infectious disease. Aung Aung was also prohibited from becoming a monk, which in the Buddhist religion and culture disallows hir from progressing towards *nirvana*, a state which cannot be reached by anyone except a male. Buddhist men need to become monks a least once in their lives, both to make merit for their families, and to aid them in their own path towards reaching *nirvana*. Prohibiting Aung Aung from becoming a monk is incredibly degrading for hir and is embarrassing for hir family. Despite identifying at *apwint*, Aung Aung may not actually identify as female, but due to limited lexical categories and cultural understanding of SOGI, hir only option to be open about hir same-sex sexual orientation is to have a gender orientation of *apwint*.

Another respondent, number three from Mawlamyine, was verbally denigrated and shamed in front of other classmates by hir professors at university, who would ask intrusive and disparaging questions regarding hir SOGI during class. Outside of the classroom, one respondent experienced discrimination in being able to finish hir degree at university due to hir LGBT identity. Myanmar has ratified CRC, which emphasis non-discrimination, including on the grounds of sexual orientation, which in theory protects an LGBT individual's right to education. However, in a country where the average number of years of education is 3.9 for most adults, a guarantee of education is far from a reality.<sup>82</sup> Discrimination based on

### Social Discrimination Experiences



<sup>81</sup> In this interview, it was not possible to determine whether or not the respondent experienced rape or if the sex between hir and hir friends was consensual.

<sup>82</sup> International Human Development Indicators-UNDP, <http://hdrstats.undp.org/en/countries/profiles/mmr.html>, accessed 9 May 2013



sexual orientation or gender identity only adds additional barriers to obtaining an already limited education.

While attending the Government Technical Institute, I was stigmatized and discriminated against for my [LGBT] identity. The dean of the school threatened me; if I continued to express myself as apwint at the Institute, I would not be given permission to pass my exam and would be expelled from the school.

-- Respondent Five from Kyauk Pa Daung

#### 2.4.4 Discrimination in Employment

Approximately 40% (10 of 25) of respondents also experienced discrimination in obtaining a job or by their colleagues or employers. Many of the respondents state that they have experienced general discrimination in the workplace. Obtaining a job was noted to be particularly difficult for two of the respondents. For example, Aung Aung was unable to obtain a job that was highly skilled or highly paid and feels that because of his sexual orientation and gender identity, "I was restricted to working as a cooker in the alcohol industry." Although Aung Aung now works as a beautician, experiences discrimination in patronage: many people do not visit his salon to get haircuts because they believe that they may become infected by a sexually transmitted infection. An additional example of discrimination in employment was from respondent number two from Kyauk Pa Daung, who reported a specific incident where he was discriminated against and verbally harassed when he was trying to find a job. The respondent stated

**I have faced difficulty finding a job because of my identity. Once, I had heard of a job opening through a friend. When I interviewed for the job, the business owner rejected me, saying that gays are not good employees and told me to make a living dancing and selling snacks on the road. I remember the business owner yelling, "Hey, you homosexual! You don't deserve this job! You only deserve to have a job on the street!"**

Many of the respondents in this study work as *nat kadaw*, a specific type of spirit medium recognized in Myanmar Buddhist culture. *Nats* are animist spirits that have been integrated into Myanmar Buddhist beliefs and culture. Some *nat kadaws* are transgender and are believed to be inhabited by a female spirit. Culturally and religiously, *nat kadaws* are entirely accepted in Myanmar, and they play special roles in many religious ceremonies and festivals.<sup>83</sup> However, it is unclear from this study if respondents choose to work as *nat kadaw* due to the *nat kadaw* community's acceptance of their sexual orientation and gender identity, and the broader social acceptance of *nat kadaws*; or as is the case with respondent number four from Yangon, as an economic necessity due to discrimination in employment. Respondent number four from Yangon states that he became a *nat kadaw*, because everyone told him he would not be able to get a job as a transgender individual. Obtaining and sustaining gainful employment has been a challenge for many respondents throughout their lives.

## 2.5 Rights Abuses by Law Enforcement

### 2.5.1 Overview of Rights Abuses by Law Enforcement

Respondents in this study experienced a wide breadth of human rights abuses by police, including verbal harassment and threat-making, bribery and corruption, no access to legal counsel when arrested or detained by police, poor conditions of imprisonment or detention, physical abuse, and sexual abuse. Many of the respondents experienced multiple forms and instances of abuse by police, leading to severe psychological trauma and depression in some, and a continued repression of gender identities and sexual orientations in most. As discussed in Part One, International Laws and Obligations, Myanmar has only ratified CEDAW, which is The Committee on the Elimination of All Forms of Discrimination Against Women, and CRC, which is the Convention on the Rights of the Child. These two treaties are not primarily for the

<sup>83</sup> Eli Coleman et al., *Male cross gender behavior in Myanmar (Burma)*, 1992



### III Treatment by Law Enforcement Agents

Case studies	Sexual Orientation	Gender Orientation	Verbal Harassment and Threat Making	No Access to Legal Counsel	Bribery
Yangon 1	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Yangon 2	<b>MSM</b>	Apwint	Experienced	No access granted	Not specified
Yangon 3	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Yangon 4	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced
Yangon 5	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced
Monywar 1	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced
Monywar 2	<b>MSM</b>	Apwint	Experienced	Not specified	Not specified
Monywar 3	<b>Bisexual/MSM</b>	Apone	Not specified	Not specified	Experienced
Monywar 4	<b>MSM</b>	Apwint	Experienced	Not specified	Not specified
Monywar 5	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mandalay 1	<b>MSM</b>	Apone	Experienced	No access granted	Not specified
Mandalay 2	<b>MSM</b>	Apwint	Not specified	No access granted	Experienced
Mandalay 3	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced
Mandalay 4	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced

Note: Not Specified means that the respondent did not explicitly state or discuss personal experiences with the listed forms of torture, abuse, arbitrary imprisonment, or poor conditions of imprisonment.

### III Treatment by Law Enforcement Agents (cont'd)

Case studies	Sexual Orientation	Gender Orientation	Verbal Harassment and Threat Making	No Access to Legal Counsel	Bribery
Mandalay 5	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mawlamyine 1	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced
Mawlamyine 2	<b>MSM</b>	Apwint	Experienced	Not specified	Not specified
Mawlamyine 3	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mawlamyine 4	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced
Mawlamyine 5	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced
Kyauk Pa Daung 1	<b>MSM</b>	Apwint	Experienced	Not specified	Not specified
Kyauk Pa Daung 2	<b>MSM</b>	Apwint	Experienced	Not specified	Not specified
Kyauk Pa Duang 3	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced
Kyauk Pa Duang 4	<b>MSM</b>	Apwint	Experienced	Not specified	Not specified
Kyauk Pa Duang 5	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
	<b>Total</b>		<b>14</b>	<b>3</b>	<b>11</b>

Note: Not Specified means that the respondent did not explicitly state or discuss personal experiences with the listed forms of torture, abuse, arbitrary imprisonment, or poor conditions of imprisonment.

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protection of gay and transgender individuals, and their committees have notably not made recommendations for the rights protections of gay and transgender persons.

Furthermore, the power of these treaties is somewhat limited, as gay and transgender individuals in Myanmar, if even aware of the protections provided, have limited avenues for redress in the case of protection violations. Protection in practice for gay and transgender people under CEDAW and CRC is untested, and the potential protection offered by these two treaties is unclear at this point.

Additionally, as discussed in Part One, The Impact of Domestic Laws, domestic law in Myanmar theoretically offers equal protection in a variety of areas, including in the eyes of the law, employment, education, and health care; however, the vague wording of numerous penal code and police act statutes, along with the omnipresent Myanmar Penal Code Section 377, means that in practice there is really no protection for gay and transgender individuals. Myanmar Penal Code Section 377, the Rangoon Police Act 1899 Section 30 (d), and 1945 Police Act Section 35, and sections of the Criminal Procedure Code conflict with every single equal protection law currently in existence in Myanmar.

Fear of prosecution under these laws and social stigma towards gay and transgender people are also factors which may stop an individual from pursuing the protections theoretically afforded to them in law. Low knowledge of the law and rights protections amongst the general public, in addition to the weak rule of law that currently exists in Myanmar means that gay and transgender people have no real protection of their rights. Ultimately, members of the LGBT community who experience human rights abuses at the hands of police or other law enforcement officials have very limited social and legal recourse and their abusers face neither social condemnation, nor legal punishment for their actions.

### 2.5.2 Ill Treatment By Law Enforcement Agents

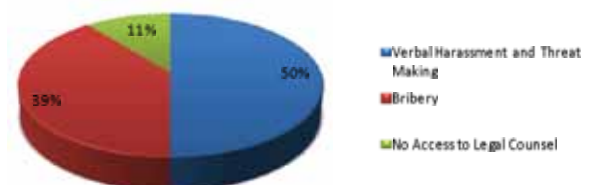
Verbal harassment and threat-making by the police was a common experience for over 50% of our respondents

(14 of 25). Several respondents experienced verbal harassment and were threatened by police both in public and in detention. Threats of additional violence were also used as a method of coercion by police to elicit bribes and confessions for crimes that were not committed by transgender or gay respondents. Four respondents, including Aung Aung and Min Min, and two others, experienced a specific type of verbal harassment, wherein police told them to “act like a man,” and in the case of Min Min, was forced to shout “I am a man.” All four respondents had visible signs of being transgender and self-identified as *apwint*. Threats of additional violence or longer prison sentences were also noted in two cases, resulting in respondents confessing to a crime they did not commit. Respondent number five from Mandalay discussed the verbal harassment has experienced by police when in public he attended a community concert and was ridiculed by the police officers there. The majority of respondents in this study expressed fear when contemplating an encounter with law enforcement, and most respondents actively avoid any form of interaction with police. Respondent number one from Yangon said,

**“I am afraid of them. I regret being gay whenever I meet police officers, and I do not want to encounter them in any economic or social manner.”**

Some respondents are going so far as to deny their gender identity publically while still self-identifying as *apwint*, by dressing as heterosexual males, staying in their homes at night, and not socializing with members of the LGBT community to avoid encountering police in any manner.

Ill Treatment by Law Enforcement Agents



My past experiences and constant discrimination have forced me to change my behavior and appearance. I now assume the mannerisms of and dress like a heterosexual man when I am in public.

-- Respondent Number One from Monywa.

Another important finding was in the relationship between the use of slang language and harassment by police. The use of unique slang language originally developed for self-protection by the *apwint* and *apone* community to limit outsider understanding of personal conversations between LGBT individuals, and often used to warn against the presence of police, was frequently cited as an impetus for verbal harassment and further abuse by the police. In Mandalay, respondent number two was harassed in the past when ze used slang language, and ze was kicked by not only police officers, but by firemen and other officials. Min Min from Kyauk Pa Daung has also experienced harassment for using slang language. Ze has been scolded and verbally abused by police officers and other government officials for using slang language. Min Min believes the police will not harass hir if they receive bribes, but if they do not, they are abusive.

The lower level officials always ridicule LGBT persons which makes me afraid even though I have done nothing wrong.

-- Respondent Number Five from Mandalay

Those who are visibly transgender are at higher risk for verbal and physical harassment by police, because their SOGI is visually recognizable by police and the public. One respondent believes that police officers are always arresting gay and transgender individuals under false charges in order to fill up their annual case quotas. In this study, threatening actions, words, and verbal abuse that induce shame and embarrassment were found to be common techniques employed by police. Respondent number two from Mawlamyine shared,

**I have heard of police intimidating LGBT individuals by threatening them with handcuffs, and pulling a gun on them. I also know that the police sometimes ask their victims to sing and dance in order to avoid arrest.**

Persistent fear of police was voiced by almost all respondents in this study, in addition to the feeling that police disproportionately targeted and singled out gay and transgender individuals for harassment and bribes.

### Bribery and Fines

Over a third of respondents interviewed in this study (11 of 25) have directly paid bribes to police officers in order to avoid detention or imprisonment, or to secure their release from police detention. These bribes were separate from instances of paying fines for citations for breaking vague laws such as Rangoon Police Act Section 30 (d), and the 1945 Police Act Section 35. Often, excessive bribes are levied on gay and transgender individuals, as was the case with respondent number four from Mandalay: **"I faced multiple instances of bribery to secure my release from police detention, and I have paid the police 100,000 kyat<sup>84</sup> in bribes"**. Earning only 50,000 kyat a month, respondent number four from Mandalay had to borrow money from friends in order to secure hir release from police detention and avoid further harassment and abuse by police.

Many respondents feel that gay and transgender individuals, especially those easily identifiable as such, are targeted to pay bribes for fear of additional harassment and abuse. This was the case with Min Min: ze was forced to pay bribes to the police in order to avoid court and further abuse. Additionally, in order to avoid being identified to their family, friends, and community as gay or transgender, gay and transgender individuals who are not visually identifiable are common targets of bribery and extortion.<sup>85</sup>

Police will threaten to "out" a person as gay or transgender and use the knowledge of a person's SOGI to extract a bribe from an individual who is fearful of being known to their family and community as gay or transgender. Social

<sup>84</sup> Approximately USD 112

<sup>85</sup> interview with legal resource persons (names withheld for personal safety reasons)



## Torture by Law Enforcement Agents

Case studies	Sexual Orientation	Gender Orientation	Poor Conditions of Imprisonment	Physical Abuse	Sexual Abuse
Yangon 1	<b>MSM</b>	Apwint	Experienced	Experienced	Experienced
Yangon 2	<b>MSM</b>	Apwint	Experienced	Experienced	Experienced
Yangon 3	<b>MSM</b>	Apwint	Experienced	Experienced	Experienced
Yangon 4	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Yangon 5	<b>MSM</b>	Apwint	Not specified	Experienced	Not specified
Monywar 1	<b>MSM</b>	Apwint	Not specified	Experienced	Experienced
Monywar 2	<b>MSM</b>	Apwint	Not specified	Experienced	Not specified
Monywar 3	<b>Bisexual/MSM</b>	Apone	Experienced	Experienced	Not specified
Monywar 4	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Monywar 5	<b>MSM</b>	Apwint	Not specified	Experienced	Experienced
Mandalay 1	<b>MSM</b>	Apone	Experienced	Experienced	Experienced
Mandalay 2	<b>MSM</b>	Apwint	Not specified	Experienced	Not specified
Mandalay 3	<b>MSM</b>	Apwint	Not specified	Experienced	Experienced
Mandalay 4	<b>MSM</b>	Apwint	Not specified	Experienced	Experienced

Note: Not Specified means that the respondent did not explicitly state or discuss personal experiences with the listed forms of torture, abuse, arbitrary imprisonment, or poor conditions of imprisonment.

## Torture by Law Enforcement Agents (cont'd)

Case studies	Sexual Orientation	Gender Orientation	Poor Conditions of Imprisonment	Physical Abuse	Sexual Abuse
Mandalay 5	<b>MSM</b>	Apwint	Not specified	Experienced	Experienced
Mawlamyine 1	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mawlamyine 2	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mawlamyine 3	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Mawlamyine 4	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced
Mawlamyine 5	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced
Kyauk Pa Daung 1	<b>MSM</b>	Apwint	Not specified	Experienced	Not specified
Kyauk Pa Daung 2	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
Kyauk Pa Duang 3	<b>MSM</b>	Apwint	Not specified	Not specified	Experienced
Kyauk Pa Duang 4	<b>MSM</b>	Apwint	Experienced	Not specified	Experienced
Kyauk Pa Duang 5	<b>MSM</b>	Apwint	Not specified	Not specified	Not specified
	<b>Total</b>		<b>6</b>	<b>14</b>	<b>13</b>

Note: Not Specified means that the respondent did not explicitly state or discuss personal experiences with the listed forms of torture, abuse, arbitrary imprisonment, or poor conditions of imprisonment.



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stigma is so strong against LGBT that paying an exorbitant fine is preferable to being labeled as gay or transgender. Respondent number five from Mawlamyine observes that police officers enjoy abusing gay and transgender people because they can easily extort money from them.

The third respondent from Kyauk Pa Daung thinks the police will not harass hir if ze can provide them with enough bribe money. If not, they will harass and intimidate hir more. Bribery following severe physical and sexual abuse was a common pattern in this report. Typically, once respondents were able to provide bribes, they were released from police custody, ultimately ending the verbal, physical, and sexual abuse or preventing the abuse from occurring in the first place.

**I fear that if I do not provide the police with a bribe, I will be assaulted and raped again.**

-- Respondent One from Monywa

### 2.5.3 Torture by Law Enforcement Agents

Over half of the respondents in this study (14 of 25) experienced some form of physical assault, abuse, or torture by police or other law enforcement officials. Whether encountering police in public, in detention, or in prison, respondents in this study shared common experiences of severe physical assault, abuse, and torture, often in conjunction with verbal and sexual abuse. Both Aung Aung and Zaw shared explicit instances of physical abuse from police.

Aung Aung was beaten and tortured while being questioned regarding another crime. Gay and transgender individuals are vulnerable in relation to other criminal cases, and there have been reports of arbitrary arrests and torture when police pursue criminal cases where the perpetrator is believed to be from the LGBT community.<sup>86</sup> Respondent number one from Kyauk Pa Daung was similarly tortured by police in connection with a murder committed by an associate of hers:

<sup>86</sup> Interview with legal resource persons (names withheld for personal safety reasons)

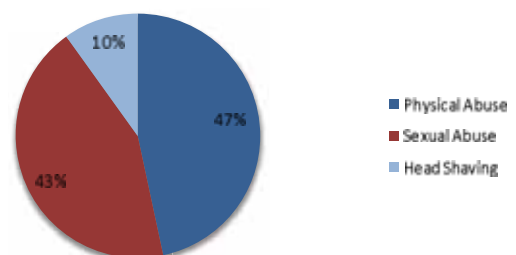
**I was violently interrogated, the police officers beating and berating me in order to extract information from me. Eventually, they released me after they realized I was innocent.**

When discussing perceptions of the gay and transgender community by police and by society, many respondents felt that individuals perceived them to be thieves and criminals. This perception may also lead to unjust persecution of gay and transgender individuals by police when investigating other crimes.

Transgender individuals in police detention and prison are also significantly more vulnerable to physical and sexual violence by police, prison guards, police and prison administrators, and from other prisoners. Frequently, in detention situations, there is a hierarchy, and gay and transgender individuals inhabit the lowest tier of this hierarchy, experiencing double and triple discrimination.<sup>87</sup>

Zaw was physically abused while awaiting trial in police detention. Police officers used a wooden stick on him after they forced him to strip. They would hit his bare skin. Respondent number two from Yangon also experienced severe physical trauma while in police custody. Possession of condoms led to arrest, and while trying to explain where the condoms came from, the respondent and hir friend were physically assaulted.

#### Torture by Law Enforcement Agents



<sup>87</sup> Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights\*



I was arrested by police officers with a friend while coming back from my community's pagoda [temple]. We were buying betel to chew and two police officers came on motorcycles and took us to the police station. The officers told us we were arrested because there were condoms found in our bags. I explained that the condoms were not for sex and we took them from the health care center, but the officers did not listen to me and physically assaulted us.

-- Respondent Number Two from Yangon

Respondent number five from Yangon also experienced physical assault when ze was being released from police detention,

**I was arrested by the police under the 1899 Rangoon Police Act Section 30(D) while I was talking with and kissing my boyfriend. I had to pay a bribe to the police so I could go free and my parent were told that I am transgender and I was hit on the face in front of them. My friend was also struck by police officers and hir possessions were taken. I feel dehumanized and psychologically traumatized from this event.**

Physical abuse and assault are usually accompanied by other forms of degrading and inhumane treatment. Respondent number five from Yangon was beaten and hir sexual identity was publically acknowledged in front of hir parents as a way of shaming and embarrassing hir. Often victims of police abuse are ashamed of what has happened to them and do not report or seek out justice from the perpetrators.

Last year, I was followed by three police officers while walking beside the railway. I was afraid and started to run away from them towards my house. The police officers caught up with me, struck me on the head and back, and forced me to do sit-ups. Afterwards, one of the officers ordered me to follow him, but I ran away. They followed me on their motorbikes to my family's house. My family is distraught by this incident, and now I avoid the police as much as I can.

-- Respondent Number Three from Monywa

Sexual assault and abuse by police was a common experience for respondents in this study. Over 50% of those interviewed stated that they experienced some form of sexual assault or abuse by police, either when they encountered them in public, in detention, or in prison. Sexual assault in this study ranged from forced stripping and the fondling of breasts to forced oral sex and anal intercourse (rape). Gang rape and sexual assault by groups of police officers, prison guards, and other prisoners was also frequent in the cases of documented sexual abuse. Typically, if a respondent had experienced sexual assault, it was perpetrated by multiple individuals and happened multiple times. All three of the featured case studies in this study, Aung Aung, Zaw, and Min Min, were gang raped while in police custody or in prison. Many of the instances of sexual assault and rape were preceded by verbal and physical abuse. Fear of sexual assault was also noted by some respondents. False confessions to crimes were obtained by threatening physical and sexual assault, and one respondent from Monywa explicitly stated that ze is afraid that the police will sexually abuse hir, which suggests that sexual assault is a common form of abuse directed towards the gay and transgender community in Myanmar.

Zaw spent three months in prison, and during that time was raped and sexually assaulted repeatedly by police officers, prison administrators, and groups of prisoners.

**The officers forced me to strip and struck me on my back and buttocks. One officer forced me to perform oral sex on him, and then handcuffed me to a motorcycle and anally raped me...The officers accused me of trying to persuade men to have sex with me. I received even more egregious treatment if the officers were drunk. The officer in charge of the prison forced other prisoners to rape me, and I was forced to perform oral sex on the head of the quarter in the prison. I was also raped by other prisoners while taking a shower. There were many instances of rape by both the officers and other prisoners.**

Some of the transgender respondents who were detained were forced to deny their gender identities while standing naked before police officers.

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The police forced me to strip and to shout "I am a man."  
Then they raped me.

-- Min Min

Additionally, police often fondle, slap, squeeze, and roughly handle the breasts of respondents. Though not expressed as a reason for assault by respondents in this study, other research has found that the breasts and cheekbones of those who are transgender are targeted regions of the body. Rough squeezing, rubbing, and beatings of breasts and cheekbones is done in order to cause implants to burst, and to cause the subsequent release of toxic materials into transgender individuals' bodies.<sup>88</sup> Additionally, since hormones are widely available in Myanmar, many respondents likely developed breasts through hormone therapies, and excessive and hard squeezing, rubbing, and beating can be extremely painful. Respondent number two from Yangon experienced intentional rough handling of her breasts by police officers:

**My three *apwint* friends and I were taken to the police station. Police officers rubbed and squeezed my breasts and forced us to wear men's clothing. They constantly threatened and intimidated me. They forced me to perform oral sex.**

Other forms of physical torture are often conducted simultaneously with sexual abuse. Respondent number five from Mandalay was forced to strip and police officers struck her breasts with rubber bands and made her do sit-ups. They released her after a few hours. Another respondent, number five from Mawlamyine, found that even after she agreed to pay a bribe, she was still sexually assaulted. The police told her that she must pay 35,000 kyat<sup>89</sup> if she wanted to be released, and she agreed to pay. Subsequently, the police officer took her to the back of the station and raped her, and thereby exposed her to unprotected sex. Exposure to unprotected sex is but one result of forced sexual assault.

88 Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights\*

89 Approximately 39 USD

Many of the respondents also expressed having severe psychological trauma and depression following attacks by police and prison guards. Inherent to sexual assault is also an element of shame and self-blame, which lawyers found in working with gay and transgender individuals in Myanmar. Finally, gay and transgender individuals who are sexually assaulted may feel extremely disempowered due to social stigma from their community, and out of fear of additional abuse, they may not report an attack. Reporting of sexual abuse and assault by police is not common, nor is it common for victims of abuse to seek psychological counseling, resulting in greater trauma from their assaults.<sup>90</sup>

In Mid-2012, I was met by police officers while I was talking with my gay friends at a local meeting spot... the police officers were drunk at the time. They forced me and my friends to perform oral sex against our will. We refused and were struck on the head by one officer. My friends and I tried to run away, but the police followed us and beat us up. I bled and was knocked unconscious. One of my friends came to help us, but the three officers apprehended my friend and raped her.

-- Respondent Five from Monywa

## Head-Shaving

A particularly degrading form of physical abuse by police and prison personnel is head-shaving. One of the strongest identifying markers of a transgender individual is often the presence of long hair. In three case studies, respondents reported that their heads were shaved while in police custody or prison. Another respondent had her head shaved by her father upon the discovery of her sexual orientation and gender identity. Transgender people commonly experience trauma and shame when arrested or convicted of a crime because their hair is forcibly shaved.<sup>91</sup>

90 Interview with legal resource persons (names withheld for personal safety reasons)

91 Interview with legal resource persons (names withheld for personal safety reasons)



Two respondents from Mawlamyine were incarcerated at Mawlamyine prison, and upon arrival at the prison, their heads were shaved. Head-shaving marks transgender individuals during detention and could possibly lead to greater abuse by other prisoners or staff at a prison. Additionally, it marks as criminals those who are arbitrarily arrested and then released as innocent, regardless of whether or not they are charged with a crime. Head-shaving is physically shaming and marks an already very identifiable and vulnerable community of people. It is also a form of both physical and psychological abuse, and could be considered sexual abuse as it is aimed directly at degrading and shaming an individual's gender identity. Finally, based on observations by a researcher closely connected to the gay and transgender community in Myanmar, it should be noted that head shaving is common practice any time a transgender person is sent to prison.<sup>92</sup>

**At the police station, some of my friends' heads were shaved. I was repeatedly struck on the cheek until I bled. I was detained for seven days and forced to perform oral sex on seven police officers while in custody. I believe that the police did not like our appearance and expression of gender identity, and this is why we were arrested and abused.**

**-- Respondent Number Three from Mandalay**

### Arbitrary Detention and Imprisonment

Approximately 25% of respondents (six of 25) expressed that the conditions of their imprisonment while in police detention or prison were very poor. Some respondents shared that they were made to sleep near toilets and were segregated from other prisoners due to their sexual orientation or gender identity. Additionally, some respondents perceived that they were forced to work in prison more than other prisoners, to a discriminatory extent. Respondent number two from Yangon was imprisoned with an associate; there they were treated badly and experienced discrimination from the other senior prisoners. The prison did not call a medical doctor even if they fell ill. Another respondent, number three

from Monywa, was kept in prison for 10 days longer than his sentence for a reason not specified by or unknown to the respondent.

Three respondents also noted that both police and court officials did not give them access to a lawyer. It is unclear from this study if this is related to the respondent's SOGI or is a general human rights issue in relation to arrest and trial proceedings in Myanmar. Respondent number one from Mawlamyine was the only respondent who told the interviewer that he was given access to a lawyer. In this case study, the lawyer suggested to the respondent that he bribe the police in order to be released and avoid court. Respondent number two from Mandalay was arrested, tried in court, and sentenced to seven months in prison under the 1899 Rangoon Police Act Section 30 (d). Although respondent number two lives in Mandalay, his testimony during the interview for this study was that he was charged under a Rangoon Police Act statute. Clarity on whether or not the police record shows this discrepancy, or if police simply used any law they could find, regardless of its legal applicability in the city of Mandalay was not able to be determined.

Police arbitrarily arresting and then citing a law completely different at a later date is fully within the realm of possibility. It is also possible that the respondent is mistaken about the law, which illustrates the vulnerability of transgender and gay individuals when they are unaware of their legal protections. Regardless, for respondent number two from Mandalay, his conviction and sentencing occurred without the respondent having any access to a lawyer. The remaining 21 respondents did not mention whether or not they were given access to a lawyer; however, in interviews with lawyers and legal experts, it was noted that most LGBT individuals are typically not given access to lawyers, or may not know to ask for a lawyer due to a low level of legal and rights awareness in this population.

<sup>92</sup> Gilbert, David. Report comments for HREIB. June 2013.

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## 2.6 Behavior Changes in Transgender and Gay Men

This study has found that many male to female transgender individuals and gay men living in Myanmar live in persistent fear of abuse by police and their communities. Aware of the many laws that can be used to arrest and detain them and the lack of social support for the LGBT community, the majority of respondents in this study have indicated that at some point in their lives, they have chosen to deny their gender identity and/or sexual orientation out of fear for their own safety. Self-censorship and repression are common experiences for many respondents following abuse by their family, friends, community, and the police. By avoiding going out at night, choosing to dress as a male rather than female, and adopting masculine expressions, several respondents have also indicated that they feel they have lost their freedom.

I feel I have experienced a serious loss of freedom due to my gender identity and sexual orientation.

-- Respondent Number Two from Monywa

As expressed by Min Min and other respondents, repression of their identities, constant fear, and traumatic experiences with verbal, physical, and sexual abuse has also led to depression. Persistent fear of police and fear of existing laws has led many respondents to actually change their appearances and thus deny their true SOGI.

Respondent number one from Monywa described an environment of fear and intimidation because of his sexual orientation and gender identity:

**My family always warns me to come home before dark, to avoid being abused by the police. They implore me to change my appearance and behavior, and warn me about contracting an STI. My gay friends warned me to not wear sexy women's clothes at night. Also, I am now too afraid to meet my partner at night. My past experiences and constant discrimination has forced me to change my behavior and appearance. I now assume the mannerisms of and dress like a**

**heterosexual man when I am in public.**

Fear of walking in the streets of their home communities at night, or even sitting in front of their homes at night was another commonly shared feeling. Respondent number five from Monywa said that

**I am aware of [Rangoon Police Act] 35 (d), and am afraid to go out alone at night. My family and lover encourage me to dress like a man when I go out in public.**

Another respondent from Mawlamyine shares a similar experience regarding being fearful of going out at night, stating that he is aware of anti-LGBT related laws such as the restriction of gay and transgender individuals from going out at night. Additionally, the same respondent also shared feeling guilty, despite not committing in crimes. Through the criminalization of sexual orientation and gender identity, those who are part of the gay and transgender community become criminals in their own communities, in the minds of their family and friends, and sometimes even in their own minds.

Because of the police attitudes and the risk of social ostracization, I know my family is ashamed towards the [LGBT] community and I feel guilt even though I did not commit any crime. I do not want individuals in the community to experience the same hardships I have faced.

-- Respondent Number One from Mawlamyine

Despite living in fear of verbal, physical, and sexual abuse, and facing daily discrimination in all sectors of society and from family and friends, many of the respondents in this study also stated that although fearful, laws and society cannot change their gender identity or sexual orientation. These brave individuals continue to express themselves and love whom they choose. Respondent number two from Mandalay feels this way:

**These laws cause me to fear going out at night, and I hide every time I see a police officer. I cannot meet with my lover in public and I feel a loss of freedom. Despite the suffering, I cannot change my identity and**



### behavior to that of a heterosexual male.

Fear and discrimination will not stop the respondents from being true to themselves and to their gender identity and sexual orientations. Facing homophobia and transphobia supported by the Myanmar state and pervasive throughout society has led a whole community of individuals to live hidden lives and to suppress their true selves. Laws, social attitudes, and police that act with impunity has caused significant pain and suffering in the Myanmar LGBT community.

I have witnessed firsthand the destruction of the stigmatization and discrimination due to my gender identity from my family and those around me, and I know that the [LGBT] communities are suffering every day in Myanmar.

-- Respondent Number Three from Mawlamyine

## 2.7 Common Laws and Codes Applied to Transgender and Gay Men

Although Section 377 of the Myanmar Penal Code is the official anti-sodomy, anti-homosexuality law in Myanmar, only one respondent of the twenty-five interviewed in this study was charged under Myanmar Penal Code Section 377.<sup>93</sup> By conducting additional interviews in the Myanmar legal community, and coordinating research with a network of LGBT organizations and self-help groups working in Myanmar, only one other legal case has been found to use Myanmar Penal Code Section 377. In this case a transgender individual was arrested while sitting in front of a public toilet. was unaware of why was arrested and has no knowledge of he substance of the Myanmar Penal Code Section 377. was arrested and taken to the Police Station and tred under Myanmar Penal Code Section 377 in the District Court in Yangon. is currently

<sup>93</sup>The circumstances surrounding the charge under Section 377 of respondent number four from Yangon are not clear. Allegations of pedophilia and rape in this particular case were not documented by the researcher, however, these allegations came to light after interviews were transcribed and translated. At the time of this writing, determining if these allegations are substantiated and true has not been possible.

servng a two and a half year prison sentence.

In a number of cases, police cite Myanmar Penal Code Section 377 at the time of arrest, but the individuals are never actually charged. In some cases, individuals were arrested under Myanmar Penal Code Section 377, only to have their charges changed to another law while in police detention.<sup>94</sup> According to interviews with lawyers and legal experts, Myanmar Penal Code Section 377 is particularly used to target transgender individuals. However, there have been a number of reports of police using Myanmar Penal Code Section 377 against masculine gay men who are vulnerable to extortion since they do not want their sexual orientation revealed.<sup>95</sup> Vague wording of Myanmar Penal Code Section 377 is one of the primary reasons that it is not commonly used in formal charges. Because the term 'unnatural offences' is so broad, the police are unclear as to how to enforce it. In one case, Myanmar Penal Code Section 377 was used where a father raped his daughter. The case was later changed to incestuous rape, under the Penal Code Section 376. Government prosecutors are not sure how to file Myanmar Penal Code Section 377 cases in court and are afraid that they might not succeed in a conviction if they use Myanmar Penal Code Section 377.

It is also challenging for police to prove that an unnatural offence has taken place, since under law, witnesses are needed and sex acts commonly take place in private.<sup>96</sup> Unfortunately, the existence of Myanmar Penal Code Section 377 continues to act as state-supported homophobia and transphobia, and prevailing attitudes in society and in the police force continue to result in persecution of LGBT individuals through the application of other vaguely defined and broadly applicable laws currently in place. Discussion of these commonly applied laws can be found in Part One: The Impact of Domestic Laws.

<sup>94</sup> interview with legal resource persons (names withheld for personal safety reasons)

<sup>95</sup> interview with legal resource persons (names withheld for personal safety reasons)

<sup>96</sup>ibid

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Based on interviews in the Yangon legal community, the main law used against gay and transgender people in Yangon is Section 30 (d) of the 1899 Rangoon Police Act, which stipulates that individuals cannot be outside in the dark without reason. Oral testimony shows that this law is most commonly used in convictions, and it carries a prison sentence of up to three months.<sup>97</sup> This study also found Section 35 of the 1945 Police Act was often used to arrest, detain, and jail respondents outside of Yangon where the Rangoon Police Act 1899 Section 30 (d) has no jurisdiction. Sections 30 (d) of the Rangoon Police Act 1899 and 35 of the 1945 Police Act are essentially the same law and carry the same prison term. Due to extremely vague wording and broad formulations of these laws, gay and transgender individuals are particularly vulnerable to police abuse and arbitrary arrest, as this study has shown through direct testimony. The majority of respondents in this study are aware and afraid of the laws commonly used to arrest gay and transgender people, and are also aware of Myanmar Penal Code Section 377. Those who were not aware of the laws did however have knowledge that same-sex sexual relationships and marriage is considered illegal in Myanmar.



2013 Transgender Day of Remembrance, Yangon, Myanmar

<sup>97</sup>ibid

<sup>98</sup> For some of the media coverage see following links: <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-137-2013>; <http://www.fridae.asia/news/features/printable.php?articleid=12375>; <http://overland.org.au/2013/07/queer-burma/>; <http://www.irrawaddy.org/human-trafficking/homosexuals-allege-sexual-abuse-by-police-in-mandalay.html>; <http://www.irrawaddy.org/human-rights/gay-rights-activists-to-sue-mandalay-police-for-alleged-abuse.html>; [http://burma.irrawaddy.org/%E1%81%80\\_gay-right/2013/07/16/44467.html](http://burma.irrawaddy.org/%E1%81%80_gay-right/2013/07/16/44467.html); [http://burma.irrawaddy.org/%E1%81%80\\_discrimination/2013/07/10/44117.html](http://burma.irrawaddy.org/%E1%81%80_discrimination/2013/07/10/44117.html); <http://burmese.dvb.no/archives/41786>; <http://burmese.dvb.no/archives/41556>



## Recent Incidents of Abuse in Mandalay

During the writing of this report, on the nights of 6 and 7 July, 2013, 12 gay and transgender individuals were arrested along the southeastern areas of the Mandalay moat. They were arrested based on unfounded allegations of public disturbance and detained for several hours without charge at the Mandalay Division police station. During the period of their detention they were verbally, physically, and sexually abused and assaulted by up to 10 police officers. Before releasing the victims the police took down their personal information and forced them to sign an agreement stating they would stop dressing as women and visiting the southeast area of the moat.

The actions perpetrated by the police on these nights were in violation of the Universal Declaration of Human Rights, which states that no one shall be subjected to cruel, inhuman, or degrading treatment; that everyone has the right to recognition as a person before the law; that all are equal before the law without any discrimination; and that no one shall be subjected to arbitrary arrest or detention. It was also a violation of Articles 347, which states that the Union shall guarantee any person enjoyment of equal rights before the law and shall equally provide legal protection, and Article 353, which states that nothing shall, except in accordance with existing laws, be detrimental to the life and personal freedom of any person.

Myanmar's LGBT Rights Network strongly condemned the actions taken by police, and point to this incident as indicative of the continued discrimination, prejudice, and stigma against the LGBT community in Myanmar through a press conference and subsequent release of statements. Several national and international news organizations also reported on this story, drawing attention to the ongoing need for reform in the laws used against the LGBT community, and highlighting the need for additional protection and social acceptance in Myanmar.<sup>99</sup>

The Myanmar LGBT Rights Network has since launched a number of joint actions to follow up on the incident. Three of the victims has with assistance from lawyers and the LGBT Rights Network filed official complaints

with the Myanmar National Human Rights Commission (MNHRC), the Ministry of Home Affairs, the Head of the Police, the Rule of Law Committee, and the Assessment of Legal Affairs and Special Issues Committee. One of the cases is being taken to court on one HIV positive transgender victim who was imprisoned for seven days without access to her antiretroviral therapy. The case has so far been dismissed by the District Court and is pending in the Mandalay Division Court where a hearing has been scheduled. The Divisional Court hearing will entail review of not only the police's arbitrary imprisonment and obstruction of necessary medical treatment, but also the actions of the district level judge in refusing a fair trial and potential corruption charges. If the case is once again rejected, it will be brought to the state level court in NayPyiDaw.

The LGBT Rights Network has held meetings with Myanmar Government officials and MPs raising the issue of harassment by the police and the continued existence of discriminatory laws. Based on the suggestion of some MPs, the issue of MPC 377 will be raised alongside other outdated laws as part of a more general recommended overhaul of outdated legislation. Further, Daw Aung San Suu Kyi has recently publicly called for the repeal of MP 377.<sup>99</sup>

On one hand, the incident clearly illustrates the type of discrimination and abuse that is widespread in Myanmar anchored in deep prejudice. On the other hand, the joint actions by the LGBT Rights Network and its members indicate a growing sense of community and the reception so far of the actions taken brings hope for possible changes to attitudes.

<sup>99</sup> <http://www.pinknews.co.uk/2013/11/20/aung-san-suu-kyi-stigma-against-hiv-and-anti-gay-laws-are-costing-lives-in-burma/>



## Part Three: Analysis of Study Findings and Legal Reform and Advocacy Strategies

The countries of India, Singapore, and Nepal are all experiencing on-going legal reforms concerning LGBT rights and recognition. Each of these three countries has taken slightly different paths that have led to reform of their penal codes and policies governing same-sex relationships. In addition, each of these three countries has seen active civil society advocacy on behalf of their LGBT communities, and these movements have all taken different approaches to garner support for repealing homophobic laws. To inspire strategies for reform in Myanmar each of the three countries' paths are examined briefly below.

### 3.1 Formulations of Laws Criminalizing Same-Sex Relationships in India, Singapore, and Nepal

Section 377 was part of the Indian Penal Code introduced by the British, which was later introduced in Myanmar. Until 2009, Section 377 actively prohibited same-sex relationships across India.<sup>100</sup> At the time of writing, full repeal of Section 377 is still being actively pursued in India. In 2001, The Naz Foundation (India) Trust, an NGO based in New Delhi which works towards sensitizing communities regarding the prevalence of HIV/AIDS and other issues related to sexuality and sexual health, filed a challenge to Section 377 in the Delhi High Court.<sup>101</sup> Eight years later in 2009, the Delhi High Court ordered a reading down of Section 377 to exclude consensual sex between adults, making Section 377 a much more narrow law. Currently, this decision is being appealed in the Indian Supreme Court.<sup>102</sup> As it stands, Section 377 no longer actively prohibits same-sex relationships in India, and is no longer enforced by police. Section 377 has not however been

repealed or removed fully from Indian law. Additionally, should the Supreme Court choose not to uphold the High Court's decision, the current non-enforcement policy would be subject to change. In India, the Naz Foundation and their supporters were the impetus to legal reform and the organizational power of the involved groups was fundamental in making legal reform a success. Without the actions of civil society organizations, Indian law would very likely still retain prohibitions to homosexual sex acts and relationships.

In Singapore, Section 377 of the British Penal Code was removed in 2007 under the consideration that it was anachronistic and targeted heterosexual behaviors in addition to homosexual behaviors.<sup>103</sup> Despite the removal of Section 377, the 1938 addition to Section 377 (Section 377A) remains law in Singapore, though the provision is not actively enforced. Section 377A prohibits 'gross indecency', and reads:

*"Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years."*<sup>104</sup>

Section 377A is thus a continued criminalization of same-sex relationships.<sup>105</sup> However, there are two cases currently under consideration by Singapore's High Court regarding the legality of Section 377A. On 9 April 2013, the judge upheld Section 377A, stating that "the legislature has decided that retaining the Section without advocating the enforcement is enough to fulfill the purpose of Section 377A." Additionally, the judge rejected the argument that Singapore's Constitutional guarantee of equal protection

100 Wintemute, Robert. "Same Sex Love and the Indian Penal Code" *NUJS Law Review*, January-March 2011.

101 <http://www.nazindia.org/advocacy.htm>, accessed 9 May 2013

102 Wintemute, Robert. "Same Sex Love and the Indian Penal Code" *NUJS Law Review*, January-March 2011.

103 Weiss, Meredith L. "Diversity, rights, and rigidity in Singapore". *36 N.C.J. Int'l L. & Com. Reg.* 625 2010-2011

104 Itaborahy, Lucas Paoli "State Sponsored Homophobia" International Lesbian, Gay, Bisexual, Trans and Intersex Association, [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf). Accessed 9 May 2013.

105 Chui, Lynette J. "Saying No to Section 377 and Section 377A". (2003) *Singapore Journal of Law Studies*, pp. 209-261.



applied in this case.<sup>106</sup> A final judgment was handed down on the 3rd of October 2013 dismissing a legal challenge to Section 377A saying that the law was an issue of morality and social values, thus falling into the jurisdiction of Parliament, and if Parliament felt that public opinion on the issue had shifted, it could take steps to amend the law. Ironically, following the same ruling on 9 April 2013, a record 21,000 people attended a Pink Dot gay rally.<sup>107</sup>

In Nepal, the path towards obtaining legal rights and recognition for members of the LGBT community has been decidedly different than in India and Singapore. The Nepal Criminal Code did not inherit Section 337 of the British Penal Code. However, British common law and the Indian Penal Code have influenced the writing of Nepali law due to Nepal's colonial history and regional proximity to other states that maintain features of British common law.<sup>108</sup>

Officially, there has never been a statute in Nepali law directly criminalizing same-sex activities and relationships the way Section 377 A in Singapore does. Despite this fact, members of the LGBT community in Nepal face significant stigma and abuse by police and government officials, as

well as in society and by their families.<sup>109</sup> Article 16 of the Nepal Criminal Code forbids sodomy, and reads that

*“any person who performs, or causes (permits) to be performed, an unnatural sexual act, shall be punished with a term of imprisonment of one year or a fine of 5,000 rupees.”<sup>110</sup>*

Article 16 of the Nepal Criminal Code is generally understood to criminalize same-sex relationships in a way similar to the understanding of Section 377.<sup>111</sup> The undefined wording of “unnatural acts” shares similar wording to Myanmar, India, and Singapore’s Section 377 and 377 A of “against the order of nature.” This vague wording is open to interpretation and has no clear defining limits on how it can be applied. All three provisions (Section 377, Section 377 A, and Article 16) share a similar wording that implies same-sex sexual acts are illegal.

In Nepal advocacy at the local level played an important role in the recognition of LGBT persons as Nepali citizens. Citizenship recognition gave LGBT people equal protection under the law, which Article 16 had been denying, rendering Article 16’s prohibition of same-sex sexual acts and relationships void. Same-sex marriage is next on the agenda for Nepal’s LGBT civil society organizations, which if achieved, would make Nepal one of the most progressive countries in the region in terms of LGBT rights and protections.

### 3.2 The Relationship between Criminalization, Enforcement, and Culture

In the following the paths followed for reform in India, Singapore, and Nepal are discussed for consideration in relation to Myanmar and its reform process. Within these three countries, as well as many others with laws prohibiting same-sex relationships, there are three common and mutually reinforcing factors that make the lives of LGBT extremely difficult and changes to

<sup>106</sup> *Singapore High Court upholds criminalization of homosexuality*. Channel News Asia, 10 April 2013. Accessed 24 October 2013.

<sup>107</sup> Sarkar, Sudeshna, *Singapore keeps ban on ‘grossly indecent act between males’*. 5 October 2013. Gay Star News. Accessed 24 October 2013.

<sup>108</sup> Urschelet, Heckendorn L. “Innovation in a hybrid system: the example of Nepal”. PER / PELJ 2012(15)3

<sup>109</sup> Pant, Sunil Babu, “Social Exclusion of Sexual and Gender Minorities”, 2005, Blue Diamond Society

<sup>110</sup> Ottoson, Daniel. “State Sponsored Homophobia” (2008). Entire statute reads: Article 16 Rape of animals/sodomy “(1) No person should have sexual intercourse with four legged animals or perform, or cause to be performed, any other unnatural sexual act. (2) If a person has sexual intercourse with a cow, he shall be punished with a term of imprisonment of two years, and if a person has sexual intercourse with another four-legged animal other than a cow, he shall be punished with a term of imprisonment of six months. (3) If a woman causes a four-legged animal to perform a sexual act with her, she shall be punished with a term of imprisonment of one year or must pay a fine of 500 rupees. (4) Any person who performs, or causes (permits) to be performed, an unnatural sexual act, shall be punished with a term of imprisonment of one year or a fine of 5,000 rupees. (5) The offence shall become statute-barred in one year if no complaint is submitted.”

<sup>111</sup> *ibid*

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social attitude towards LGBT people and homophobic laws difficult to ignite and propel.<sup>112</sup> The three factors includes criminalization of same-sex relationships in law, homophobic attitudes and cultural practices, and corrupt police practices targeting same-sex oriented and transgender individuals (mis)using laws that allow wide discretionary powers for the police, but are not specifically aimed at same-sex oriented and transgender individuals.

### Codified Criminalization

With laws officially criminalizing homosexuality in place, societies are not forced to face any of the other issues surrounding equal rights for LGBT.<sup>113</sup> Social attitudes against equal rights for same-sex oriented individuals are left unchallenged as long as the state formally sanctions them, or sends an inconsistent message regarding issues surrounding sexual orientation and gender identity. Additionally, although the police often do not actively enforce laws against same-sex oriented individuals, they often still violate the rights of LGBT by arbitrarily applying laws regarding curfew, assembly, and indecent behavior. Instances of abuse were documented in Nepal, India, Singapore, and Myanmar where law enforcement agents and private citizens were neither investigated nor punished for their actions because of the underlying existence of laws prohibiting same-sex relationships often combined with homophobic social attitudes.

### Police Enforcement and Non-Enforcement

The second common factor contributing a discriminatory environment for LGBT is the police arbitrary enforcement of laws towards LGBT people. Police will target known LGBT venues, such as the gay bars and saunas in Singapore, in law enforcement stings, penalizing those they find at these venues for lesser crimes such as gross indecency, pro-same-sex speech, and assembly related to sexuality.<sup>114</sup> Similarly abusive actions by law enforcement agents

have been documented in Nepal and India. In Nepal, men who have sex with men and publically present themselves in an effeminate manner, cross dress, or are transgender, experience documented police abuse inside and outside of police stations and prisons similar to the findings on this study in Myanmar.<sup>115</sup> Social attitudes and cultural practices often result in the police not being penalized or challenged for their unsanctioned actions, and the existence of official laws such as Section 377, 377 A, and Article 16 allow police to act with impunity. This in turn leaves targeted LGBT people at a distinct disadvantage in their encounters with police.

### Culture and Society

The last common factor between these three countries and Myanmar is the cultural and social attitudes towards LGBT. Social and cultural values are generally reflected in the creation and maintenance of law. Additionally, the acts of the police (and the judiciary) may be widely supported and even encouraged by popular social attitudes. On the other hand, social values can also be legitimized by the existence of homophobic laws, and when a state supports a law that criminalize a section of the population and treats them as lower class citizens, society is invited to do the same thing.<sup>116</sup> In Singapore and India specifically, creating LGBT friendly 'space' in society is essentially prohibited. Speech supporting LGBT rights is illegal in Singapore, and the existence of laws like Section 377 deters the creation of social venues such as clubs and bars in India.<sup>117</sup> Police enforcement of lesser criminal codes creates a situation in which gathering, discussing, and acting in support of LGBT rights becomes dangerous. Laws such as Section 377 have a chilling effect on social movements.<sup>118</sup>

112 Sanders, Douglas E. "377 and the unnatural afterlife of British colonialism in Asia", *Asian Journal of Comparative Law*, 4(1), 2009. Article 4.  
113 *ibid*

114 Lim, Kean Fan. "Where Love Dares (Not) Speak Its Name". 2004. *Urban Studies*, 41 (9), pp. 1759-1788

115 Singh, Sonal et al. "Human Rights Violations amid sexual minorities in Kathmandu, Nepal". 2012. *BMC International Health and Human Rights*, 12(7).

116 <http://www.un.org/apps/news/story.asp?NewsID=40743&UYvjtXIC5o>, accessed 9 May 2013

117 Wintermute, Robert. "Same Sex Love and the Indian Penal Code" *NUJS Law Review*, January-March 2011.

118 *ibid*



Additionally, laws that support the suppression of protest and organizing can discredit movements in the public eye.<sup>119</sup> Finally, discrimination and stigmatization throughout society is tolerated because there are few if any legal protections for LGBT. Discrimination in employment, housing, and education is commonplace in all four of the countries discussed in this study. Essentially, formal criminalization of same-sex sexual acts or relations is a legitimizing source that are expressed culturally and socially as homophobic sentiment.<sup>120</sup> There is no incentive to modify social attitudes or cultural behaviors as long as provisions like Section 377, 377A and Article 16 exist, and these laws are likely to remain on the books until social pressure is exerted upon governments and judiciaries that continue to enforce them.

### 3.3 Legal Reform and Advocacy Strategies

Challenges to anti-homosexuality laws in India, Singapore, and Nepal were undertaken in both the legal and civil society spheres following different strategies. These experiences may be useful for those in Myanmar who seek legal recognition of rights and social acceptance for the LGBT community through reform. In India, Singapore, and Nepal, legal challenges and changes to the penal codes of each country would not have been possible without activism and organizing at the community level. Collaboration between organizations, public demonstrations supporting repeal, and massive outreach campaigns were essential to bringing legal challenges in Singapore and Nepal, and full repeal in India.

#### India

A legal challenge against Section 377 of the Indian Penal Code was launched in India in 2002, soon after the nationally publicized Lucknow arrests in July 2001. Police

in Lucknow arrested four staff members of organizations working in HIV/AIDS prevention for men who have sex with men. They were charged under Section 377, along with criminal conspiracy and sale of obscene materials, and jailed for 47 days. In December 2002 the Naz Foundation in India filed a Public Interest Litigation challenge to Section 377 in the Delhi High court. However, the government maintained that Section 377 was shared with many other countries and was an accurate reflection of Indian social values. Moreover, the government defended Section 377 under the need to prosecute cases of child abuse and uphold public morality.

The Naz Foundation's petition against Section 377 was dismissed on the grounds that they were not personally aggrieved by the code. This led to the formation of *Voices Against 377* in 2003. *Voices Against 377* was a coalition of NGOs representing a diverse range of social movements, including human rights, LGBT rights, child rights, women's rights, health, and education. In 2006, four more men were arrested in Lucknow under 377, accused of belonging to an international gay club. To strengthen their case against 377, *Voices Against 377* formed a united voice against 377 and brought forth testimonials from people who suffered under fear of prosecution and blackmail from police and other people taking advantage of 377's discrimination. Later in 2006, *Voices Against 377* filed a petition in support of the Naz Foundation's public interest litigation, highlighting the discrepancies between Section 377 and the Indian Constitution's guarantee of respect of privacy, liberty, and non-discrimination.<sup>121</sup>

The Delhi High Court eventually recognized this discrepancy in July 2009, judging that a more narrow interpretation of Section 377 was necessary, while directing that the section would continue to govern non-consensual penile-vaginal sex and penile non-vaginal sex involving minors. However, following the 2009 reading down of Section 377, the Law Minister, Home Minister and Health Minister assembled a panel to consider the ruling, and finally opted to let the Supreme Court judge whether the High Court's ruling will hold. The Supreme

119 Chua, Lynette J. "Pragmatic Resistance, Law, and Social Movements in Authoritarian States: The Case of Gay Collective Action in Singapore". 2012 *Law and Society Review*: 46 (4)

120 *ibid*

121 Misra, Geetanjali. *Decriminalising Homosexuality in India*, p. 23

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Court received a number of private challenges to the High Court's 2009 verdict, and final judgment is still pending. With the government choosing to remain neutral in the case, the fate of Section 377 in India lies with the Supreme Court.

Achieving the Delhi High Court's 2009 judgment required a multifaceted approach. Although it was ultimately a legal solution that brought success for the LGBT community in India, the mobilization of civil society organizations like Naz Foundation, the various members of *Voices Against 377*, and several others was a vital part of this success. While the media coverage of the Lucknow cases of 2001 and 2006 helped publicize the problems surrounding Section 377, the formation of the *Voices Against 377* coalition really solidified the advocacy movement.

Members from over 70 organizations across the four major metropolitan areas of Bangalore, New Delhi, Calcutta, and Mumbai worked together in weighing the advantages and disadvantages of different legal approaches, and in building consensus across many different groups. Moreover, over the period between its first formation and the judgment in 2009, the coalition shifted notably from focusing mainly on health risks associated with 377 to focusing on human rights. Indeed, with *Voices Against 377* representing a wide range of minority groups, the petition against Section 377 became a rallying point for other marginalized groups to openly advocate for their rights. As the case against Section 377 focused on the rights to privacy, liberty, and non-discrimination, as well as health implications, the Naz Foundation and *Voices Against 377* could include other non-LGBT movements to advocate against a broader discrimination of minorities.<sup>122</sup>

Consensus building across the country was vital in showing that the Naz Foundation did have legal standing to challenge Section 377 as a group representing a significant portion of society. Civil society organizations were essential in organizing petition drives to prove that the Naz Foundation represented a large group of

people who were harmed by Section 377.<sup>123</sup> Additionally, to keep alive the momentum against 377, the *Voices* coalition organized peaceful protests and press conferences across the country. The coalition continues to engage in activities including the Million Voices Campaign, dialogues and debates, public demonstrations, litigation, and community interventions, and support.<sup>124</sup>

Support for repeal continued to grow thanks to all members of the *Voices Against 377* coalition leveraging their local networks. Several prominent and internationally recognized members of Indian society also voiced their support for repealing 377. In 2006, a number of celebrities signed a letter supporting the challenge to Article 377. Nobel Laureate Amartya Sen and author Vikram Seth lead the petition, with Seth speaking publicly as a gay man about his objections to the law. The liberal media also began to support decriminalization. In June 2008, Delhi, Bangalore, Calcutta, Indore, and Pondicherry witnessed gay pride parades, which would eventually spread to other cities around India. After the 2009 verdict legalizing same-sex sexual acts, Pink Pages, India's first online LGBT magazine, was released and Bombay Dost, India's first gay magazine was re-launched.

One of the notable successes of the challenge to Section 377 was the coming together of organizations from across the LGBT spectrum. Groups that had not previously worked together were united and mobilized behind the repeal of Section 377 and the fight for equal rights, regardless of sexual orientation and identity. Challenging 377 brought together lesbian and women's rights groups with HIV/AIDS prevention organizations, sex workers with transgender and transsexual individuals, and members of the LGBT community across all socioeconomic levels.

124 <http://www.voicesagainst377.org>. Current organizations and individuals supporting the coalition are: Anjuman, Breakthrough, Creating Resources for Empowerment Action (CREA), Haq; Centre for Child Rights, Jagori, Nigah, Nirantar, Partners for Law in Development (PLD), Prism, Saheli, Sama; Talking About Reproductive and Sexual Health Issues (TARSHI), Gautam Bhan, Lesley Esteves, Ponni Arasu, Pramada Menon, and Sumit Baudh.

122 Misra, Geetanjali, *Decriminalising Homosexuality in India*, p. 24

123 Sexuality Policy Watch, *Sexpolitics – Reports from the Front Lines*, 2004, p. 117



Support from civil society organizations was fundamental in the reading down of Section 377 to remove homosexual relationships and behaviors. Simultaneously, uniting behind the challenge to 377 strengthened and grew LGBT organizations, partnerships, and coalitions the way no other issue could have.<sup>125</sup>

Indeed, *Voices Against 377* was among the first sustained coalitions worldwide of LGBT and non-LGBT groups working together to support sexuality rights.<sup>126</sup> The coalition showed that sexuality rights are part of a larger movement in support of all minority rights. The benefits of challenging Section 377 thus go far beyond the legal success, and the challenge has profoundly reshaped the organizational and grassroots LGBT landscape in India.<sup>\*</sup>

## Singapore

In Singapore, before 2007, there were sections 377 and 377A of the Penal Code. Whereas section 377 applied to both same-sex and opposite-sex couples who committed “carnal intercourse against the order of nature” (similar to Myanmar’s section 377), section 377A targeted only same-sex conduct between men (“gross indecency”). In 2007, the government repealed section 377. Due to increased prosecutions under Section 377 of heterosexuals for oral sex, including the highly publicized court sentencing of a former policeman to prison for having oral sex with a teenage girl in 2004, public outrage towards 377 grew. As a result of public pressure, in 2006 the Ministry of Home Affairs launched a review of 377, which eventually grew into a revision of the entire Penal Code, focusing on the status of homosexual sex. In 2007 the government repealed 377, while retaining 377A. This ended the prohibition of opposite sex oral and anal sex, while continuing to limit same-sex rights.

<sup>125</sup> Sexuality Policy Watch, *Sexpolitics – Reports from the Front Lines*, 2004, p. 119

<sup>126</sup> Misra, Geetanjali. *Decriminalising Homosexuality in India*, p. 19

\* On the day this report was sent to print, India’s High Court ruling was sadly overturned by the Supreme Court. BBC News: “India top court reinstates gay sex ban”, 11 December 2013; [www.bbc.co.uk/news/world-asia-india-25329065](http://www.bbc.co.uk/news/world-asia-india-25329065).

For section 377A, it found support among some groups in society, such as with Christian fundamentalists, who disapproved of same-sex relationships. However, in reality, the police rarely enforced the law in private and consensual situations. Some politicians publicly supported the law in 2007, but also were sympathetic to removing it. Officially, the government continues to defend the law on the basis of societal values, and Christian churches support its retention.

Most recently, in April 2013 the High Court issued judgment on a constitutional challenge raised by long-term gay couple Kenneth Chee Mun-leon and Lim Meng Suan. They argued that 377A violates Article 12 of the Constitution, which states that “all persons are equal before the law and entitled to the equal protection of the law.” However, the High Court ruled that equal protection in this situation did not apply.

Civil society movements and advocacy at the grassroots level was difficult to achieve in Singapore. The Singaporean government often would arbitrarily not grant legal status to LGBT non-governmental organizations; it placed controls on the media to limit LGBT news, banned positive images of same-sex relationships, and banned or strictly controlled public LGBT demonstrations.

One of the unique aspects of the advocacy movement in Singapore was the counter movement that also occurred at the local level. While supporters of 377A in Singapore invoked community values and prevention of moral degradation in the country, anti-377A advocates emphasized the importance of civil liberties, human rights, and increasing scientific evidence that homosexuality is inborn and not a choice. During the government’s review of 377 and 377A, activists organized forums to discuss homosexuality in Singapore and the repeal of the law. These forums grew to even include members of Parliament in the debate and gained international media attention.

The campaigns for and against the law also spread to the internet, most notably with [repeal377a.com](http://repeal377a.com) asking the Prime Minister for a repeal of the law, and [keep377a.com](http://keep377a.com) asking for it to be retained. These websites ran

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petitions that gained thousands of signatures, albeit with questionable credibility regarding the authenticity of all of the signatures. The back and forth nature of protest in Singapore helped to bring attention to both pro- and anti-377A movements.

As a result of the high level of control over pro-homosexuality gatherings and in protest of having a lack of safe venues for socializing, local activists began a Singapore-based gay 'circuit party' in 2001 which was held on Singapore's National Day. The Nation Parties grew every year, with the Nation Party in 2004 drawing over 8,000 people. The party appeared in international media, but received no local publicity. However, the Singaporean government felt that the party had gained too much attention, and it denied licenses for future Nation-style parties. After the ban, activists began planning local events and activities under the title 'IndigNation,' despite facing continued government bans.

## Nepal

Nepal's decriminalization of homosexuality took a very different path to that of India's and Singapore's. Rather than directly challenging Article 16 in a court of law, civil society organizations addressed the greater issue of equal rights by seeking recognition of LGBT as citizens under a new Nepali law. In 2001 Sunil Babu Pant founded the Blue Diamond Society (BDS), which would be the first LGBT organization in Nepal. As BDS's campaigns grew, a lawyer brought a legal challenge against the BDS, asserting that homosexuality was illegal in Nepal. Although the challenge did not go to trial, the BDS joined with other organizations to raise a case declaring that LGBT people were entitled to constitutional rights in Nepal. The case was taken up by the International Commission of Jurists, who gathered information on Western developments and international law regarding equal rights for those identifying as LGBT.

In December 2007 the court ruled the prohibition of same-sex sexual acts was in conflict with constitutionally protected human rights. It called for a committee that would include BDS's lawyer to advise the government on the future status of same-sex relationships, with the

prospect of legalizing same-sex marriage. In 2012, Nepal's Central Bureau of Statistics gave official recognition to LGBT people, allowing citizenship under an "others" category. Nepal continues to wait for the legalization of same-sex marriage.

Formed in 2001, the BDS began a series of LGBT rights campaigns by publicizing police violence against metis (transgender individuals), gaining both local and international visibility. The BDS expanded outreach work to include health promotion, psycho-social counseling, HIV/AIDS awareness campaigns, promotion of human rights and sexual health, documentation of human rights violations, legal counseling, income generation for poor LGBT, and other advocacy and media campaigns. Sunil Pant was elected to the interim legislature on the party list of the small Communist Party of Nepal (United), campaigning as a gay man and on behalf of metis. Aside from Pant's party, the Maoists and the Nepal Congress both included LGBT issues in their party platforms.



2011 Transgender Day of Remembrance for the Myanmar community living in Chiang Mai, Thailand



## On Legal and Advocacy Strategies

While India, Nepal, and Singapore have each dealt with the respective homophobic laws in unique ways, their approaches all highlight the importance of both an effective advocacy movement against the law and an appropriate legal offensive. In considering legal approaches toward repealing Section 377 in Myanmar, a collective rights approach offers one legal route toward repeal. A collective rights method is based on identifying a specific right that is protected by national or international law but not equally applied to all members of society. The social groups and individuals that are marginalized by this law; because of sexual orientation and gender identity, race, sex, religion, or other status, can then build coalitions and advocate collectively.<sup>127</sup>

This method does not require individuals to identify themselves as part of a minority group, but instead to be part of larger movement. We have already seen similar approaches find levels of success in the above examples of India, Nepal, and Singapore. This may be particularly beneficial to the Myanmar LGBT population because they can avoid abuse and harassment, as they can be protected without confirming to a 'gay' identity. Additionally, the government may be more inclined to act if it is held accountable for failing to uphold the constitution rather than accused of violating the rights of a specific group.<sup>128</sup>

Several sections in the Constitution of the Republic of the Union of Myanmar 2008 are in direct conflict with Section 377. Under a collective rights approach, these contradictions could be used as legal leverage to push for the repeal of Section 377 in a similar way to *Voices Against 377's* highlighting of the discrepancies between Section 377 and the Indian constitution's guarantee of respect of privacy, liberty, and non-discrimination. What remains certain is the need for wide social mobilization uniting groups from various parts of the Myanmar society if they are to succeed with a repeal of Section 377, hopefully as part of a wider reform of the penal and criminal codes in the country. The examples from India, Singapore and Nepal provide inspiration for possible starting points.

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127 Faucette, Judith "Human Rights in Context: The Lessons of Section 377 Challenges for Western Gay Rights Legal Reformers in the Developing World" *Journal of Gender, Race & Justice*, Washington & Lee Law School Vol 13, N.2 Winter 2012

128 *ibid*



## Part Four: Conclusions and Recommendations

This study can conclude that human rights abuses against transgender and gay males are common and widespread in Myanmar. Fear of police is invasive in the lives of transgender and gay men, as is social stigma and discrimination. In a country known for its weak rule of law and frequent rights abuses against its citizens, transgender and gay men live as second and third class citizens often with little support for their physical, mental, and economic safety. Despite some religious and cultural acceptance of *apwint* who are *nat kadaw* (spirit mediums), the lives of transgender and gay individuals are rife with fear, danger, and stigmatization. Discrimination and rights abuses are so inescapable that self-censorship, identity repression, depression, and psychological trauma are all common sufferings in the transgender and gay community.

Besides experiences of discrimination in education institutions, employment situations as well as from family, friends and the close community, many have experiences of harassment and abuse by the police. Transgender and gay men, in particular those who have visible physical attributes and mannerisms identifying them as outside of the traditional gender norms or categories, seem to be targeted for payments of fines and bribery in relation to arbitrary arrests and are threatened by the use of general provisions in the Penal Code or the Police Acts with which few are familiar.

There may be potential to increase the legal protection of transgender and gay individuals in Myanmar, especially in this time of political, legal, and economic transition. The findings of this study indicate that transgender and gay men are frequently threatened, arrested, and detained using vaguely formulated sections of the Rangoon Police Act 1899, the 1945 Police Act, and the Penal Code. One step forward would be through the repeal of Section 377 of the Penal Code to help remove the legitimacy of social stigma, discrimination in employment and education, and impunity for human rights violations, and would help move Myanmar towards recognizing gay and transgender individuals as equal citizens in both the eyes of the law and society.

A repeal would thus further add to the legal protection necessary to guarantee equal rights for all people

identifying as gay or transgender, though it should not be the primary focus when evaluating strategies for the protection of the LGBT community. More pertinent right now is documenting human rights violations against LGBT people, which along with strengthening avenues of redress, strongly defining and enforcing general human rights protections, and reviewing the outdated and repressive laws in Myanmar giving wide discretionary powers to the police, which opens up for abuse. This would increase potential legal protection for all members of the LGBT community as well as Myanmar citizens in general.

A network of LGBT support groups, rights organizations, and grassroots movements is slowly growing in Myanmar. Greater expansion of this network will increase social awareness and acceptance of the LGBT community, and could offer support for those who have faced, or are facing human rights abuses due to their sexual orientation and gender identity. Selective case studies of countries that have repealed or are currently repealing provisions similar to or the same as Myanmar Penal Code Section 377 has shown that without grassroots advocacy movements, successful legal reform challenges are more difficult to achieve. A strong and wide-ranging network of LGBT support and advocacy groups would also help to ensure the basic physical, mental, and economic needs of Myanmar's LGBT community start to be met.



A candle lit for the 2011 Transgender Day of Remembrance celebration by the Myanmar community living in Chiang Mai, Thailand.



Based on the findings of this study the following recommendations are made to the Government of Myanmar and LGBT Rights groups:

### Recommendations to the Government of Myanmar

- Repeal Section 377 of the Penal Code, which criminalize consensual same-sex sexual activities under the term “carnal intercourse against the order of nature”.
- Protect the rights to freedom of assembly, association, and expression for all persons. No one should be prevented from holding a meeting or event on the basis that it involves the discussion of sexual orientation or gender identity.
- Adopt a broad anti-discrimination and equal opportunity law that includes the establishment of an independent complaints mechanism or an expansion of the mandate of the Myanmar National Human Rights Commission.
- Include of sexual orientation and gender identity as prohibitive grounds for discrimination in Article 348 of the Myanmar Constitution (2008) in an upcoming constitutional reform process.
- Ensure investigation and prosecution of law enforcement personnel who commit human rights abuses against LGBT individuals to send clear signal that violence against and abuse of people on the basis of sexual orientation or gender identity will not be tolerated.
- Provide sensitivity and human rights training on sexual orientation and gender identity for police, prison and judicial officials at all levels to prevent future discrimination and human rights violations against LGBT people in the law and justice system.
- Promote non-discrimination and equality for all through inclusion of positive images of LGBT people and issues relating to sexual orientation and gender identity in public awareness raising and education campaigns.

- Ensure modules on human rights, non-discrimination, equality and relevant sex education are integrated in curriculum for public schools.

### Recommendations to LGBT rights groups

- Seek dialogue meetings with Members of Parliament and the Myanmar National Human Rights Commission to sensitize about sexual orientation and gender identity issues and to relay stories of abuse and discrimination.
- Continue documentation of cases of abuse, including arbitrary arrest and the misuse of power at lower levels by the local police divisions to push for judicial review and police reform.
- Provide legal advice and assistance to victims of abuse by law enforcement personnel to enable redress. Successful litigation at this level could be important in limiting the abuse of police powers and influence local police practice.
- Submit strategically selected cases to the Myanmar National Human Rights Commission.
- Advocate for a broad anti-discrimination and equal opportunity law with inclusion of a mandate for establishment of complaint mechanisms or an expansion of the current MNHRC mandate.
- Carry out strategic litigation at the Supreme Court of cases that are in breach of specific sections of the Constitution on the basis of discrimination based on sexual orientation and gender identity, such as Sections 347 (equality before the law); 348 (non-discrimination); or 357 (privacy). Successful litigation sets legal precedent and thereby becomes national law, and could effectively outlaw discrimination on the basis of sexual orientation and gender identity under Myanmar law.
- Advocate for inclusion of sexual orientation and gender identity as prohibitive grounds for discrimination in Article 348 of the Myanmar Constitution (2008) in an upcoming constitutional reform process.

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- Push for and support full implementation of the National Strategic Plan on HIV and AIDS. The Strategic Plan includes the repeal of 377 and a cross-cutting intervention on stigma and discrimination of men who have sex with men (MSM).
- Liaise with other minority groups advocating for protection laws to ensure that sexual orientation and gender is included where relevant.
- Liaise with mainstream media on balanced reporting on issues relating to LGBT people.
- Mobilize sympathetic celebrities, business and religious leaders to promote the cause of non-discrimination and equality.

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## 1.1 Questionnaire for Interviews with Individual Respondents

### Survey Form A: Victims of Human Rights Abuses

#### SECTION ONE: PERSONAL BACKGROUND (SOCIO-DEMOGRAPHIC CHARACTERISTICS)

- 1.1 In what township do you live?
- 1.2 How old are you?
- 1.3 What is your main source of income?
- 1.4 What is your average monthly income?
- 1.5 What is your religion?
- 1.6 What is your ethnicity?
- 1.7 Who do you live with (identify relationship not name – friend, partner, relative)?

#### SECTION TWO: SEXUAL ORIENTATION AND GENDER IDENTITY

- 2.1 What gender, if any, do you identify yourself as?
- 2.3 What is the preferred gender, if any, of your sexual partners?
- 2.4 Is there any word that you are comfortable with that describes your SOGI?
- 2.5 Is your family aware that you are LGBT people? If so, what has been their reaction? If not, why not?
- 2.6 Are your colleagues aware that you are LGBT people? If so, what has been their reaction? If not, why not?

#### SECTION THREE: CRIMINALIZATION AND IDENTITY

- 3.1 Do you feel that there are any official restrictions you have to follow because you are LGBT people? Give examples
- 3.2 What do you think the attitude of government is towards LGBT people? Has a government official ever addressed you using homophobic language?
- 3.3 What is the attitude of the police towards LGBT people? Prompt: Has a police officer ever addressed you using homophobic language?



- 3.4 Do you know of any laws that are used against LGBT people? If so, what are the laws? If no answer, prompt using notes in guidelines.
- 3.5 Have you ever felt afraid of the law?
- 3.6 Have you ever changed your behavior as a result of these laws?
- 3.7 What impact, if any, do these laws have on the way your family views you?
- 3.8 What impact, if any, do these laws have on your romantic relationships?
- 3.9 What impact, if any, do these laws have on the way colleagues view you?
- 3.10 What impact, if any, do these laws have on the way others view you?

#### SECTION FOUR: PUNISHMENT AND HARASSMENT BY POLICE

- 4.1 Have you ever needed to pay a bribe to police? If so, please describe the circumstances.
- 4.2 Have you ever been arrested? If so, please describe the circumstances.
- 4.3 How long were you in police custody for?
- 4.4 Were you treated differently in police custody because you are LGBT people? If so, please describe the circumstances.
- 4.5 Did the police cut your hair or change your appearance in any way? Please describe.
- 4.6 Have the police ever behaved in a way to make you afraid? If so, please describe the circumstances.
- 4.7 Have the police ever physically hurt you? If so, please describe the circumstances.
- 4.8 Have you ever been forced or pressured into any sexual act with a police officer. If so, please describe the circumstances.

#### SECTION FIVE: DEFENSE AT LAW COURTS

- 5.1 Have you been charged with a crime? If so, please describe the circumstances.
- 5.2 Have you ever appeared in court? If so, please describe the circumstances. If no, move to section six.
- 5.3 Did you have access to a lawyer?



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5.4 Do you feel like you were treated differently to others because you are LGBT people?

5.5 What was used as evidence? Was the evidence true?

5.6 What sentence did you receive? How did you feel about it?

## SECTION SIX: IMPRISONMENT

6.1 Have you ever been in prison? (If no, end the interview as per guidelines).

6.2 What prison were you in?

6.3 How long did you serve?

6.4 Was this different to your sentence?

6.5 Please describe the prison intake process (as per guidelines).

6.6 Were you in a cell with men or with other LGBT?

6.7 Please describe conditions in your cell.

6.8 Were you physically hurt by a prison official?

6.9 Were you physically hurt by another prisoner?

6.10 Have you ever been forced or pressured into any sexual act with a prison officer. If so, please describe the circumstances.

6.11 Have you ever been forced or pressured into any sexual act with another prisoner. If so, please describe the circumstances.



## 1.2 Questions for Focus Group Discussions

### Survey Form B: Focus Group Discussions

#### SECTION ONE: INTRODUCTORY QUESTIONS

- 1.1 Ask each participant to tell the group what organization they are from and where they were born.

#### SECTION TWO: CRIMINALIZATION AND IDENTITY

- 2.1 What laws do you know that are used against LGBT people?
- 2.2 What are the effects of these laws?
- 2.3 What is the attitude of government towards LGBT people?

#### SECTION THREE: POLICE

- 3.1 What are the key risks gay and transgender people face in relation to the police?
- 3.2 How many people do you know who have been arrested because of their sexual orientation and gender identity? Under what circumstances?
- 3.3 How many people do you know who have had to pay a bribe to the police because of their sexual orientation and gender identity?

#### SECTION FOUR: COURTS

- 4.1 How many people do you know who have appeared in court because of their sexual orientation and gender identity? What are the usual circumstances?
- 4.2 Do you feel that these people got a fair trial?
- 4.3 Do you think there is any discrimination in the judicial system against LGBT people?

#### SECTION FIVE: IMPRISONMENT

- 5.1 How many people do you know who have been imprisoned because of their sexual orientation and gender identity? What was the length of sentencing?
- 5.2 What are the main risks LGBT people face in prison?

#### SECTION SIX: CIVIL SOCIETY

- 6.1 Are there any restrictions on SHGs and CBOs working on sexual orientation and gender identity?

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## 1.3 Guidelines for Interviewers

### Make a good impression

Do your best to make the respondent feel at ease from the start. Identify yourself; explain about the work of HREIB and research.

### Obtain respondent's consent before interview

You must obtain a respondent's informed consent for participation in the survey before you begin an interview. Special statements will be presented at the beginning of the questionnaire. The statements explain the purpose of the survey. They assure that participation in the survey is completely voluntary and they have their right to refuse to answer any questions or stop the interview at any point. It also outlines how data will be stored, used and that confidentiality will be maintained at all times. Be sure to read the informed consent statement exactly as it is written before asking a respondent to consent to participate in an interview.

Before beginning the focus group, read out the consent form to each respondent in private. Ensure that they give their consent and if they wish to withdraw their participation, they are free to do so at any time. Begin the focus group by introducing yourself and explaining again the purpose of the research. Tell the group that they can refuse to answer any question and that they do not need to give personal information unless they wish to. The objective of the focus group discussion is to explore human rights issues at the community level. If respondent want to give examples of any incidents they are familiar with, they should do so without using names or identifying individuals.

## Case Studies

### Yangon

#### Case I – Yangon

Case I is a 35-year old Buddhist born in Myanmar. Ze lives alone in San Chuang Township, Yangon. Ze works as beautician with an income of approximately 15,000 kyats <sup>129</sup> per month. Ze is the youngest of a poor family, who does not discuss hir sexuality with hir because ze is the youngest. Ze identifies as an apwint [MSM, female appearance]. Hir family, classmates, teachers and other members of the community know ze is apwint.

Ze has been a victim of discrimination from early childhood. In school, ze would put thanaka, a natural sun block made from ground bark and worn predominantly by women, on hir face. A teacher kicked hir out of class and told hir "I don't want to see you in my class!" ze was only allowed to return to the classroom after her session was over. Ze was also forced to sit in the last chair in hir classroom. The teachers restricted hir from touching drinking water. Because of hir homosexuality and gender identity, ze was restricted to working as a cooker in the alcohol industry. Ze was also prevented from becoming a monk. Some people do not come to hir salon to get haircuts because they fear that they will become infected with an STI from the respondent even though ze is not infected with any STI.

The respondent has experienced harassment from the police for using LGBT slang language. Ze was arrested when ze first arrived to Yangon from Pakkhoku: One day, hir roommate found hir a job serving as an assistant to an older apwint, who was providing health services in the Hlaingtharyar Industrial Zone. In the stairway of the older apwint's building, three men apprehended the respondent and hir friend. They took them to the administration office. Subsequently five police officers arrested them and took them to the police station. Three electricians who came to the older apwint's house were also arrested.

Ze was kept at the police station for 10 days, and faced numerous instances of direct discrimination and abuse. Ze was forced to sleep near the toilet, and sometimes in the store room. Police pressured hir to take off hir clothes and told hir to act like a man and to change hir female appearance and expressions. The next morning, an individual came in and physically assaulted hir and hir friend, and ze was struck on the neck.

The police were allegedly investigating the murder of the older apwint, and throughout the questioning the police would strike the respondent and hir friends across the face every time they replied "I do not know anything" about the case.

The respondent and hir friend were then taken to a nearby banana plant and were forced to perform oral sex and anal sexual intercourse. They refused at first but were slapped by the police officers and forced to so. They were raped by five police officers.

The respondent perceives government organizations as viewing LGBT persons very negatively; they look down on LGBT people and suspect them of being thieves and people who transmit infectious diseases. Ze is afraid of them. Ze regrets being gay whenever ze meets police officers, and does not want to encounter them in any economic or social manner. Ze thinks the police are enemies of gays. Ze observes that LGBT persons are discriminated from other men and women; e.g. if gays are arrested, they are punished more than others.

Ze is aware of laws concerning the LGBT community such as Myanmar Penal Code Section 377 and 40(D) <sup>130</sup>, but the laws themselves do not make hir afraid. Ze knows the laws cannot change hir sexual orientation and gender identity.

<sup>129</sup> Approx USD 17 (according to official exchange rate of 890.5 MMK to 1 USD)

<sup>130</sup> Unable to find a record of a law with this number

## Case Studies

### Yangon

#### Case II – Yangon

Case II is a 22-year old Buddhist individual from Myanmar who lives alone in Ma Yang Gone Township. Ze is now attending a hair dressing course and has an income of approximately 30,000 kyats <sup>131</sup> per month. Ze is from a family that does not discuss hir sexuality with hir. Ze identifies as apwint [MSM, female appearance]. Hir family, classmates and employers know ze is apwint.

Case II has received direct discrimination from hir classmates and the people in hir community. Hir friends now avoid hir because they do not want to be associated with hir because of hir LGBT status, and the people in hir community told hir to get out from their quarter/subdivision or village. Ze has had difficulty getting a job because of hir LGBT status.

In 2011, ze was arrested and kept at the Yan Kin police station for three days. Ze was walking along Inle Lake after coming back from the Moe Kaung festival with a group of tha nge [bisexual, male appearance] and three other apwints. Police officers questioned the three tha nge and asked them if the respondent and the other apwints were their lovers, and then let them go. Ze and hir three apwint friends were taken to the police station. Police officers rubbed and squeezed hir breasts and forced them to wear men's clothing. They constantly threatened and intimidated hir. They forced hir to perform oral sex. After three days at the station, they were taken to court and sentenced to one month of imprisonment under Rangoon Police Act 1899 Section 30 (d). They were not allocated or allowed to hire a lawyer. In prison, they were treated badly and discriminated from the other senior prisoners. The prison did not call a medical doctor even if they fell ill.

The respondent perceives of government agencies as hating LGBT persons. Ze believes they are discriminated against by police officers and the community. The police do not like individuals using LGBT slang language, and they think of LGBT individuals as resources for bribes from whom they can get money easily. Ze believes that

everyone thinks of LGBT persons as thieves and regard them with suspicion.

Ze is aware of laws affecting the legal status of LGBT persons such as Myanmar Penal Code Section 377, Myanmar Penal Code Section 376, Rangoon Police Act 1899 Section 30 (d), and 1945 Police Act Section 35. These laws scare hir, and h/he has tried to hide hir LGBT identity and appearance by adopting more masculine expressions. Hir family does not treat hir differently because of these laws. Hir partners have generally also tried to help hir in any encounters with the police.

#### Case III – Yangon

see on page 31 [2.3 Featured Case Studies - Aung Aung]

<sup>131</sup> Approx. USD 34 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Yangon

#### Case IV – Yangon

Case IV is a 60-year old Buddhist, who lives with hir partner near Hlal Kuu Market. Ze works as a nat kadaw [spirit medium], with an average income of about 15,0000 Kyats <sup>132</sup> per month. Ze identifies as apwint [MSM, female appearance]. Hir family and friends know ze is apwint.

Ze has been verbally abused by people in hir community and suffers psychologically from this. Since hir childhood, hir family has pressured hir to change hir behavior and female appearance. However, recently they have begun to accept hir more because ze is earning enough money to support them.

Ze was once arrested because a man ze had slept with reported to the police that they had had sex. Ze was kept in custody for four months while awaiting trial. Ze had to pay expensive bribes during this time, but ze did not suffer any discrimination or physical abuse by the police. Ze was charged under Myanmar Penal Code Section 377 and had to pay a fine, but there was no imprisonment. Ze noted that if ze paid a bribe, ze would be freed from the law court. Afterwards ze felt shame about the case, so ze went to a monastery to live as a monk for 10 days.

The respondent perceives that government organizations neglect the LGBT community and ze has had problems with the police in the past. Ze became a nat kadaw because everyone told hir ze would not be able to get a job as an LGBT individual.

Ze has heard of Myanmar Penal Code Section 377 and 1945 Police Act Section 35 and fears being arrested and charged under these laws.

<sup>132</sup> Approx, USD 17 (according to official exchange rate of 890.5 MMK to 1 USD)

#### Case V – Yangon

Case V is a 44-year old Buddhist from Myanmar who lives with hir same sex partner in East Dagon, Yangon. Ze used to work in Malaysia as a waiter at restaurant earning 300,000 kyats <sup>133</sup> per month but ze does not have any job now. Ze identifies as apwint [MSM, female appearance]. Hir family, friends, and people in hir community know ze is apwint.

When ze was a child, hir family did not notice hir gender identity, but ze was later scolded and hit by hir family because of hir sexual orientation and gender identity and underwent psychological trauma. The people in hir community do not treat hir well because they do not want to be suspected for violating anti- LGBT laws.

Ze was arrested by the police under Myanmar Penal Code Section 30 (d) while ze was talking with and kissing hir boyfriend. Ze had to pay a bribe to the police to let hir go free, and hir parents were told that their son is transgender and ze was hit on the face in front of them. Hir friend was also struck by police officers and hir possessions were taken. Ze felt dehumanized and psychologically traumatized from this event.

The respondent believes the government officials and the police do not like LGBT people. They think all gays are HIV transmitters and useless people. Ze is aware of Myanmar Penal Code Section 377, Rangoon Police Act 1899 Section 30 (d). Hir family and friends are aware of these laws but do not treat hir differently because of them.

<sup>133</sup> Approx, USD 336 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Mandalay

#### Case I – Mandalay

see on page 30 [2.3 Featured Case Studies - Zaw]

#### Case II – Mandalay

Case II is a 25-year old Buddhist from Myanmar who lives with hir family in Mandalay. Ze works as a make-up artist and earns an income of approximately 5-6 lakh or 500,000 – 600,000 kyat <sup>134</sup> per month. Ze identifies as apwint [female appearance, MSM]. Hir family and those around hir identify hir as apwint. Now, the family accepts hir and hir gender identity. However, in the beginning hir father would criticize hir for being gay, but he has now changed his mind. Part of the reason for hir acceptance from hir family is the fact that ze is earning a large amount of money.

Ze has not been given a National Recognition Card, even though ze applied for it two years ago. Ze thinks this is because ze went to the application office accompanied by other gays. In the past, ze has used LGBT slang language and ze was kicked by not only police officers, but by firemen and other officials. The respondent is aware of anti-LGBT laws such as Myanmar Penal Code Section 377, Rangoon Police Act 1899 Section 30 (d), and 1945 Police Act Section 35. These laws cause hir to fear going out at night, and ze hides every time ze sees a police officer. Ze cannot meet with hir lover in public and ze feels a loss of freedom. Despite the suffering, ze cannot change hir identity and behavior to that of a heterosexual male.

The respondent was buying snacks at a shop when ze was struck from behind by the police. Ze uttered rude words in response accidentally, so ze offered a bribe to the police. However, they did not accept and took hir into custody. The police charged hir under Rangoon Police Act 1899 Section 30 (d), and the court sentenced hir to 7 months imprisonment without access to a lawyer. The judge and police told hir this sentence was used to fill an annual case quota. Ze stayed in Owe Pho prison. Upon hir arrival to

prison, ze was sent to an area isolated from the rest where gay prisoners stayed. Ze was forced to work at the betel nut shop and to clean rooms in the prison.

Even though hir family accepts hir now, partially because of hir large income, ze is still very afraid of the police and the anti-LGBT laws. Ze was discriminated against by the police in custody, in prison, and during the court case. Ze was not given access to a lawyer, and hir sentencing seems somewhat arbitrary. Fortunately, ze does not perceive to be discriminated against by hir community.

#### Case III – Mandalay

Case III is a 19-year old Buddhist from Myanmar who lives with hir husband in Mandalay. Ze works as a make-up artist and an offer <sup>135</sup> at night, and earns an income of about 1 lakh or 100,000 kyat <sup>136</sup> per month. Ze identifies as apwint [female appearance, MSM]. Hir family and friends are aware that ze is apwint, and they tell hir to be well-behaved and reserved.

Before ze became a make-up artist, ze was able to get a job because hir boss did not know that ze was gay. When ze was in school as a child, hir teacher allowed hir to use the female toilet to avoid any unnecessary problems with male students.

On one occasion, ze was sitting with hir friends at nighttime and they were forced to bribe the police to avoid being arrested. On another occasion, ze was at a concert with hir friends when the police sought to arrest hir. Ze tried to run away from them, but the officers caught hir, kicked hir in the chest and buttocks, and forced hir on the ground. The police harangued them with rude words and they were taken to Police Station No. 5 in handcuffs. At the police station, some of hir friends' heads were shaved. Ze was repeatedly struck on the cheek until ze bled. Ze was detained for seven days and forced to perform oral sex on seven police officers while in custody. The respondent believes that the police did not like their appearance and

134 Approx. USD 561 to 674 (according to official exchange rate of 890.5 MMK to 1 USD)

135 Male prostitute

136 Approx. USD 112 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Mandalay

expression of gender identity, and this is why they were arrested and abused.

The respondent perceives the police as anti-LGBT, and ready to verbally abuse LGBT persons with rude words for no reason. Ze knows of Myanmar Penal Code Section 376, Rangoon Police Act 1899 Section 30 (d), 1945 Police Act Section 35, and 420<sup>137</sup>. Ze is afraid for hir family if ze is caught violating any laws. Because of these laws, ze no longer works as an offer at night, only during the daytime. Ze has also heard stories of offers being murdered while working at night, so when ze does go out ze is accompanied by a friend.

### Case IV – Mandalay

Case IV is a 22-year old Buddhist who lives with hir family in Mandalay. Ze identifies as apwint [MSM, female appearance], yet expresses hirself as apone [MSM, male appearance] because hir family forbids hir to express hirself as transgender. Ze works as a social worker and earns about 1 lakh (100,000 kyat)<sup>138</sup> per month. Hir family has forbidden hir from wearing female clothing or finding lovers.

Hir peers and those around hir criticize hir LGBT identity by making jokes. Ze has faced direct discrimination in the workplace and in finding a job; ze was fired from hir previous place of employment with no fault or explanation. Currently, ze is happily working for an NGO in a workplace that accepts hir identity and expression of it.

In November 2010, the respondent was arrested under 1945 Police Act Section 35, having been caught with a lover. Hir lover was released, but the respondent was taken to the police station. The police demanded a 50,000 kyat bribe for hir release, to be paid the next day. While in custody, ze was struck on the head by the police officers and verbally abused. Ze was so traumatized that ze considered denying hirself hir apwint identity even further.

In May 2012, while having sex with a lover in the military, the respondent again encountered violence at the hands of the police. The police repeatedly struck them with a teaser on their backs and kicked them. Afterwards, they released hir lover, and forced the respondent to strip naked. The police officers then rubbed hir breasts and demanded ze sit down and stand up more than a hundred times. Ze informed the police that ze worked for an NGO, and subsequently they demanded a bribe of 50,000 kyat the next day or they would put hir in jail. Ze informed hir friends of the situation and was able to pay off the police. This trauma has led hir to try hir best to avoid all police contact.

The respondent observes that government organizations' attitudes towards LGBT individuals are "bad" and that they consider LGBT individuals to be "of a low standard." Ze observes that the police are always at the ready to arrest LGBT individuals to extract bribes and fill their annual case quotas for their departments. Ze is aware of anti-LGBT laws such as Myanmar Penal Code Section 377 and 1945 Police Act Section 35; one of hir friends was kept in jail for one month under 1945 Police Act Section 35. Because of these laws and hir and hir friends' encounters with the police, ze is afraid to go out at night and feels in danger of police violence. Also, ze is depressed, has anxiety, and suffers from exhaustion due to hir trauma.

<sup>137</sup> Unable to find a record of a law with this number

<sup>138</sup> Approx USD 112 (according to official exchange rate of 890.5 MMK to 1 USD)



## Case Studies

### Mandalay

#### Case V – Mandalay

Case V is a 27-year old Buddhist of Rakhine descent who lives with hir family in Mandalay. Ze works at an NGO and earns an income of about 80,000 kyat <sup>139</sup> per month. Ze identifies as apwint [MSM, female appearance] and hir family and friends know ze is apwint.

The respondent was arrested while ze was with hir friend, another apwint. Hir family got hir out of custody. Hir family was embarrassed and ze was ridiculed by other people in hir community.

Ze attended a community concert and was ridiculed by the police officers there. One time in 2011, ze was taken to the police station under suspicion of committing a crime without evidence. They forced hir to strip and struck hir breasts with rubber bands and made hir do sit-ups. They released hir after a few hours.

Hir family and friends largely let hir stay as ze wishes and accept hir identity. However, some in hir community are afraid to be associated with hir because they are afraid to be viewed as hir partner or lover. Ze perceives of discrimination as mainly perpetrated by middle and lower level officials rather than high level government officers. The lower level officials always ridicule LGBT persons, which makes hir afraid even though ze has done nothing wrong. Ze has observed that some police officers try to get money from LGBT people or arrest them in order to fill annual case quotas. Ze is not aware of anti-LGBT laws, but ze is afraid of unjust arrests and punishment.

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<sup>139</sup> Approx, USD 90 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Monywar

#### Case I - Monywar

Case I is a 22-year old Muslim, who lives with hir mother in the Daw Na Quarter of Monywa. Ze works as a makeup artist and earns an income of approximately 30,000 kyat per month.<sup>140</sup> Ze identifies as apwint [MSM, partial female appearance], and hir family and friends know ze is apwint.

The respondent has experienced numerous instances of direct discrimination and rape from both the police and people in the community. Hir family has told hir that "Islam Buddha" does not like LGBT people, and if ze does not change ze will go to hell. Hir classmates discriminate against hir and verbally abuse hir, and are embarrassed to be seen with hir in public. On more than one occasion, classmates have forced hir to perform oral sex, and raped hir.

This year ze has been arrested by the police when ze was at Kan Thar Yar, a local meeting spot for LGBT people in Monywa. Some officers forced hir to perform oral sex, and then stole all of the money ze had on hir. Afterwards, they struck hir from behind and they left hir. Ze fears that if ze does not provide the police with a bribe, ze will be assaulted and raped again.

The respondent believes that government organizations look down on LGBT people. The police are there to only harass and extort money from LGBT persons. Ze is afraid to use LGBT slang language. Ze is aware of laws, which are used against LGBT people, and ze has been warned to not go into dark areas with any friends and to not have same-sex sexual intercourse.

Hir past experiences and constant discrimination has forced hir to change hir behavior and appearance. Ze now assumes the mannerisms of and dresses like a heterosexual man when ze is in public.

<sup>140</sup> Approx. USD 34 (according to official exchange rate of 890.5 MMK to 1 USD)

#### Case II - Monywar

Case II is a 31-year old Buddhist who lives with hir family in Htan Taw A Lan Taing Quarter in Monywa. Ze works as a makeup artist and earns an income of approximately 50,000 kyat per month.<sup>141</sup> Ze identifies as apwint [MSM, partial female appearance] and hir family and classmates know ze is apwint.

The respondent has described an environment of fear and intimidation because of hir sexual orientation and gender identity. Hir family always warns hir to come home before dark, to avoid being abused by the police. They implore hir to change hir appearance and behavior, and warn hir about contracting an STI. Hir gay friends warned hir to not wear sexy women's clothes at night. Also, ze is now too afraid to meet hir partner at night. Hir friends tell hir to look and act like a straight man, but ze does not perceive this to be discriminatory, and believes that they are acting out of concern for hir.

Last year, the respondent was followed by three police officers while walking beside the railway. Ze was afraid and started to run away from them to hir house. The police officers caught up with hir, struck hir on the head and back, and forced hir to do sit-ups. Afterwards, one of the officers ordered hir to follow hir, but ze ran away. They followed hir on their motorbikes to hir family's house. Hir family is distraught by this incident, and ze now avoids the police as much as ze can.

Ze believes that government organizations' attitudes towards the LGBT community are unfavorable, and that they want to extort money from LGBT persons. Ze is afraid that the police will sexually abuse hir. Ze is aware of anti-LGBT laws such as Myanmar Penal Code Section 377 and 1945 Police Act Section 35, and ze is afraid of being prosecuted under them. Ze feels ze has experienced a serious loss of freedom due to hir gender identity and sexual orientation.

<sup>141</sup> Approx. USD 56 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Monywar

#### Case III - Monywar

Case III is a 21-year old Buddhist who lives with his family in the Nyaung Pin Gyii Quarter in Monywa. He works as a laborer and earns an income of about 60,000 kyat per month.<sup>142</sup> He identifies as MSM bisexual, but he expresses himself as apone [MSM, male and female appearance]. His family and some of his classmates know of his sexual orientation.

His family urges him to change and “not remain a bisexual.” Because of anti-LGBT laws such as Myanmar Penal Code Section 377, his parents forced him to marry a woman against his will. His friends encourage him to stay with his wife and to suppress his identity. Others around him ridicule and discriminate against him for dressing in both men’s and women’s clothes.

He has had to provide bribes to police in the past to avoid harassment on multiple occasions. Once at midnight, he was caught and arrested by the police while he was talking with his friends. He stayed in custody at the police station for one day, where he was beaten with a wooden stick and struck on the cheek. The court sentenced him to two months in prison, where he had to wash and iron clothes and clean the rooms. The police tortured him by beating him up, slapping his face and kicking him. He was kept in prison for 10 days longer than his sentence. The respondent believes that government organizations have a negative attitude towards LGBT people. He is most afraid of the police.

<sup>142</sup> Approx, USD 67 (according to official exchange rate of 890.5 MMK to 1 USD)

#### Case IV - Monywar

Case IV is a 20-year old Buddhist who lives with his family in Nat Lu Htaik Pan Quarter in Monywa. Ze works as a hair dresser and earns an income of about 100,000 kyat per month.<sup>143</sup> Ze identifies as apwint [MSM, partial female appearance] and his family, friends, and the close community know ze is apwint.

The respondent feels alienated from society because of his sexual orientation and gender identity. His family restricts him from socializing with gay friends frequently, and his classmates implore him to change and behave as a heterosexual man. Ze feels no one from his environment will help him if he needs it.

In early 2012, ze was going home from the Ma Ngwe Taung festival when two police officers approached him. The police were going to rape him. Ze told ze had to “clean himself first,” and then ran away.

The respondent believes that the police attitude is not favorable towards the LGBT community, and ze is aware of laws such as 1945 Police Act Section 35. The police abuse their power against LGBT people and suppress the LGBT community. Ze is scared to be alone outside at night.

<sup>143</sup> Approx, USD 112 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Monywar

#### Case V – Monywar

Case V is a 19-year old Buddhist who lives with hir family in the Aung Chan Thar Quarter in Monywa. Ze works in a grocery store and earns an income of approximately 45,000 kyat per month.<sup>144</sup>

Case V identifies as apwint [MSM, partial female appearance] and is identifiable as apwint to hir family and those around hir; e.g. ze wears make-up on hir face.

About three months ago, ze was met by police officers while ze was talking with hir gay friends at Kan Thar Yar, a local meeting spot for LGBT people. The police officers were drunk at the time. They forced hir and hir friends to perform oral sex against their will. They refused and were struck on the head by one officer. The respondent and hir friends tried to run away, but the police followed them and beat them up. The respondent bled and was knocked unconscious. One of hir friends came to help them, but the three officers apprehended hir friend and raped hir. This event was very traumatizing and ze is now afraid to go out at night, and ze has stopped wearing make-up.

Those around hir discriminate against hir and ridicule hir for hir apwint appearance. The respondent believes that government organizations have a negative attitude towards LGBT people, and that the police are the worst. Ze is aware of 1945 Police Act Section 35, and is afraid to go out alone at night. Hir family and lover encourage hir to dress like a man when ze goes out in public.

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<sup>144</sup> Approx. USD 50 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Mawlamyine

#### Case I – Mawlamyine

Case I is a 41-year old Buddhist who lives with hir family in the Shwe Pyi Aye quarter in Mawlamyine. Ze works as a volunteer in an MSM Self Help Group and earns an income of about 50,000 kyat per month.<sup>145</sup> Ze identifies as apwint [MSM, partial female appearance] but ze expresses male associated behavior. Sometimes ze dresses as a woman and dances in concerts held in other towns. Even when in traditional men's shirt and longyi, ze is identifiable as transgender.

In 1998, when ze was in hir 3rd year at Mawlamyine University, the respondent was walking with hir three friends when a police car stopped behind them. The police put them on a truck. They were taken into custody for one night in Thar Yar Aye police station and were charged with violating 1945 Police Act Section 35. The police then forced them to confess to a violation of 1945 Police Act Section 35 by threatening a longer prison sentences if they did not confess. A lawyer came and told them to give the police 15,000 kyat to avoid court, but they did not have the money, so the respondent gave the police hir necklace. This was not enough for the bribe.

In court, they were sentenced without the police notifying their parents, and were incarcerated for 15 days at Mawlamyine Prison. They were convicted under 1945 Police Act Section 35 for hiding in a dark place, and for being out in public after 1:00am. There was no evidence against them. One of the friends was released after bribing the police. Upon arrival at the prison, their heads were shaved. They were forced to clean the floor, cut grass at the golf club, and carry rice bags.

The respondent perceives government organizations and government officials as bullies who look down on the LGBT people. Ze feels ze is not treated equally or afforded equal rights, and is treated poorly. The government officials only acknowledge the hard work of "normal citizens", not LGBT

people. People mock and ridicule them. Ze feels isolated from making friends with non-MSM individuals because of discrimination and stigmatization against hir sexual orientation and gender identity.

Ze is aware of anti-LGBT related laws such as the restriction of LGBT individuals from going out at night. Because of police attitudes and the risk of social ostracization, ze knows hir family is ashamed and ze feels guilty even though ze has not committed any crime. Ze does not want individuals in the LGBT community to experience the same hardships ze has faced.

#### Case II – Mawlamyine

Case II is a Buddhist who lives with hir grandparents in the Thiri Myaing Quarter in Mawlamyine. Ze works at an NGO during the day and as an offer<sup>146</sup> at night. Ze earns an income of about 75,000 kyat per month.<sup>147</sup> Ze identifies as apwint [MSM, partial female appearance] and hir family and close friends know ze is apwint.

Four years ago, around 8:00 pm, ze was talking with hir friend in front of hir school when ze was arrested. Hir friend was able to escape, but the respondent was taken to the police station. Ze was taken into custody for one night, and then to court the next day. The police gave hir an ultimatum: either confess to committing a crime or ze would be beaten, hit, and kicked. Ze was sentenced to one month at Mawlamyine prison. When ze arrived at the prison, hir head was shaved. Ze was forced to clean rooms during hir incarceration.

The respondent's uncle used to criticize and scold hir for being apwint, but because ze can send money home to hir family, the family accepts hir. In the past, ze has also experienced restrictions at hir workplace.

Ze believes that the government's attitude toward LGBT

<sup>145</sup> Approx, USD 56 (according to official exchange rate of 890.5 MMK to 1 USD)

<sup>146</sup> Male prostitute

<sup>147</sup> Approx USD 84 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Mawlamyine

people is very negative. However, LGBT people are impressed with some MSM becoming leaders and there are MSM organizations being established in Myanmar.

The respondent is aware of anti-LGBT laws such as Myanmar Penal Code Section 377. Ze has heard of police intimidating LGBT individuals by threatening them with handcuffs, and pulling a gun on them. The police sometimes ask their victims to sing and dance in order to avoid arrest.

### Case III – Mawlamyine

Case III is a 21-year old Buddhist student who lives with hir family in Mawlamyine. Ze receives pocket money amounting to about 2000 kyat per day, and about 40,000 kyat per month.<sup>148</sup> Ze identifies as apwint [female appearance, MSM], as transgender with a female identity. However, ze feels ze must dress as a boy and assume an apone identity and behavior because ze feels ze is endangering hirself by wearing clothes typical of females. Hir family, classmates, and others around hir know ze is transgender and sexually oriented towards men.

At one point, hir parents found hir diary, which contained stories and confessions about loving a boy very much. Hir father struck hir, and shaved hir head. Hir parents questioned hir every move. They even tried to set hir up with a girl in order to change hir mind. Some of hir classmates discriminate against hir because of hir gender identity, including hir feminine dressing and mannerisms.

Although ze feels ze is restricted because of hir gender identity, ze has decided to continue to pursue hir studies and career. At hir university, the professors often verbally abuse hir and shame hir in front of hir classmates by asking intrusive and disparaging questions. Although ze is familiar with LGBT slang, ze does not employ it.

<sup>148</sup> Approx, USD 45 (according to official exchange rate of 890.5 MMK to 1 USD)

The respondent feels threatened by certain legal provisions, such as 1945 Police Act Section 35, and knows ze can be arrested even if ze sits in front of hir house at night. Ze is not familiar with explicit anti-LGBT laws; however, ze is aware that same-sex marriages and same-sex intercourse are illegal. Ze has witnessed firsthand the destruction of the stigmatization and discrimination due to hir gender identity from hir family and those around hir, and ze knows that the LGBT communities are suffering everyday in Myanmar.

### Case IV – Mawlamyine

Case IV is a 25-year old Buddhist who lives in the Myaynikone Quarter in Mawlamyine with hir family. Ze works as a hawker and earns an average income of about 80,000 kyat per month.<sup>149</sup> Ze identifies as apwint [female appearance, MSM] and is transgender with a female identity. Ze expresses hir feminine gender identity through wearing hir shirt outside hir longyi, and also puts thanaka on hir cheeks.

Hir parents have reprimanded hir for this expression of hir transgender identity, and ze is required to do more housework than hir siblings. Hir friends are restricted to the MSM community. Ze has good relationships with some people in the community, but others ostracize hir.

The respondent experiences discrimination in hir field of work. In some instances, even if ze pays extra fees to the supervisor of the market at which ze vends, ze is still restricted from conducting business because of hir transgender identity. Ze has had to bribe the police because ze wanted to sell hir goods on the night train. However, even though ze paid the appropriate fees to the supervisor of the station, the other merchants have falsely accused hir of starting trouble.

Ze was arrested by the police once, and forced to stay at the police station overnight. While ze was in custody, ze

<sup>149</sup> Approx, USD 90 (according to official exchange rate of 890.5 MMK to 1 USD)

## Case Studies

### Mawlamyine

was ridiculed and shamed in front of other prisoners, and was forced to strip in front of everyone. After ze was able to pay a bribe, ze was released. The respondent has not experienced discrimination from government officials against individuals using LGBT slang language. However, ze knows ze can get into trouble with the police at anytime. Ze is aware that many LGBT people face problems with the police due to 1945 Police Act Section 35. Despite this knowledge, ze is not afraid because ze knows if ze pays a bribe, ze will be set free.

Although hir parents are not knowledgeable about anti-LGBT laws, they warn hir about going out at night because they know it is dangerous. Ze is not aware of any anti-LGBT laws, but ze knows that LGBT individuals do not have the right to marry. Ze expressed that ze has come to terms with hir sexuality, and knows ze cannot change hir transgender identity and sexual orientation towards men. The laws cannot change who ze is.

### Case V – Mawlamyine

Case V is a 28-year old Buddhist who lives in the Zayyar Myain Quarter in Mawlamyine. Ze works as a makeup artist and earns an income of about 200,000 kyat<sup>150</sup> per month. Ze identifies as apwint [female appearance, MSM] and always dresses as a woman. People around hir know ze is apwint.

Ze does not believe that hir family has discriminated against hir, which ze attributes to hir feminine mannerisms and dressing since ze was very young. Hir friends are mainly LGBT and are accepting.

One night, during hir quarter's pagoda festival, ze was arrested by police officers. Ze and hir friends were dressed in women's clothes and were heading home from the night market at around 11:30 at night. On their way back, two police officers offered them a ride to their houses. Instead, the officers took them to the police station and

charged them for violating 1945 Police Act Section 35. The police told hir that ze must pay 35,000 kyat<sup>151</sup> if ze wanted to be released, and ze agreed to pay. Subsequently, the police officer took hir to the back of the station and raped hir, and thereby exposed hir to unprotected sex. The next day, ze was able to give them the money and ze was released.

The respondent does not feel ze is being discriminated against by those around hir due to hir gender identity. Ze observes that police officers enjoy abusing LGBT people because they can easily extort money from them. The respondent openly uses LGBT slang language but the local police do not understand the intimations, and ze has thus been able to avoid danger.

Ze is not explicitly aware of anti-LGBT laws as such, but ze is aware of arrests of LGBT persons under 1945 Police Act Section 35.

<sup>150</sup> Approx. USD 225 (according to official exchange rate of 890.5 MMK to 1 USD)

<sup>151</sup> Approx. USD 39

## Case Studies

### Kyauk Pa Duang

#### Case I – Kyauk Pa Duang

Case I is a 35-year old Buddhist who lives alone in the Aung Mingalar Quarter in Kyauk Pa Daung. Ze works as a spiritual medium (nat kadaw) and earns an income of approximately 30,000 kyat per month.<sup>152</sup> Case I identifies as apwint [MSM, partial female appearance] and hir family and close friends know ze is apwint.

Once, ze was arrested as a suspect in a homicide case. Hir casual sex partner had murdered someone, and then run away. Ze was put into custody at the police station, and was forced to sleep on a bench. Ze was violently interrogated, the police officers beating and berating hir in order to extract information from hir. Eventually, they released hir after they realized ze was innocent. Now, the police secretly follow hir all the time and they frighten hir. Ze is so scared that ze is afraid to go anywhere and to do hir work freely.

The respondent has also experienced verbal and physical abuse from family and friends. Ze has been struck by family members, and even kicked out of the house. Some of hir friends have sexually abused hir. Although ze is the eldest of hir siblings, ze receives no respect because of hir sexual orientation and gender identity. At first, hir friends tried to offer hir positive criticism regarding hir female appearance and LGBT expression, but eventually some of them just used hir for sex.

After experiencing brutality and discrimination while in police custody for the homicide case, the respondent is afraid of being arrested again. Ze is stigmatized and is now facing discrimination from hir family and friends. The discrimination is so severe that ze is no longer able to do hir job. Hir family's landlord kicked hir and hir family out of their house because of hir conviction in the homicide case. Some of hir friends have tried to cheer hir up, but others have avoided hir altogether.

<sup>152</sup> Approx. USD 33 (according to official exchange rate of 890.5 MMK to 1 USD)

Ze is aware of anti-LGBT laws: Myanmar Penal Code Section 377, 40(D)<sup>153</sup>, 1945 Police Act Section 35, and 420.<sup>154</sup> Because of the stigmatization, abuse, and discrimination from family, friends, and the police, ze now suppresses and hides hir identity and is now living alone.

#### Case II – Kyauk Pa Duang

Case II is a 27-year old Buddhist who lives with hir parents and siblings in the Damawatti Quarter in Kyauk Pa Daung. Ze is unemployed and currently searching for a job. Ze identifies as apwint [MSM, partial female appearance] and hir family, friends and community know ze is apwint.

Ze has faced difficulty finding a job because of hir identity. Once, ze had heard of a job opening through a friend. When ze interviewed for the job, the business owner rejected hir, saying that gays are not good employees and telling hir to make a living dancing and selling snacks on the road. Ze remembers the business owner yelling, "Hey, you homosexual! You don't deserve to this job! You only deserve to have a job on the street!"

Case II has suffered verbal and physical abuse from hir family. Hir sister constantly scolds hir with rude words, and hir brother has physically assaulted hir. Hir family forbids hir gay friends from visiting the house, and sometimes they lock hir in hir room. Hir friends implore hir to change and become a heterosexual man. Ze faces constant discrimination and suffering.

Ze is aware of anti-LGBT laws such as Myanmar Penal Code Section 377, 40 (D)<sup>155</sup>, 1945 Police Act Section 35, and 420<sup>156</sup>. Because of these laws, hir family does not trust hir and views hir as a bad guy. They accuse hir of going out to have sex, and have restricted hir freedom. Hir partner is not treating hir any differently. Because of the fear and

<sup>153</sup> Unable to find a record of a law with this number

<sup>154</sup> Unable to find a record of a law with this number

<sup>155</sup> Unable to find a record of a law with this number

<sup>156</sup> Unable to find a record of a law with this number



## Case Studies

### Kyauk Pa Duang

intimidation, ze now expresses hirself as apone [MSM, male appearance] even though ze identifies as an apwint. Ze is mentored by senior transgender people, who advise hir on how to avoid trouble and harassment.

#### Case III – Kyuak Pa Duang

Case III is a 37-year old Buddhist who lives alone in the Myoma Quarter in Kyauk Pa Duang. Ze works as a spiritual medium [nat ka daw] and earns an income of about 70,000 kyat <sup>157</sup> per month. Ze identifies as apwint [MSM, partial female appearance] and hir family and friends know ze is apwint. Ze believes hir family and friends are not showing any reaction to hir sexual orientation and identity because ze earns enough money to support them.

Ze was arrested for a violation under 1945 Police Act Section 35 at Amarapura Township. The police took hir into custody at the police station for one night, where they forced hir to strip and shout out “I am a man.” Ze had to pay a bribe to be released. Ze feels embarrassed about the situation whenever ze thinks about it. Ze is now afraid of the police and censors hir behavior.

The respondent thinks the police will not harass hir if ze can provide them with enough bribe money. If not, they will harass and intimidate hir more. They discriminate against individuals who use LGBT slang language.

Ze is aware of anti-LGBT laws such as Myanmar Penal Code Section 377, 40(D), and 1945 Police Act Section 35, and is in constant fear of being persecuted under these laws. Ze feels that hir family and people in society look down on hir because of hir LGBT identity and do not treat hir with respect. So, ze now hides hir identity as apwint.

<sup>157</sup> Approx. USD 79 (according to official exchange rate of 890.5 MMK to 1 USD)

#### Case IV – Kyuak Pa Duang

see on page 31 [2.3 Featured Case Studies - Min Min]

#### Case V – Kyuak Pa Duang

Case V is a 36-year old Buddhist who lives in the New Myoma Quarter in Kyauk Pa Duang. Ze is a shopkeeper and earns an income of about 30,000 kyat <sup>158</sup> per month. Ze currently lives with hir teacher. Ze identifies as apwint [MSM, female appearance] and hir family and classmates know ze is apwint. Hir family accepts hir identity because ze is able to support them financially.

While attending the Government Technical Institute, ze was stigmatized and discriminated against for hir LGBT identity. The dean of the school threatened hir. He said that if ze continued to express hirself as apwint at the Institute, ze would not be given permission to pass hir exam and would be expelled from the school.

Ze believes that police officers are always arresting LGBT individuals under false charges in order to fill their annual case quotas. Ze has heard of anti-LGBT laws such as Myanmar Penal Code Section 377, 1945 Police Act Section 35, 40(D) <sup>159</sup>, and 420 <sup>160</sup>, but ze is not afraid of these laws because ze is always on guard and cautious around the police. Hir family and friends tolerate and do not criticize hir for hir LGBT identity; however, ze feels society as a whole views LGBT individuals poorly.

<sup>158</sup> Approx. USD 33 (according to official exchange rate of 890.5 MMK to 1 USD)

<sup>159</sup> Unable to find a record of a law with this number

<sup>160</sup> Unable to find a record of a law with this number

