

**IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES
NO. 11**

**EXPLORING THE POTENTIAL
OF THE UN TREATY BODY SYSTEM
IN ADDRESSING SEXUALITY RIGHTS**

**International Women's Rights
Action Watch Asia Pacific**



IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES

NO. 11

**EXPLORING THE POTENTIAL
OF THE UN TREATY BODY SYSTEM
IN ADDRESSING SEXUALITY RIGHTS**

**International Women's Rights
Action Watch Asia Pacific**



International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific) is an independent, non-profit NGO in Special consultative status with the Economic and Social Council of the United Nations.

The IWRAP Asia Pacific Occasional Papers Series makes available emerging discussions and debates related to the organisation's areas of work. The views here reflect those of the author(s) and do not necessarily always reflect the views of the organisation.

This publication has been made possible through the generous support of the Ford Foundation, New Delhi.

IWRAP Asia Pacific Occasional Papers Series • No. 11

This paper was written by tan beng hui, former Programme Officer of IWRAP Asia Pacific. Many thanks to Dianne Otto, Maria Herminia Graterol, and Shanthi Dairiam for their insightful comments and support. Much appreciation also goes to the IWRAP Asia Pacific team for their input and persevering with this till the very end: Audrey Lee Ai Schuen, Janine Moussa (who also contributed to the section on the UN treaty body reforms) and Tulika Srivastava.

© IWRAP Asia Pacific 2007

International Women's Rights Action Watch Asia Pacific
80B Jalan Bangsar
59200 Kuala Lumpur, MALAYSIA
Tel: 60-3-2282 2255
Fax: 60-3-2283 2552
Email: iwraw-ap@iwraw-ap.org
Website: www.iwraw-ap.org

ISBN 978-983-43654-3-1

Cover, Layout & Design by: Michael Voon <amexvee@mac.com>
Printed by: TM Graphic Sdn. Bhd.

CONTENTS

	Page
I. Introduction	1
What are sexuality rights?	1
II. About UN treaties and the treaty body system	3
III. Sexuality rights and the UN treaty body system: CEDAW, CESC<small>R</small> and HRC	7
The CEDAW Committee	7
Challenges	11
CESC <small>R</small> and HRC	18
Challenges	21
IV. Conclusion and recommendations	23

I. Introduction

This paper seeks to explore the potential of the United Nations (UN) treaty body system in addressing sexuality rights, especially that related to the sexual identity/preference/orientation of women.¹ It investigates what scope the system – which represents a major global human rights standard-setting structure – offers advocates to protect and forward these rights, at the same time identifies and discusses points where caution may be necessary. In so doing, the paper hopes to serve as a tool of reflection for women's groups, on the importance of dealing with the right to sexual identity/preference/orientation. It calls on those already (or planning to be) engaged with the different treaty bodies – in particular, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) – to include this concern in their agendas, and to do so in a way that will promote an expanded understanding and recognition of sexuality rights.

The paper does not attempt to be comprehensive in its coverage of sexuality rights but rather, seeks to illustrate how it is possible to push, at minimum, for an improved understanding of sexual identity/preference/orientation as integral to human rights, through the treaty body system. Or better still, how this system can be utilised to promote these rights. Its analysis is therefore restricted to three of the seven existing treaty bodies: The CEDAW Committee, the Committee on Economic, Social and Cultural Rights (CESCR), and the Human Rights Committee (HRC). Recognising the concrete moves to reform the treaty body system, the paper also poses some questions as to what this potential change may mean for sexuality rights.

What are sexuality rights?

In general, there is a lack of clarity on what is meant by sexuality rights. Even though sexuality is an integral part of every human being, exactly what this translates to in terms of rights is mostly vague and often contested, particularly when it comes to a woman's right to determine and control her sexuality.

At the same time, it is critical to note that sexuality rights do not speak only to the rights of lesbian, gay, transsexual, bisexual and other sexually marginalised communities. While the rights of these communities are important, the notion of sexuality rights also encompasses a range of other concerns – such as “bodily

¹ This paper is adapted from a presentation previously made at the meeting “Sexuality and Human Rights in Muslim Societies in South/Southeast Asia”, Jakarta, Indonesia, 23-26 September 2004, organised by Women for Women's Human Rights (WWHR) – New Ways and the Indonesian Women's Health Foundation.

integrity, autonomy, privacy, choice”, as well as “freedom from discrimination, coercion and violence”² – which *all* persons are entitled to. Indeed, just as rights are indivisible and interrelated, sexuality rights should be understood as a spectrum of entitlements – including the right to sexual behaviour and practices, as well as the right to sexual identity and relationships – affecting all humans. Thus, regardless of her sexual identity/preference/orientation, every woman has a right to control her own sexuality, and to make decisions in this regard.

The term “sexuality rights” is preferred here over “sexual rights” to distinguish it from the existing sexual and reproductive rights discourse, which more often than not has allowed activists and advocates to conflate the two concepts and use them interchangeably. This is particularly so in many contexts, such as in Asia, where matters of sex and sexuality are deemed taboo. Yet doing so is problematic on several accounts. For example, the indiscriminate use of the terms has contributed to a lack of clarity on what constitutes sexuality rights. At best, the concept is understood within the narrow confines of sexual health or violence against women; at worst, the interchangeable use of the two terms has perpetuated the invisibilisation of sexuality rights within initiatives that are meant to do otherwise. As noted by Ali Miller, the framework of sexual and reproductive rights does not take into account “both non-procreative heterosexual practices and non-heterosexual persons and their acts – and effectively removes them from the sphere of rights protection” associated with sexual and reproductive rights.³

Notwithstanding the above, this paper focuses on rights in relation to sexual identity/preference/orientation because of the subject’s traditionally more contentious nature as opposed to aspects involving say, sexual violence or sexual health. This is especially relevant in today’s context where opponents of sexuality rights are trying to justify their latest sidelining attempts by labelling these as “new rights” which, they claim, not only “dissipate focus on genuine human rights issues,” but also, are “contrary to religious and cultural values.”⁴

² Oral intervention to the 49th Session of the Commission on the Status of Women by Dorothy Aken’Ova on behalf of the Diverse Sexualities Caucus. 10 March 2005.

³ Alice Miller (n.d.), “Sexual Rights, Conceptual Advances: Tensions in Debate”. Unpublished paper presented at the Sexual, Reproductive and Human Rights Seminar. p8. <http://www.choike.org/documentos/alice_miller.pdf>. Date accessed: 18 September 2007.

⁴ The adversarial position adopted by opponents is typified by the statement of the representative of Pakistan at the 61st Session of the Commission on Human Rights in 2005, by warning that any such attempts to raise “new rights” would add to the confrontation that already exists. See Organization of Work, Agenda Item 3, Statement by Ambassador Masood Khan, Permanent Representative, on behalf of the OIC, 14 March 2005, <http://missions.itu.int/~pakistan/2005_Statements/CHR/CHR_OIC_Item_3_Stat_14_March_2005.htm>. Date accessed: 14 August 2007.

II. About UN treaties and the treaty body system

To begin, it is useful to clarify what a treaty means, and why one may wish to engage with the UN treaty body system.

A treaty is an agreement binding two or more countries under international law. It can be entered into on a number of issues such as trade, delineation of borders, human rights, and so on. Treaties set certain standards in relation to the issues around which they are formulated. Once countries ratify a treaty, they are bound by its provisions. In other words, treaties impose obligations that are legally binding on any state that is party to them. Countries therefore voluntarily surrender part of their sovereignty and agree to submit themselves to international scrutiny once they become States parties. At the same time, in so far as it involves the subject matter of the treaty concerned, it also means that they agree to a reordering of domestic law and policy in accordance to international standards.⁵

There are literally hundreds of treaties covering issues ranging from international trade and health to human rights and the status of women.⁶ Out of this, seven human rights treaties establish monitoring mechanisms in the form of committees comprising experts in the field.⁷ These committee members are elected by States parties once every four years, and are meant to serve in their individual capacity rather than as representatives of any government. Therefore, technically, they have a level of independence. The seven treaties are CEDAW, ICESCR, ICCPR, CAT, ICERD, CRC and ICRMW.⁸ Together, their committees

⁵ For details see IWRAW Asia Pacific's *Building Capacity for Change: A training manual on the CEDAW Convention* (2007) (ISBN 978-983-43654-2-4).

⁶ For details, go to <<http://untreaty.un.org>>. Examples of treaties include the Convention on the Prevention and Punishment of the Crime of Genocide, the International Convention for the Suppression of the Traffic in Women and Children, and the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which supplements the UN Convention against Transnational Organised Crime.

⁷ An eighth treaty, the Convention on the Rights of Persons with Disabilities adopted by the UN General Assembly in December 2006. It was open for signature from 30 March 2007 and requires 20 ratifications before it can come into effect.

⁸ CEDAW (Convention on the Elimination of All Forms of Discrimination against Women); ICESCR (International Covenant on Economic, Social and Cultural Rights); ICCPR (International Covenant on Civil and Political Rights); CAT (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); ICERD (International Convention on the Elimination of All Forms of Racial Discrimination); CRC (Convention on the Rights of the Child); and ICRMW (International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

– CEDAW, CESC, HRC, CAT, CERD, CRC and CMW respectively – form the UN treaty body system.⁹

While all treaties are legally binding, the advantage of these seven treaties is the fact that they come with an official mechanism, i.e. the committee, which monitors and promotes their implementation by the State party. Under the present system, depending on the treaty provisions, each committee will meet two or three times a year to review progress reports by states that have ratified their respective conventions or covenants. A committee's set of recommendations then appears in the form of Concluding Comments or Observations. From time to time, it may also formulate General Comments or Recommendations to give greater clarity about what its treaty requires States parties to do.¹⁰ Both Concluding Comments or Observations and General Comments or Recommendations contribute to the interpretation of international standards in relation to the subject area of a particular treaty.

The above notwithstanding, it is important to note that reform of the existing treaty body system is currently being discussed, in particular reform of the treaty body reporting process and reform of the composition of treaty bodies. Although reform has been under discussion for some time, it has been given new impetus due in large part to support by the former Secretary General Kofi Annan and the Office of the United Nations High Commissioner for Human Rights (OHCHR).¹¹ As these developments will have an impact on the work of advocates who engage with the treaty body system, a brief commentary on the reform process and its potential implications is provided below.

Reform of the treaty body reporting process

As mentioned earlier, once a country ratifies a human rights covenant or convention, it voluntarily takes on the obligation to submit a report to the related

⁹ CEDAW (Committee on the Elimination of Discrimination against Women), CESC (Committee on Economic, Social and Cultural Rights), HRC (Human Rights Committee), CAT (Committee Against Torture), CERD (Committee on the Elimination of Racial Discrimination), CRC (Committee on the Rights of the Child); and CMW (Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families).

¹⁰ For example, the CEDAW Committee is currently working on the next General Recommendation which will be an authoritative interpretation of what state obligation means under the CEDAW Convention (Article 2).

¹¹ See Report of the Secretary General, "In Larger Freedom: Towards development, security and human rights for all", A/59/2005; and the Office of the United Nations High Commissioner for Human Rights, "Concept Paper on the High Commissioner's proposal for a Unified Standing Treaty Body", HRI/MC/2006/CRP.1.

treaty body on its fulfilment of the rights contained within this treaty. However, with an increasing number of treaties being introduced, and a growing number of states that are parties to these, the number of reports that states have to submit has risen as well. Reform of the reporting process therefore attempts to reduce the amount of work around reporting and to avoid duplication of information across the various reports submitted.

After much discussion, it was decided that each State party would now submit the same Common Core Document (CCD) to all the treaty bodies, and one treaty specific document (TSD) to each particular treaty body.¹² The CCD will contain general and factual information on the implementation of all or several of the treaties, which includes general information about the reporting state; the general framework for the protection and promotion of human rights; and information on non-discrimination and equality and effective remedies.¹³ The TSD will include information relating to the implementation of the specific treaty which the Committee being submitted the report is monitoring.¹⁴

Reform of the composition of the treaty bodies

In recent years also, there have been strong moves to reform the composition of the treaty bodies. The proposal forwarded by the OHCHR – in what is commonly referred to as the Concept Note¹⁵ – will create one single, unified treaty monitoring body to oversee the implementation of *all* human rights treaties (rather than the existing system which has one monitoring body per treaty).

On the whole, this proposal has been widely criticised by most of the treaty bodies, States parties and civil society alike.¹⁶ The main concern is the fear that having one common treaty body to oversee implementation of all treaties will

¹² This decision was adopted at the United Nations Annual Chairpersons and Inter-Committee Meeting held in Geneva, Switzerland in June 2006.

¹³ See Office of the United Nations High Commissioner for Human Rights, “Harmonised guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific document”, HRI/MC/2006/3.

¹⁴ *ibid.*

¹⁵ See Office of the United Nations High Commissioner for Human Rights, “Concept Paper on the High Commissioner’s proposal for a Unified Standing Treaty Body”, HRI/MC/2006/CRP.1.

¹⁶ See Note by the Secretary General, “Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights”, A/61/385. See also, “Letter dated 14 September 2006 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General”, A/61/351.

dilute the specificity of rights under the current treaty body system. For instance, rather than having one treaty body made up of 23 experts on women's rights, there will now be one body that will be focussing on a range of rights, e.g. women, migrants, persons with disabilities, etc.¹⁷

Nonetheless, introduction of the OHCHR's Concept Note has prompted discussions on other possible reforms to the composition of the treaty bodies. One idea suggests creating a common body that will oversee complaints procedures for all the human rights treaty bodies. Another idea is to leave the composition of these treaty bodies as is, and instead, focus on streamlining their working methods across the board.¹⁸ Currently no one option is being adopted, but active discussions continue.

Whether it is one centralised monitoring body or several different bodies, it could be argued that it remains difficult holding governments accountable for the implementation of treaties that they have ratified since there is no penalty for not reporting, let alone for not abiding by the provisions of a treaty or the recommendations of treaty bodies. At best, the closest thing to a "penalty" for not reporting is fear of being shamed at the international level. Clearly there are situations where states violate provisions of treaties they are party to and/or fail to adhere to their reporting obligations. It is beyond the scope of this paper to deal with measures that can help ensure the effectiveness of the treaty body system.

Suffice to say, regardless of this shortcoming, the treaty body system is still an arena that offers scope for the advancement of human rights. At minimum, Concluding Comments or Observations and General Recommendations or Comments are important tools that civil society can use to raise community awareness, forge transnational links with other human rights movements, and lobby for a state to fulfil its international human rights obligations. They can also be made legally binding if advocates challenge non-compliance in the domestic

¹⁷ See IRAW Asia Pacific's Occasional Papers Series No. 4, *Making United Nations Human Rights Treaty Bodies More Effective: A gender critique of reforms to the reporting process* (2005).

¹⁸ See, "Letter dated 14 September 2006 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General", A/61/351. See also, Statement by the Committee on the Elimination of Discrimination against Women, "Towards a harmonised and integrated human rights treaty bodies system", June 2006, 35th CEDAW Session, <http://www.un.org/womenwatch/daw/cedaw/cedaw35/statements/CEDAW%20statement%20_%20TB%20reform.pdf>. Date accessed: 24 April 2007.

courts.¹⁹ The effect of all these levels of activity may well be that the State party will take seriously its obligations under a said treaty, and move towards ensuring that this is fully implemented at the local level.

III. Sexuality Rights and the UN Treaty Body System: CEDAW, CESCR and HRC

This section looks at the position of the CEDAW Committee on sexuality rights – what it has or has not said, and what are the factors that may influence the Committee's ability to make further progress in this area. The opportunities and challenges of this treaty body are then compared to those of the HRC and CESCR.

The CEDAW Committee

The CEDAW Committee is the expert body that monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW Convention), a treaty about women's human rights. The Convention came into force in 1981 and to date, has one of the highest number of States parties (185 as at December 2006), second only to the Convention on the Rights of the Child. This suggests a consensus on what the global standards are in relation to women's rights.

The strength of the CEDAW Convention lies in its normative framework with three underlying principles: substantive equality, non-discrimination and state obligation. Based on these three principles inherent in the Convention, as well as the expansive and progressive jurisprudence developing around it, it is evident that the CEDAW framework extends to and includes issues of equality and discrimination that go far beyond the literal text of the Convention. This allows the Convention to remain relevant to changing circumstances and histories, and to be utilised in response to emerging issues. In this manner, the CEDAW Committee has been – and continues to be – able to address matters that fall under the ambit of sexuality rights.

Unfortunately this point is often missed. Hence a frequent criticism about CEDAW is how the Convention's text says nothing about lesbian rights, or the right to

¹⁹ Of course this requires a certain legal culture at the national level. For more details see IRAW Asia Pacific's *Building Capacity for Change: A training manual on the CEDAW Convention* (2007) (ISBN 978-983-43654-2-4).

sexual identity/preference/orientation. True, the Convention's text does not spell out details about this social group, or its interests, but neither does it do so for a host of other social groups or interests.²⁰ More importantly, this criticism is valid only in so far as one limits oneself to looking at specific provisions in the text for an explanation of how the convention can be utilised to respect, protect and fulfil the sexual rights of women, for example, those who are lesbians.

Instead, the definition of discrimination, as spelt out in Article 1 of the Convention, is broad enough to cover any aspect of discrimination that women face. It reads:

“discrimination against women” shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

Clearly then, it is possible to argue that the CEDAW Convention can be utilised to set standards in relation to women's sexuality rights, as long as it can be shown how they are disadvantaged and discriminated against as a result of this, e.g. how has sexuality been used to subordinate women and reinforce male superiority. For instance, how a lesbian's right to life is violated when she is subjected to death threats for not conforming to dictated heterosexual norms, or how a butch (i.e. masculine-looking) lesbian is denied the right to work in a particular occupation because she is not effeminate or “womanly” enough.²¹

²⁰ For example, the text does not specifically address VAW, and the only group singled out for particular mention are rural women (Article 14).

²¹ Human rights violations on the basis of sexual orientation and gender identity are increasingly being recognised by other UN human rights mechanisms, in particular, the work of the Special Representative of the Secretary-General on the Situation of Human Rights Defenders and numerous Special Rapporteurs. The latter include the Special Rapporteurs on Extrajudicial, Summary or Arbitrary Executions; on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; on Violence Against Women, Its Causes and Consequences; on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health; on the Promotion and Protection of the Right to Freedom of Opinion and Expression; on the Right to Education; on the Independence of Judges and Lawyers; on Sale of Children, Child Prostitution and Child Pornography; and on Adequate Housing. Among these, the work of the then Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, was considered as pioneering, having been the first among her peers in 2002 to consider practices such as the regulation of women's sexuality as a violation of human rights. She also recommended, in her final report submitted in 2003, the creation of a Special Rapporteur on Sexual Orientation. See International Commission of Jurists (2005), “International Human Rights

Moreover, as indicated earlier, a treaty body's Concluding Comments or Observations and General Recommendations or Comments are important avenues through which the body expands on standards of human rights jurisprudence in international law.

The CEDAW Committee has not been known for making explicit references to the right to sexual identity/preference/orientation in its Concluding Comments – the reasons for this will be explored later in this paper. Nevertheless, this expert body has once expressed concern over discrimination on the basis of sexual orientation and the criminalisation of sexual relations between women in its Concluding Comments to Kyrgyzstan.²² Accordingly, the Committee has called for lesbianism to be reconceptualised so that instead of being deemed a sexual offence, it should be understood as a form of sexual orientation.²³ It has also recommended that penalties for this practice be abolished to eliminate discrimination against women.²⁴ Elsewhere, the Committee has commended the passing of legislation granting asylum to those with “a well-founded fear of persecution on the basis of sexual orientation or gender, particularly in cases that involve discrimination against women”.²⁵

In addition to its Concluding Comments, the CEDAW Committee's General Recommendation 21 on Equality in Marriage and Family Relations interprets the provision in the Convention i.e. Article 16.1(a) and elaborates on a woman's right, if, when and *whom* to marry. It therefore acknowledges a woman's right to choice in relation to marriage and family matters, including matters of sexuality. It also recognises the existence of “various forms of family”, such that the “concept of the family can vary” but “whatever form it takes, and whatever the legal system,

References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity”, 61st Session of the United Nations Commission on Human Rights, March-April 2005. Unpublished document; Amnesty International, “The Human Rights of Lesbian, Gay, Bisexual and Transgender People: A primer to working with the United Nations Treaty Monitoring Bodies and the Special Procedures of the United Nations Commission on Human Rights”, IO 40/004/2005 (2005); and Obando, Ana Elena (2003), “Sexualities and Sexual Rights” in Women's Human Rights Net, WHRnet, December.

²² See Kyrgyzstan, CEDAW, A/54/38/Rev.1 part I (1999) 15 at paras. 127 and 128.

²³ See CEDAW/C/KGZ/1 p22 at para. 75: “According to the Criminal Code of the Kyrgyz Republic (Art. 130) violent actions of a sexual nature such as lesbianism and other actions of a sexual nature involving the use of violence or the threat of its use or exploitation of the victim in a defenceless state are punishable by imprisonment for three to eight years”. <<http://daccess-ods.un.org/access.nsf/Get?Open&DS=CEDAW/C/KGZ/1&Lang=E>>.

²⁴ *ibid.*

²⁵ See Sweden, CEDAW, A/56/38 part II (2001) 76 at para. 334.

religion, custom or tradition within the country, the treatment of women in the family both in the law and in private must accord with the principles of equality and justice for all people as Article 2 of the Convention requires”.²⁶ This statement leaves it open for the Committee to recognise and protect the rights of lesbian families.

The Committee has also recognised, both in its Concluding Comments and General Recommendation 25 on Temporary Special Measures, that certain groups of women may be subjected to intersectional discrimination that has the effect of compounding their barriers to equality.²⁷ This happens when, apart from the discrimination directed against them as women, they also experience multiple discrimination “based on additional grounds such as race, ethnic or religious identity, disability, age, class caste or *other factors*” (emphasis added in italics).²⁸ This understanding also leaves it open for the Committee to recommend that States parties take action to address the intersectional discrimination, and its compounded negative impact, that lesbians may experience.

Besides the above, the Committee’s engagement on sexual identity/preference/orientation is also evident in its oral dialogue with States parties. The Committee has used the dialogue with States parties during the review process to foreground non-discrimination and equality as principles for states to apply to women from sexually marginalised groups. Though not of the same standing as Concluding Comments or General Recommendations, the dialogue is still of great value as it is documented and then made available through the official Summary Records. In turn these are accessible a few months after a review session.²⁹

For example, in its review of Trinidad and Tobago, the Committee’s attention was drawn to the Equal Opportunities Act, 2000, which legislated against discrimination, except on the ground of sexual orientation.³⁰ Also, NGOs had shared through their shadow report that the Sexual Offences (Amendment) Act No. 31 of 2000 actually

²⁶ CEDAW Committee, General Recommendation 21: Equality in Marriage and Family Relations, para. 16.

²⁷ For a detailed commentary on this, see IWRAP Asia Pacific’s Occasional Papers Series No.8, *Temporary Special Measures: A key to women’s substantive equality* (2006).

²⁸ CEDAW Committee General Recommendation 25: Temporary Special Measures, para. 12.

²⁹ For more immediate access to a state dialogue, one can utilise the Press Releases, which capture highlights of the day’s review session. Go to <<http://www.un.org/womenwatch/daw/cedaw/>>.

³⁰ Amnesty International, “Briefing to the UN Committee on the Elimination of All Forms of Discrimination Against Women, 26th Session, on Trinidad and Tobago”. 7 January 2002.

provided for criminalising sexual relations between women.³¹ These two issues were raised in the dialogue with the state. The state responded that “homosexuality and lesbianism were sensitive issues,” and therefore it had decided to take the conservative approach, and not decriminalise homosexuality.³²

More recently, at the 39th Session, in its review of Brazil, Honduras, New Zealand, the Republic of Korea and Singapore, the CEDAW Committee also discussed more extensively, the issue of non-discrimination in relation to sexual orientation, raising questions about the right of homosexuals to have their union legally recognised, the right to be free from violence, and the right to non-discrimination in the workplace, in health services and general society.³³ It may be argued that these situations increase the value of the summary records and press releases of the Committee as alternative interpretative sources.

Challenges

Technically then, there is nothing to stop the CEDAW Committee from expanding the manner in which international standards can be applied to sexuality and in so doing expanding our understanding of what constitutes sexuality rights, including the right to sexual orientation. However, there are several considerations that determine the extent and ability of the Committee to do so.

Engagement of women's groups and sexuality rights advocates

In part, the dearth of references to such rights by the Committee has to do with how, for a long time, most sexuality rights advocates have not engaged with

³¹ Non-Governmental Organisations Shadow Report on the Initial, Second and Third Periodic Report of the Republic of Trinidad and Tobago on the International Convention on the Elimination of All Forms of Discrimination Against Women. Prepared by the Caribbean Association for Feminist Research and Action Trinidad and Tobago (CAFRA - Trinidad and Tobago), Trinidad and Tobago. 2002.

³² See Summary Records of the 26th Session of the CEDAW Committee (CEDAW/C/SR.547, Summary Records of the 547th Meeting of the CEDAW Committee, para. 7.

³³ See Press Releases at <<http://www.un.org/womenwatch/daw/cedaw/39sess.htm>>. For example: “Anti-discrimination committee calls for adequate enforcement to support Brazil’s landmark law against violence against women”, GA/WOM/1640, 25 July 2007; “Women’s anti-discrimination committee commends Singapore on progress, but presses it to withdraw reservations to convention, strengthen domestic legal framework”, GA/WOM/1647, 1 August 2007; “Women’s anti-discrimination committee takes up report of Honduras; child labour, working conditions in maquiladores among issues – Minister Of National Institute For Women describes systematic effort to ensure equality, non-discrimination in judiciary”, GA/WOM/1641, 26 July 2007.

CEDAW-related processes. Instead, they have approached treaty bodies such as the HRC or utilised other UN human rights mechanisms such as the Special Rapporteurs. While doing so is important, this has denied the CEDAW Committee the opportunity of hearing critical arguments that support the application of non-discrimination and equality to build an expanded understanding of sexuality rights.

As discussed earlier, the Committee has had small success in attempting to carve its jurisprudential niche in this matter. Of the several occasions where the Committee has attempted to focus on issues of sexual identity/preference/orientation in its dialogue with the States, only in one instance did this engagement translate into a definitive statement in its Concluding Comments, i.e. the previously mentioned case of Kyrgyzstan in 1999. In this case, the Committee, identified lesbianism as an issue of deep concern.

Indeed, since its early sessions, the CEDAW Committee has been open to receiving alternative information (shadow reports) from NGOs on the situation of women's rights, particularly for its review of States parties' reports.³⁴ Despite this, for various reasons – including fears of persecution, marginalisation within local women's movements, unwillingness to engage with women's groups, or a general disdain of getting involved in international processes – violations involving sexuality rights have not been adequately brought to the attention of the Committee. This was especially true in the case of experiences from South East, and to a lesser extent, South Asia.

Recently, however, a different trend seems to be emerging as evident with NGOs in countries like Turkey, Lebanon, the Philippines and India submitting such information during the review of their respective government's reports by the CEDAW Committee. For example, in 2004, Turkish women's NGOs made a case for discrimination on the basis of sexual orientation to be included as a form of prohibited discriminations under the country's Penal Code to bring it in line with the CEDAW Convention.³⁵

³⁴ IWRAP Asia Pacific runs a programme called "From Global to Local" which facilitates the participation of women's NGOs in this process as a way to improve the accountability of governments in fulfilling their obligations under CEDAW.

³⁵ Shadow NGO Report on Turkey's Fourth and Fifth Combined Periodic Report to the Committee on the Elimination of Discrimination against Women for submission to the CEDAW 32nd Session. Prepared by Women for Women's Human Rights – New Ways, and endorsed by the Women's Platform on the Turkish Penal Code. January 2005. <[http://www.iwraw-ap.org/resources/turkey_WWHR-New_Ways\(Eng\).pdf](http://www.iwraw-ap.org/resources/turkey_WWHR-New_Ways(Eng).pdf)>.

Similarly in 2007, Indian civil society groups highlighted the issue of violence against women on grounds of their sexual orientation and to overcome this, proposed that sexual orientation be included in the country's constitutional framework, and that Section 377 of the Indian Penal Code which criminalised homosexual relations be repealed.³⁶ Elsewhere, Philippine and Singaporean NGOs have also drawn the CEDAW Committee's attention to the fact that sexual and reproductive rights of lesbians were being violated and sought remedy for this.³⁷

Where it has not been possible to include the issue of sexuality rights as part of the consolidated NGO shadow report of a country, those working in this area have the option of submitting stand-alone shadow reports. This was the approach of Helem, a Lebanese NGO for the protection of lesbians, gays, bisexuals, transgenders, intersexed and queers which participated in the CEDAW review process by submitting their report "The Status of Women with Alternative Sexualities".³⁸ This drew attention to the different ways in which lesbians and bisexual women in Lebanon were discriminated against, in terms of the violence they were subjected to, their access to health care or their participation in public life.

So clearly, an organised attempt is being made to engage the interest of the Committee on this issue. Whether the strategy of raising sexuality rights will eventually lead to this subject – in particular, the right to sexual identity/preference/orientation – being taken up by the CEDAW Committee in a similar and sustained a manner as it treats other violations of women's human rights, remains to be seen. It is significant, however, that despite the efforts of NGOs described above to provide more detailed information on this issue, none of the Committee's Concluding Comments for the countries involved included recommendations for states to respect, protect or uphold a woman's right to determine her own sexuality.

³⁶ India Second NGO Shadow Report on CEDAW. Coordinated by the National Alliance of Women (NAWO). December 2006. <<http://www.iwraw-ap.org/resources/pdf/India%20FINAL%20shadow%20report%20Jan%202007.pdf>>.

³⁷ Philippines NGOs Shadow Report to the 36th Session of the Committee on the Elimination of Discrimination against Women. Prepared by Women's Legal Bureau. June 2006. <http://www.iwraw-ap.org/resources/pdf/Philippines_%20SR.pdf> and the Singaporean NGOs Shadow Report to the 39th Session of the Committee on the Elimination of Discrimination against Women. Prepared by Association of Women for Action and Research (AWARE). May 2007. <<http://www.iwraw-ap.org/resources/pdf/Singapore%20SR%20final.pdf>>.

³⁸ A copy of this document can be accessed at <<http://www.iwraw-ap.org/resources/pdf/Lebanon%5B2%5D.pdf>>.

Perhaps an explanation for this lies in the ability of Committee members to understand the relationship between sexuality rights and women's human rights, as well as their openness to taking on such matters. These will also determine what and how much they say in relation to sexuality rights. In this regard, ensuring that experts on this body remain independent and knowledgeable about the range of women's human rights concerns is of paramount importance.

Notwithstanding the above, a much greater obstacle lies in the current political climate surrounding women's human rights.

The political environment

It is well established that women's rights have been under attack for a number of years. This assault is led by the religious right comprising the Vatican and its allies (such as the US Bush administration), together with the Organisation of Islamic Countries (OIC). Under particular attack have been the outcome documents of the UN Cairo and Beijing conferences,³⁹ as well as CEDAW. As documents with strong language promoting women's human rights, these have been singled out for 'dismantling'. And as the body under whose auspices these documents have emerged, the UN too has had to bear the brunt of conservative criticisms.⁴⁰

The religious right has been very consistent in its efforts to thwart women's rights, often doing so in the name of being pro-life and pro-family. Its opposition is usually registered in relation to sexuality issues and includes matters pertaining to family planning, safe abortion, condoms for HIV/AIDS prevention, and homosexuality.

Interestingly, the right-wing combine is not limited to the Vatican, the present Bush administration and the OIC. As far as narrowing the content of rights – especially those to do with women and more so with rights related to sexuality – this combine is joined by many states, mostly from the South. These act in concert and from a "relativist" position to deny perceived Western cultural domination and claim the protection of "threatened" culture and traditions of their people to justify denying women's human rights generally, and sexuality rights in particular.

³⁹ The Cairo Conference refers to the UN International Conference on Population and Development that took place in Cairo, Egypt in 1994, while the Beijing Conference refers to the Fourth UN World Conference on Women held in Beijing, China the following year. Both meetings are considered by some as important markers in the development of sexual and reproductive rights, and women's human rights globally.

⁴⁰ For a typical example of such criticism, see "A 'Family' in Crisis at the United Nations" by Wendy McElroy <www.setetics.com/mac/articles/unfamily.htm>. Date accessed: 9 September 2004; and Robert Stacy McCain, "Feminists accused of pushing agenda at UN", *The Washington Times*, 11 August 2006.

This combine was extremely successful in limiting the language of the outcome document from the Cairo International Conference on Population and Development in 1994. Despite the intentions of activists and other advocates to include the actual term and language of “sexual rights” into this document, in the final event, the battle to attain consensus on the term “reproductive rights” proved difficult enough so the former was omitted leaving only the spirit of this intention visible in provisions related to sexual health services and, within limits, the provision of sex education.⁴¹

Similarly, they succeeded in limiting the Beijing document of 1995 as well. Not surprisingly, the most contentious sections of the Beijing Platform for Action were to do with sexuality rights, but more specifically the right to sexual orientation. Like the experience with Cairo, there was a flurry of activity around negotiations and bracketing of controversial parts of outcome document's text,⁴² with the end result that again, sexuality rights per se is not explicitly mentioned. Nevertheless, some women's rights advocates have regarded the inclusion of paragraph 96⁴³ – that defines the concept of sexuality rights – as a major achievement.⁴⁴

While the CEDAW Convention is close to universal ratification with only seven countries abstaining (as at August 2007), it continues to face many obstacles

⁴¹ Thus, while paragraphs 5.1 and 5.2 of the Cairo Programme of Action recognises the “diversity of family forms” and the need for government policies to benefit all, especially the most vulnerable, it does not expressly recognise sexual rights including “the right to diversity of sexual expression and orientation”. For a critique of the Cairo Programme of Action, see Rosalind P. Petchesky, “Reproductive and Sexual Rights: Charting the course of transnational women's NGOs”, United Nations Research Institute for Social Development, Geneva, Occasional Paper No. 8, p19. June 2000.

⁴² This refers to the practice of governments putting square brackets around particular wording(s) of the draft text of a said conference, which they cannot agree upon and that is then subjected to amendments, additions or deletions. At Beijing, for example, Paragraph 225, which dealt with grounds where discrimination was deemed unacceptable, originally included “sexual orientation”. However, this was bracketed and subsequently deleted from the text.

⁴³ Para 96 reads: “The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence”.

⁴⁴ According to Sonia Correa, “Taking into account the relative thinness of the conceptual elaboration of ‘sexual rights’ one year earlier and the range of countries negotiating the text, the final result is extremely significant”. See “From Reproductive Health to Sexual Rights: Achievement and future challenges”. <<http://www.grhf.harvard.edu/reprorights/docs/correa.html>>. Date accessed: 6 February 2007. Indeed, the paragraph was adopted only after much battle with conservative forces. See Ilkkanacan, Pinar. “Sexuality as a Contested Domain in Muslim Societies” in *Sexuality in Africa Magazine*, Vol. 2, Issue 2, 2005.

in being adhered to. It is also one of the most reserved conventions. States parties have reserved or individually interpreted terms and articles to ratify the Convention without really having to implement it. For example, Bangladesh with reference to Article 2; Egypt with reference to the definition of equality; and India with reference to Article 16, the most reserved article, after Article 29.

As well, the CEDAW Committee has received its fair share of conservative attacks. For instance, in April 2003, the Vatican published a 900-page glossary of words and phrases it considers as codes for anti-Church sentiments, to assist Catholics in understanding reports by the UN and other international agencies. In this, CEDAW was listed and criticised for being anti-marriage and anti-child.⁴⁵

The Vatican's problem with the term "gender" is related to how this has been construed to mean that each person can choose their sexual identity, and how in the process, homosexuals, bisexuals, and transsexuals are to be regarded the same as heterosexuals. Its quarrel with the term "reproductive rights", on the other hand, is due to a perception that this is limited to a woman's right to control her own sexuality and body, and ignores the rights of men and children, as well as the unborn.⁴⁶ These notwithstanding, the bottom-line is the Vatican's opposition to the whole notion of women's agency and how exercising sexuality rights may impact on the institutions of marriage and the family.

⁴⁵ See Allyson Smith, "Vatican's New Lexicon Joins War of Words", Culture and Family Institute, Concerns Women of America, <<http://www.cultureandfamily.org/articledisplay.asp?id=3664&department=CFI&categoryid=cfreport>>. 2 April 2003. Date accessed: 4 August 2006. According to an editorial of the journal *Contraception*, the Vatican's *The Lexicon on Ambiguous and Colloquial Terms about Family Life and Ethical Questions* "expands the cloud of suspicion to surround not just abortion but sexuality in general" including reproductive health, reproductive rights, gender and safe sex. Worse, gender is projected to mean "radical ideological feminism" while safe sex is said to "feed a dangerous illusion and opens the way to perverse consequences". Further, it concludes that there is no proof that condoms prevent the spread of AIDS. (68) 2003, pp157-158.

⁴⁶ See "UN Pressuring Nations to Undermine the Family. Chilean Cardinal Condemns 'Cultural Colonialism'". Source: <<http://www.endeavourforum.org.au/March02-06.htm>>. Date accessed: 12 September 2006. In a typical attack, the online magazine *Inside the Vatican* concluded that "those clamouring to declare abortion a 'human right' are those who profit by it" and included in its condemnation, "the nefarious bullies of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which serves not women but extreme ideology". See John Mallon, "Political Prisoners in the Womb", <<http://www.insidethevatican.com/articles/status-ecclesiae/status-ecclesiae-june-july2006.htm>>. June/July 2006. Date accessed: 12 January 2007.

Even the move by the CEDAW Committee to develop a General Recommendation on state obligation – which would provide greater clarity on the obligations of CEDAW States parties in relation to ending discrimination against women – was yet again berated as an attempt to draft an international law on abortion. During the day of general discussion that was held in July 2004, church observers took offence at how the Committee had supposedly privileged the participation of a New York-based women's NGO, and took this to mean that the expert body would be influenced by the NGO's stand on abortion.⁴⁷

Indeed, under the scrutiny of these right-wing forces, conventional wisdom may suggest that Committee members may be more cautious in the jurisprudence the body formulates. Some may even be unwilling to go down the road of sexuality rights to avoid further negative attention being directed at CEDAW.

While one may read a cautionary note here, as advocates, those of us interested in promoting sexuality rights should still consider CEDAW an avenue to set international standards in this regard. This does not mean forcing the Committee to commit political *hara-kiri* and coming out with judgements in these difficult times. Rather, sexuality rights advocates have to continue providing the Committee with information on the range of sexuality concerns even during this stormy period. At the end of the day, it is up to the Committee how it wishes to proceed, but certainly, without any information at all, members are not being given a chance to exercise their discretion, let alone live up to the challenge of continuously expanding the boundaries of what constitutes women's human rights.

In the past, the Committee has confronted head-on, issues of discrimination based on culture and religion. In General Recommendation 19 for instance, it has clarified that violence against women can never be justified by culture and religion or be exempt from the scrutiny of world opinion. Mindfulness of conservative forces also works both ways to remind us of the “polity” that promotes and concretises conservative ideologies which service the misconception that culture and religion are inherently anti-women when it is in fact the byplay of these and other forces that have found political and economic benefit and power in the subordination of women as a class.

⁴⁷ This was the Center for Reproductive Rights. As reported in the website of the Catholic News Weekly. See “UN Committee One Step Closer to Drafting International Abortion Law”. Source: <<http://www.catholicnewsagency.com/showarchive.php?date=2004-08-13>>. Date accessed: 9 September 2004.

CESCR and the HRC

The role of interpreting international standards on sexuality rights is not the sole charge of the CEDAW Committee. In many ways, it is a good place to start for those interested in forwarding the sexuality rights of women because as mentioned, the CEDAW framework offers much potential for a range of women's rights claims to be understood. Given the challenges the CEDAW Committee currently faces, however, it could be strategic to consider what opportunities other treaty bodies may offer to advancing the sexuality rights agenda. This would serve the added benefit of ensuring that sexuality rights are mainstreamed and not ghettoised as a CEDAW issue, and therefore also ensuring that sexuality rights advocates have more entry points.

Provisions in both the covenants monitored by the Human Rights Committee (HRC) and the Committee on Economic, Social and Cultural Rights (CESCR) explicitly state that discrimination on the basis of "other status" is not permitted.⁴⁸ Article 26 of the ICCPR also "prohibits any discrimination under the law and guarantees *all* people equal protection from discrimination on any ground" (emphasis in italics added). Further, each committee has issued General Comments that reinforce this broad and inclusive understanding of non-discrimination. For instance, CESCR's General Comment 14 (on the highest attainable standard of health) explicitly forbids discrimination in access to health care on the grounds of sexual orientation.⁴⁹ The HRC's General Comment 18, on the other hand, defines discrimination as "any distinction, exclusion, restriction or preference which is based on *any* ground" (emphasis added in italics).

As well, both treaty bodies have issued a substantial number of observations on the issue of sexuality rights, far more than the CEDAW Committee.

The HRC, for example, has expressed concern through several of its Concluding Observations, about States parties to the ICCPR that violated the civil and political rights of homosexuals. It has noted that violations of the ICCPR include "discrimination against individuals on the basis of their sexual orientation";⁵⁰ criminalising and penalising private acts of "sexual relations

⁴⁸ See ICCPR Article 2(1) and ICESCR Article 2(2).

⁴⁹ CESCR (2000), General Comment 14: The Right to the Highest Attainable Standard of Health, para. 18.

⁵⁰ See for example, Greece, HRC, CCPR/CO/83/GRC (2005) at para. 19.

between adult consenting partners of the same sex”;⁵¹ threatening their right to life through “social cleansing” operations and other forms of violence;⁵² and subjecting them to the death penalty;⁵³ The HRC has also called for the provision of “remedies against discriminatory practices on the basis of sexual orientation”;⁵⁴ recommended that sexual preference and orientation be included in anti-discrimination laws;⁵⁵ and welcomed initiatives of this nature, including the adoption in legislation of equality and non-discrimination principles that extend to the area of sexual orientation.⁵⁶

In addition, through its individual complaints procedure,⁵⁷ the HRC made a landmark ruling in 1994, in *Toonen v. Australia*,⁵⁸ by stating that the Tasmanian Criminal Code, which persecuted adult homosexual men who engaged in private

⁵¹ In its Concluding Observations for the United States of America, the HRC stated that “the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without discrimination is of concern”. See USA, ICCPR, A/50/40 vol. I (1995) 52 at para. 287. See also Cyprus, ICCPR, A/53/40 vol. I (1998) 34 at para. 190; Chile, ICCPR, A/54/40 vol. I (1999) 47 at para. 216; Romania, ICCPR, A/54/40 vol. I (1999) 70 at para. 375; and Egypt, HRC, CCPR/CO/76/EGY (2002) at para. 19.

⁵² See Colombia, ICCPR, A/52/40 vol. I (1997) 44 at para. 279 and El Salvador, HRC, CCPR/CO/78/SLV (2003) at para. 16.

⁵³ Sudan, ICCPR, A/53/40 vol. I (1998) 23 at para. 119.

⁵⁴ Greece, HRC, CCPR/CO/83/GRC (2005) at para. 19.

⁵⁵ See United Kingdom of Great Britain and Northern Ireland (Hong Kong), ICCPR, A/51/40 vol. I (1996) 15 at para. 59; Trinidad and Tobago, ICCPR, A/56/40 vol. I (2001) 31 at para. 72(11) cited in <www.bayefsky.com>, Philippines, HRC, CCPR/CO/79/PHL (2003) at para. 18 and Namibia, HRC, CCPR/CO/81/NAM (2004) at para. 22.

⁵⁶ See Slovakia, HRC, CCPR/CO/78/SVK (2003) at para. 4; Finland, HRC, CCPR/CO/82/FIN at para. 3; and Greece, HRC, CCPR/CO/83/GRC (2005) at para. 5. It has also welcomed the adoption of national plans of action against homophobia and discrimination. See Sweden, HRC, CCPR/CO/74/SWE (2002) at para. 3.

⁵⁷ This procedure is available under the First Optional Protocol to the ICCPR. It allows an individual from within the jurisdiction of a State party to the ICCPR and its optional protocol, to bring an alleged violation of civil or political rights to the attention of the HRC. In turn, the HRC will issue a judgement, which while may not be binding, can still be a recommendation to the said State party regarding its next course of action. Apart from the HRC, the other treaty bodies with individual complaints mechanisms are CEDAW (the Optional Protocol to CEDAW); CERD (under Article 14 of ICERD) and CAT (under Article 22 of CAT). The CMW and recently adopted Disability Rights Convention also have similar procedures but are still awaiting the required number of ratifications before they can enter into force.

⁵⁸ See UN Doc CCPR/C/50/D/488/1992, 4 April 1994. This case involved a gay activist who challenged the state of Tasmania’s sodomy laws.

consensual sexual acts, violated the petitioner's right to privacy under Article 17 paragraph 1 of the ICCPR. The HRC on being queried by the state whether sexual orientation may be considered an "other status" for the purpose of Article 26,⁵⁹ also held that the term "sex" as it had been referred to in Article 2, paragraph 1⁶⁰ and Article 26 is to be taken as including sexual orientation. Accordingly, it recommended that the offending sodomy provisions be repealed.⁶¹

In finding for the complainant, the HRC clearly articulated the violation of Article 17(1), and chose not to expound on whether a violation of Article 26 had also occurred. However, Mr Bertil Wennergren, in a dissenting opinion, said that the violation of Article 17(1) has to be deduced from the violation of Article 26 itself. His opinion clearly lays out that the law in question is discriminatory and has to be struck down for that reason. Even more significantly, it was the first time an expert body of this nature had interpreted the prohibition of sex discrimination to include prohibition of discrimination on the ground of sexual orientation.⁶²

Although not a positive outcome, it is also worth pointing out that the HRC has also heard a case in 2002 involving four lesbian authors (two couples) from New Zealand, who petitioned for recognition of their right to marry their respective partners.⁶³ In this case, however, the Committee held that the ICCPR did *not*

⁵⁹ Article 26 prohibits discrimination under the law and lays out guarantees of equal protection for all persons from discrimination on any ground. The text of the article says "...all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

⁶⁰ Article 2(1) of the ICCPR requires the state to "...respect and ensure the rights of all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

⁶¹ For details, see commentary in *Bringing Rights to Bear: An analysis of the work of UN treaty monitoring bodies on reproductive and sexual rights* by the Center for Reproductive Rights and University of Toronto International Programme on Reproductive and Sexual Health Law, pp212-13. 2002.

⁶² It marked the first time a treaty body had interpreted "the reference to 'sex' in Articles 2, paragraph 1, and 26 [which protects against distinction or discrimination on any ground] as including sexual orientation" (cited in Amnesty International, op. cit. p5). The HRC later reaffirmed this principle in *Young v. Australia* (see UN Doc CCPR/C/78/D/941/2000, 18 September 2003) a case involving the different treatment between same-sex and opposite-sex couples accessing government pensions, i.e. equality of opportunity.

⁶³ *Juliet Joslin et al v. New Zealand*, Communication No. 902/1999, UN Doc A/57/40 at 214 (2002).

require States parties to recognise same-sex marriages, and rejected this claim. Interestingly, two concurring members noted that states that did not allow same-sex marriages, “may be required to extend rights and benefits of marriage to same-sex couples under a different regime”.⁶⁴

The CESCR has also been vocal on the rights of sexually marginalised groups, with the Committee welcoming positive initiatives by States parties such as “the creation of the office of an Ombudsperson against Discrimination due to Sexual Orientation”,⁶⁵ and expressing concern when states have not been proactive in ensuring that anti-discrimination laws include sexual orientation as grounds for protection.⁶⁶ The CESCR has also specifically recommended that discrimination on the basis of sexual orientation be prohibited,⁶⁷ and that lesbianism be decriminalised.⁶⁸

Challenges

As evident from the foregoing account, both the HRC and CESCR offer great potential for promoting and protecting sexuality rights at the international level. Nevertheless, they also face some shortcomings.

The whole notion of sexual autonomy, let alone women’s sexual autonomy, is contentious especially in relation to issues such as abortion, sexual practices and relationships, and of course, sexual orientation. It is thus not surprising that these treaty bodies have thus far avoided the need to deal with sexual orientation as a right in itself, preferring instead to discuss it as a matter of the right to life or the right to privacy or as a ground of discrimination. This has been particularly evident in the case of the HRC. While obliging states to offer protection on these grounds may be

⁶⁴ See Lau, Honglin, “Assessing the harms of non-compliance with the International Covenant on Civil and Political Rights’ protections of sexual minorities”, Williams Institute on Sexual Orientation Law and Policy, UCLA School of Law, p3. 2006. <<https://www.law.ucla.edu/williamsinstitute/publications/Policy-Discrimination-index.html>>. Date accessed: 7 February 2007.

⁶⁵ See Sweden, ICESCR/E/2002/22 (2001) 106 at para. 715. In the same vein, the Committee welcomed the Polish government’s move to include among the responsibilities of the Government Plenipotentiary for Equal Gender Status, “combating discrimination based on [...] sexual orientation”. Poland, ICESCR, E/C.12/1/Add.82 (2002) at para. 5.

⁶⁶ See Trinidad and Tobago, ICESCR, E/2003/22 (2002) 45 at paras. 262 and 285.

⁶⁷ Hong Kong Special Administrative Region (China), ICESCR, E/2002/22 (2001) 39 at paras. 193.

⁶⁸ See Krygyszstan, ICESCR, E/2001/22 (2000) 62 at paras. 345 and 358 cited in <www.bayefsky.com>.

a strategic way to overcome a lack of agreement about the right to sexual autonomy, such approaches are still limited, especially for more permanent gains.

Clearly, hinging the finding of the Tasmanian Criminal Code as violating Article 17 instead of Article 26 does present a limiting scenario. As argued by Ali Miller, for example, the right to privacy reinforces the belief that homosexual sex between consenting adults is only acceptable if confined to the private sphere. When such behaviour, which is beyond the act of sex or occurs outside what is traditionally considered “private space” such as one’s bedroom, it may be vulnerable to state or other interference. In linking protection to the right to privacy without finding on Article 26, a limitation has been invoked on the right to equality and non-discrimination, which is of primary value in this case.

Further, because discrimination on the basis of sexuality takes place at all levels – in public and private spheres – limiting sexuality rights claims to the realm of the private is not an approach one should keep advocating, especially as a long-term strategy. In fact, as she rightly points out, in the process of trying to advance sexuality rights, one should also be aware how certain claims may be more acceptable than others because they “conform to what the dominant sexual assumptions require for worthy rights claimants: intimacy, responsibility, privacy”. Pursuing these would sometimes then have a converse effect to what was intended, i.e. restrict rather than expand what is recognised as the range of sexuality rights claims.⁶⁹

Despite its progressive stance on a number of sexuality rights issues, at least up to 2006, the HRC had not come out explicitly in support of lesbian rights. A number of its Concluding Observations, for example, have been stated in gender-neutral language that ignores the specific conditions women face, at the same time that others expressly mention protecting the sexuality rights of gay men. One reason for this could be because the majority of women’s rights activists do not engage with the HRC the same way as they do, if at all, with the CEDAW Committee. As noted earlier, treaty bodies formulate their Concluding Observations or Comments based on information that they have or are aware of. Moreover, given that the HRC has long recognised equality between the sexes, first in General Comment 4 and later in General Comment 28,⁷⁰ there is potential for advocates pursuing women’s sexuality rights to further explore this arena as a means of expanding such standards.

⁶⁹ Miller, *op. cit.* p7.

⁷⁰ Human Rights Committee, General Comment No. 4: Equality between the sexes (Art. 3), 30 July 1981 was superseded by General Comment No. 28: Equality of rights between men and women (Art. 3), 29 March 2000.

On the other hand, as seen above in its call to decriminalise lesbianism in Kyrgyzstan, the CESCR has been marginally better in its recognition of lesbian rights. The Committee also adopted General Comment 16 in 2005,⁷¹ which elaborates its understanding of equality between women and men in relation to economic, social and cultural rights. Some would go further to say that this comment recognises that the thrust of Article 3 of the ICESCR is aimed at eliminating women's inequality.⁷²

Even so, there have been some tensions in how the Committee reconciles cultural rights and women's human rights,⁷³ but exactly how this will play out in relation to claims for women's sexuality rights remains to be seen. This – the use of cultural arguments to marginalise sexual rights – is an important area for monitoring and advocacy for activists in South and South East Asia where the “Asian values” discourse has often been exercised to justify persecution of sexually marginalised groups.⁷⁴ Here it should be noted that the CEDAW Committee, which has explored the issue of cultural rights and women more substantively, could provide some direction on how to deal with cultural traditions and practices that discriminate against women.

IV. Conclusion and recommendations

The UN treaty body system is a politically charged site of debate and contestation. As a pivotal international human rights standard-setting mechanism, it offers those interested in pushing and expanding the boundaries of human rights an avenue to do so. Precisely because of this, however, it is also a target of control by conservative and right-wing forces that would rather stall, derail or halt such developments from occurring. This is especially true in the area of sexuality rights. In this sense, it could be argued that there is little choice for sexuality

⁷¹ Committee on Economic, Social and Cultural Rights, General Comment 16 on Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights (Thirty-fourth session, 2005), U.N. Doc. E/C.12/2005/3 (2005).

⁷² Centre for Equality Rights in Accommodation, Update on “Women’s Economic, Social and Cultural Rights: A recent development in international human rights law”.

⁷³ For instance, on 13 May 2002, during the day of general discussion on the General Comment on Article 3, held at the 28th Session of the CESCR, at least two members of the CESCR had suggested that VAW could be acceptable within certain cultural contexts.

⁷⁴ Malaysia is a good case in hand where the ‘Asian values’ discourse has been used successfully to demonise particular sexually marginalised groups.

rights advocates; that they cannot ignore engaging with the treaty body system any longer. At the very least, their involvement in this arena would challenge the control that conservative and rightwing forces have over global public discourses on sexuality.

In the current manner the treaty body system is operating, there are several strategies advocates can adopt to highlight the range of sexuality rights issues at the international arena. Along with the CEDAW Committee – despite the obstacles and scrutiny this body faces – other treaty bodies can also be approached, to whom not only information of violations but also critical arguments invoking their rights can be directed. The treaty bodies can then proceed or act on this. In fact, this multi-pronged approach of cross-referencing and building a wider outreach for the advocacy may be preferable as a strategy to mainstream women's sexuality rights into the other treaty bodies.

Nevertheless, the potential of the CEDAW Committee in providing a clear stand on sexuality rights is immense not only through the framework of the Convention and its principles of equality and non-discrimination, but also its articulations have the ability of being path breaking, particularly in response to arguments based on religious and/or cultural grounds. An even bigger contribution would be going beyond the current focus on “negative” rights (e.g. protection from torture), moving into the realm of “positive” rights (e.g. right to sexual orientation) and articulating what these might be in relation to issues around sexuality. In so doing, the Committee would contribute to the ongoing process of developing a progressive interpretation of human rights standards, and the recognition of new elements to the principles of equality and non-discrimination.

There is of course a larger gain to be made from this engagement. The usage of the Convention is not only for raising issues with the state and the Committee. It provides advocates with a tool to deepen our understanding on issues and bring more of us on board by creating and sharpening understanding on the universal and intersectional nature of human rights. Processes related to the review process such as preparing a shadow report and lobbying the Committee for Concluding Comments are spaces, platforms and tools through which we link with each other's issues politically, and use the substantive content of the Convention to build a wider outreach and an alliance of more aware advocates.

Clearly, the fundamental principles of the Convention ensure that the issue is framed in the language of equality and non-discrimination, to principles which are at the core of the human rights discourse, and key to its realisation. This enables the integration of the issue of sexual orientation to human rights, a position that

has been constantly challenged by right-wing advocates. It tackles the issue in the definition itself:

“discrimination against women” shall mean any *distinction, exclusion or restriction* made on the basis of *sex* which has the *effect or purpose of impairing or nullifying the recognition, enjoyment or exercise* by women, irrespective of their marital status, on a basis of equality of men and women, *of human rights and fundamental freedoms* in the political, economic, social, cultural, civil or any other field... (*emphasis added in italic*)

This definition, in tandem with the understanding of the HRC in *Toonen v. Australia*, wherein it found that the term sex in the phrase “race, sex, colour” in Article 26 of the ICCPR included sexual orientation, has the capacity of challenging many silences that have shrouded the matter and limited the expansion of a clear and political position in human rights law discourse.

The work of the CEDAW Committee (and other treaty bodies) in achieving recognition for the full range of sexuality rights may be aided and revitalised by recent developments to establish an international human rights framework that deals with discrimination based on sexual orientation and gender identity.⁷⁵ The Yogyakarta Principles were born out of the fragmented and inconsistent international response and understanding of how international instruments and treaty bodies have applied human rights standards to such issues. Supported through a call by 54 member states in the Third Session of the Human Rights Council in 2006 for a body to address egregious violations of the human rights based on sexual orientation and gender identity,⁷⁶ the Yogyakarta Principles are a useful framework for obtaining clarity on the nature, scope and implementation of states’ human rights obligations on such matters under existing international human rights law. NGOs, treaty bodies, state organs and all actors who bear responsibility for the promotion and protection of human rights should utilise the

⁷⁵ The “Yogyakarta Principles on the Application of International Law in Relation to Issues of Sexual Orientation and Gender Identity” adopted by a meeting of experts (including UN Special Rapporteurs and national human rights commissioners) in international law in November 2006. These principles confirm legal standards for how governments and other actors should eliminate violence, abuse, and discrimination against lesbian, gay, bisexual, and transgender people, and ensure full gender equality. See the Yogyakarta Principles website for more details <<http://www.yogyakartaprinciples.org/>>.

⁷⁶ Summary Records of the 6th Meeting. Third Session of the Human Rights Council, 1 December 2006. U.N. A/HRC/3/SR.6.

Principles to develop the rights compliant culture, build conceptual understanding as well as jurisprudence on sexual orientation and gender identity issues.

While it is too early to conclude what the impact of the current treaty body reform process may have on sexuality rights, two potential scenarios come to mind. On the one hand, the proposed CCD report could incorporate an expansive definition of equality and non-discrimination, one that integrates and mainstreams sexuality rights. On the other hand, the reverse is also possible, that the definition of equality and non-discrimination falls to the lowest – and least contentious – standards, which excludes the rights of sexually marginalised groups. Clearly, because this report is common across all treaty bodies, the impact of how equality and non-discrimination is defined will be significant. It is also hoped that the process of streamlining the working methods of all treaty bodies, and the fact that they will be serviced by one common secretariat, the OHCHR, will facilitate the various expert committees taking the most progressive of jurisprudence from each other.

The best-case scenario described above is possible but this calls for the continued engagement of sexuality rights advocates and NGOs with the treaty body process. However, they also need to do more than provide information and arguments that can assist the respective treaty bodies in their evaluation of the progress States parties have made *viz.* human rights. Promoting the domestic implementation of related international human rights standards through a process of monitoring and critical engagement with their respective states is equally necessary.



ISBN 978-983-43654-3-1

