



**Centre for Cultures of Reproduction, Technologies and Health  
[CORTH]**

**School of Global Studies, University of Sussex**

**Sexuality, Sexual Reproductive Health Rights and the Law  
Workshop  
March 15<sup>th</sup> 2016**



**Report prepared by MaryFrances Lukera, School of Law, Politics and Sociology**

## Table of Contents

<b>Introduction</b>	3
<b>Session One: The Legal Responses to Male-Led Parenting and Gay Rights</b>	5
<i>Discussant: Nigel Eltringham</i>	
The Legal Response to Male-Led Parenting and Reproductive Collaborations’ Philip Bremner	
‘LGBT Rights’ or ‘Human Rights for LGBT’? Looking at the Significance of Context in Malawi Alan Msosa	
<b>Session Two: Sexual and Reproductive Health Rights and the Law</b>	8
<i>Discussant: Jackie Cassel</i>	
The Juridogenic Effect of Article 40.3.3 of the Irish Constitution Sheelagh McGuinness	
Fighting Maternal Mortality through Legal Empowerment Francesca Feruglio	
Legal Activism and Maternal Health Rights in India Maya Unnithan	
<b>Session Three: Sexual Minority Perspective</b>	13
<i>Discussant: Maria Moscati</i>	
Sexual and reproductive health and rights of sex workers in Kenya MaryFrances Lukera	
The Right to Health of Sexual Minorities: A Perspective of the Relationship between Minority Stress and Health Inequity Po-Han Lee	
Unsuitably Modern: Sexuality, Dissidence and Law in Nepal Paul Boyce	
<b>Session Four: Key Reflections: Sexuality, Sexual Reproductive Health Rights, and the Law</b>	18
<i>Discussant: Alex Conte</i>	
Sexuality, Rights and the ‘Gayby Boom’: Queer parenting and sexual citizenship Róisín Ryan-Flood	
No Bad Women Just Bad Laws: three decades of sex workers struggle for law reform Cheryl Overs	
<b>Follow-up Workshop</b>	23

## Introduction

CORTH held an interdisciplinary workshop on 'Sexuality, Sexual Reproductive Health Rights and the Law' with the help of Pathway Development Funding from the Sussex Doctoral School. The workshop was organised by CORTH graduates MaryFrances Lukera (School of Law, Politics and Sociology) and Lavinia Bertini (School of Global Studies) with guidance and support from Professor Maya Unnithan, director of CORTH. Funding from the University's doctoral school global studies pathway funding is gratefully acknowledged.

The workshop brought together academics, doctoral students, and practitioners from within and external to the University of Sussex. It was divided into four sessions and led by discussants Nigel Eltringham (Anthropology), Jackie Cassel (Medical school), Maria Moscati (Law) and Alex Conte the director of the Centre for Human Rights Research. Presentations were delivered by Philip Bremner of the Sussex Law School; Alan Msosa PhD student at Essex Law School; Sheelagh McGuinness of Bristol Law School; Francesca Feruglio of Institute of Development Studies; Maya Unnithan, Anthropology, MaryFrances Lukera and Po Han Lee both PhD students at Sussex Law School and Paul Boyce of Anthropology. The papers focused on the role of the law and legal processes in realising sexual reproductive health rights and the implications thereof for sexual and gender identities in Malawi, Kenya, England and Wales, Ireland, Sweden, Australia, Canada, Nepal and India. The speakers examined questions on the relationship between law and sexuality, the importance of a human rights perspective in sexual and reproductive health, the implications the current framings of sexuality and sexual and reproductive health rights have for minority groups, women, sex workers etc, and how all these discussions inform policy.

A reflection session wrapped up the day's workshop with overviews from Róisín Ryan-Flood of University of Essex and Cheryl Overs a visiting research fellow at the Institute of Development Studies.



## Session One

### The Legal Responses to Male-Led Parenting and Gay Rights

#### The Legal Response to Male-Led Parenting and Reproductive Collaborations'

**By Philip Bremner** (Law, LPS, Sussex)

In his paper, Bremner explored the dynamics of gay parenting in England and Wales and Canada. He compared, England, Wales and British Columbia in Canada, where they legally recognise multiple parents in contrast to the UK (is England not a part of the UK – confusing). He analysed case law and legislation, as well as an empirical study based on interviews with legal professionals and parents/prospective parents. The families are being formed regardless of whether the legal framework facilitates it, though the law poses obstacles to the process of creating these families. Female-led parenting has a longer cultural history, male-led parenting is side-lined in the law potentially due to the perception that the involvement of gay men facilitates family making, rather than involves collaborative co-parenting. He found that females sought legal frameworks more than males, who were interested in the organic development of the family.

According to the England's Human Fertilisation and Embryology Act (2008) male parents cannot become parents on birth, as the birth mother is always the legal parent on birth and she must relinquish that right. However in Canada, male parents can be legal parents at birth with the mother's agreement. Disputed surrogacy cases provide insight into the current state of the law, e.g. in *H v S (Disputed Surrogacy Arrangements)* [2015] EWFC 36, a pre-conception agreement was contested. A dispute arose between the male couple and birth mother over where the child will live. A very young child was given to the care of two male caregivers, instead of the birth mother due to the pre-conception agreement and the best interest of the child. Bremner questions how the courts don't analyse the interest of all parents, and use the child's interests as a cover for not analysing the best interests of all parents in these cases.

The Canadian legal system offers lessons to UK law, as there can be three legal parents in a family. In Canada, female couple and biological father can agree at conception that all three are legal parents and a male couple and birth mother can agree at conception as provided by the British Columbia Family Law Act 2013. Some of the problems related to gay parenting such as enforcing intentions, the position of biological father's partners are not recognised, the disparity between female and male same-sex parenting in terms of the availability of automatic recognition on the birth certificate and having to obtain a court order as well as parental orders not being available to single people. Future research needs to look at how intentions can be enforced (i.e. keeping pre-conception agreements) and the disparity between male-led and female-led collaborative parenting approaches.

#### 'LGBT Rights' or 'Human Rights for LGBT'? Looking at the Significance of Context in Malawi

**By Alan Msosa** (University of Essex)

Msosa explored the legal experiences of LGBT people in Malawi, how the lack of human rights protection affects their daily lives. In his fieldwork he interviewed 44 gay people in Malawi and his paper reflected on their experiences. The first gay wedding took place in 2009 and both men were arrested and charged. The gay men were convicted with the maximum sentence in 2010 following a compulsory psychiatric examination. They were humiliated in prison and in court appearances. However, they were pardoned a few days later following an international outrage. Same-sex

relationships and human rights really became an issue of public interest at this point. The laws in Malawi are homophobic and follow British colonial law, e.g. s133 of the Malawi Penal Code is a replica of s377 of the Indian Penal Code.

The gay wedding has had an impact on the way policy and laws are being implemented in Malawi e.g. implementation of the Malawian Constitution, which has a Bill of Rights containing such as right to life, right to health, right to dignity and other freedoms for every Malawian. A few years later an HIV policy was developed and it recognised the discrimination in Malawian law against the same sex relationships. Although laws discriminating against same-sex relationships were expected to be reviewed, further laws against 'indecent practices between women' have been introduced in 2009, and a further law in 2015 stated that sexual identity is only recognised as that which is given at birth.

Malawian culture is also inherently homophobic, driven by popular discussion in the media. Conservatives do advance the view that same sex intimacy is illegitimate and mostly non-consensual. Msoa questioned this view and thinks it could be because there's no word in vernacular for sexuality, homosexuality, or same sex and as such LGBT is seen as an alien category. A recent report shows that over 90% of Malawians wouldn't be comfortable to have a gay neighbour. LGBT rights have been separated from the overall human rights agenda and are seen as 'sinful' and part of a controversial agenda being imposed by the West. Incorporating LGBT rights into the broader human rights agenda.[this last bit is not a sentence]

***Discussant: Nigel Eltringham (Anthropology, Global Studies, Sussex)***

In the discussion, the need to consider the interests of all concerned, recognising the significance of context, and appreciating the tensions in children's rights remains unresolved and warrants further research. Many families feel completely disengaged with the law, like it had nothing to offer them. For the LGBT community, the relationships between the Ugandan contexts, felt the colonial impositions constructing same-sex relationships as transgressed; a reminder that law constructs something rather than finding something, which gives them a normative quality. The vernacular standing in the way of the rights movement and external interventions in LGBT issues further pushes the notion that it is a Western agenda.



## Session Two

### Sexual and Reproductive Health Rights and the Law

#### The Juridogenic Effect of Article 40.3.3 of the Irish Constitution

**By Sheelagh McGuinness (Bristol Law School)**

McGuinness examined the abortion law in Ireland. The law currently constitutionalises the right to life of the unborn, which has generated a lot of discussion on the need to repeal the right due to its harmful implications. McGuinness reflected on Ruth Fletcher's earlier work on how the Constitution in Ireland can be interpreted progressively (progressive constitutional approach) as well as the legal cultures surrounding the right to life and its negative impact on access to abortion care and maternal health services in general with respect to a healthcare service that doesn't recognise the consent of a pregnant woman. She commences with the 1992 case of *Attorney General and X*, in which Ruth wrote the paper imagining a progressive future and concluded with a recent case of *Miss Y*, which hasn't had extensive litigation yet. However, the legal issues that arise in *Miss Y* illustrate the problem of both lack of access to abortion care and how women are treated in a maternal health service that lacks the consent of a pregnant woman. Y is not just a pregnant and doesn't want to be pregnant, has no access to abortion care and she exists in institution that doesn't respect her consent as a pregnant woman. The consent is subsumed in the interest of the unborn.

In consideration of these two cases and the impact of 40.3.3, she drew the work of Robert West on gender harms which impacts on particular groups and in this case women; and on progressive constitutionalism. Progressive constitutionalism contrasts conservative constitutionalism. It reconceptualises constitution as a source of inspiration and guidance for legislation rather than super structured constrained adjudication. The constitutions can create opportunities for progressive adjudication but this has been the opposite in relation to 40.3.3. Gendered harm is associated with article 40.3.3. Even if the 8<sup>th</sup> is repealed, the culture still needs to shift as it sees the right to life as the right to be born. Privacy rights have allowed access to contraception, and this has been considered a possibility to gain access to abortion services.

Juridogenic law is a way of seeing law in relation to the harm it can cause. This right to life is seen in terms of cultural importance, i.e. more important than any other right – so the role of the woman is a mechanical, functional one to incubate the foetus. The woman becomes a sub-subject and the infant becomes a super-subject due to the infant being ascribed personhood. The law struggles to recognise the burdens of pregnancy, and in fact worsens these burdens. McGuinness drew on Bourdieu to suggest that the law creates a cultural suspicion of pregnant women. The status of the foetus is elevated to a separate and distinct individual of equal moral worth to the woman. The law curtails a woman's personal autonomy.

McGuinness elaborated on the Case of *Miss X*, a rape survivor who asks the police if they can use foetal tissue as evidence against her rapist. She is seen as an aggressor and the foetus as an innocent party. The judges in the case then set about restricting her travel to prevent the abortion. This conflict between innocent infant and mother as agent, means that the law falls on the side of innocent needing to be protected and also is harmful to notions of women's sense of self. She argued that women are discharged with the burden of the State to protect the life of the unborn. She concluded with the case of *Miss Y* who arrived in Ireland, seeking asylum in 2014, having been raped and is pregnant which



triggers flashbacks of the rape. She is suicidal as a result of pregnancy. She has no funds or means to travel but manages to get a ferry to Liverpool, but is returned to Ireland due to lack of documentation. She is hospitalised and given a C-section at 22-24 weeks against her wishes, following refusal of food and water. The forced C-section is an example of sexual violence and structural violence. Y's case shows how she's transformed from a woman who is denied access to abortion care into a woman who is denied basic bodily integrity in her maternal healthcare treatment. Unwanted pregnancy forces the woman into an intimate relationship.

### Fighting Maternal Mortality through Legal Empowerment

**By Francesca Feruglio (IDS, Sussex; Nazdeek legal empowerment organization)**

Feruglio is a co-founder of Nazdeek, a legal empowerment organization based in Delhi. She discussed their work in Assam and in Delhi in terms of how Nazdeek has developed a legal empowerment approach to address maternal mortality and other context specific issues. On the legal framework around reproductive health and emergency obstetric care in India, Article 21 of the Constitution of India has successfully been used to demand access to healthcare, infrastructure and services. A legal activism around maternal health and access to healthcare in conjunction to the right to non-discrimination and equality, articles 14 and 15 of the Constitution. The right to food is enshrined under Article 21 on the right to life. In a 2010 landmark case, the Delhi High court recognised maternal mortality as a human rights violation. Another case talks about the indivisibility of food and especially supplementary nutrition for pregnant and lactating women and the right to health and how the access to both these services needs to be availed to women (*Premlata et al v NCT Delhi et al*, Delhi High Court 2011). In a third case the court asked the government to build a blood bank and a community healthcare centre with adequate infrastructure for women (*Sandesh Bansal v State of MP*, 2010). Courts have progressively pushed on access to health infrastructure. In terms of women workers, the Minimum Wages Act entitles all the workers to a minimum wage. The Maternity Benefit Act provides for the rights of pregnant women including their maternity benefit as workers.

However, there are number of barriers to women accessing justice leaving millions across the country left out the protection of the law and unable to realize their rights. This is due to poor rights awareness, lack of pro bono human rights lawyers and gaps between lawyers and communities - those who do exist may be disconnected with local people and activists. There's also a lack of accountability from state and private entities to enforce positive orders and judgments, with lawyers, community members and activists lacking capacity to obtain implementation. A bottom-up approach in accessing justice is therefore appropriate. Feruglio referred to local and structural issues underpinning rights violations. She took a holistic approach to explain that Assam has the highest rate of maternal mortality in India, due to many women working in the tea gardens lacking access to emergency obstetric care and antenatal care. Women workers are paid below the legal minimum wage set by the State of Assam (Rs.126/day against the State minimum wage of Rs.240/day). Poverty-level wages are exacerbated by appalling living conditions and lack of basic healthcare. Insufficient wages result in women enduring harsh working condition until the very moment of delivery. This context also leads to instances of child labour and high rates of trafficking of young girls and boys from tea plantations to mayor Indian cities.

Over the last three years, Nazdeek has employed a legal empowerment approach to increase women's agency and ability to demand their rights, and ensure better access to maternal healthcare. Their empowerment approach entails putting the law in people's hands so that they know their rights and act upon them. This involves a range of strategies, starting with legal literacy programmes that build knowledge of women on maternal health rights, nutrition entitlements and labour benefits and skills-building sessions on fact-finding and documentation and grievance filing. Through mobile and web technology, 30+ women volunteers from tea garden areas are tracking and reporting violations of maternal and infant health care. Data collected and analysed is submitted to Block level authorities through community grievance forums, which have granted women for the first time the opportunity to directly discuss issues with block authorities in charge of service delivery. These have proven to be surprisingly effective to address both individual and collective rights violations, such as cases of corruption, access to health benefits, and overall improving the quality and availability of services. Nazdeek also set up a Human Rights Law Clinic at the local Law College (Tezpur Law College) to expose students to human rights lawyering and, on the long run, expand the pool of pro bono lawyers. These local strategies have matched wider State-level efforts for improved working conditions. For instance, Nazdeek supported a State wide campaign led by local groups calling for payment of a living wage of Rs.330/day. Nazdeek's legal empowerment approach to the campaign has involved legal literacy programs on labor rights and wage laws for workers; legal research and analysis aimed at calculating a living wage reflecting of local context's needs; and international advocacy with tea companies, certifying agencies and INGOs. Additionally, Nazdeek's intervention focused on building capacity of local High Court lawyers to effectively advocate for workers' rights in ongoing litigation on wage-related matters.

#### Legal Activism and Maternal Health Rights in India

**By Maya Unnithan (Anthropology, Global Studies, Sussex)**

Linked to Feruglio's paper, Unnithan focused more closely on the legal activists understanding of their role in promoting maternal health rights in India. Her paper was based on fieldwork conducted with a research team in Rajasthan with 34 civil society organisations. Focusing on the 'rights-work' of these civil society legal aid organisations Unnithan outlined the different creative and dynamic ways in which these organisations use existing legislation to claim reproductive rights and entitlements; how they translate across a whole set of constitutional, indigenous, and international forms of legal redress and justice. An important consideration was the legal activists' moral understanding of their own role in the process.

Unnithan suggests that the culture of legal aid itself is very diverse as seen through 3 legal aid organisations in the study given anonymous names: SEVA (service), SALAH (counselling), and KANUN (the law). The team found that rights emerged as clearly defined in some organisations like KANUN, while others SEVA and SALAH viewed rights at a more discursive level through which broader social change is enacted. SEVA and SALAH, use the Protection for Women against Domestic Violence Act of 2005 to address sexual and reproductive health rights issues while KANUN casts human rights violations in a universal rights language. Unnithan and her co-researchers questioned why violence has been drawn upon by the activists to frame reproductive rights? This law was found to be important because it captured a number of interrelated problems encountered by women seeking legal counselling from SEVA e.g. dowry demands, pressure for a male child, torture by the in-laws and denial

of food, or a husband not providing her medicine when she's ill. For instance, an unmet dowry demand easily translated into reproductive violence in the form of taunts and beating connected to a failure to become pregnant, to produce sons and so forth. The research team found that legal actors were involved diversely in rights work depending on three key areas: their involvement with the constitution and the international human rights treaties; a differing focus on rights and duties versus entitlements; and differing attitudes to patriarchal gender norms and relationships. Through this we see there is no single appropriation of human rights on-the-ground,

At SALAH, these issues were referred to the local family courts, if they entered the litigation process at all. As poor women had no means to survive independently SALAH preferred mediation as the tool for conflict resolution; the mediators themselves also gave primary importance to the family unit. The family is thus the site and institution through which women claimants both suffer from reproductive violence and gain rights to healthcare. SALAH recognised the importance of the family in a context of the state's absence. Women's duties as wives rather than their rights seemed paramount to both SALAH and the women who sought their help. The strategies used by activists can thus be seen to be reinforce traditional patriarchal concerns. The key point is that women are encouraged to return to their abusers. In contrast, an explicitly human rights-based approach is used by KANUN. They believe that if you use universal rights language which is legally binding, the state is made accountable more effectively. What they failed to see, however, was the difficulty that women had in accessing their rights in the first place.

**Discussant: Jackie Cassel (Brighton & Sussex Medical School; CORTH, Sussex)**

During the discussion, Jackie highlighted the importance of contexts in Ireland and India, and Cheryl contrasted the situation in Melbourne. Further discussion was generated on the concept of 'public morality' and relations between Msoa and McGuiness' talks. McGuiness indicated that strong, enabling legislation will be needed in response to cultural resistance. Intersectionality was also raised as a significant issue surrounding migrant women, and the public rage at the way in which these women have suffered in the Irish state. This highly interventionist state contrasts with the Nordic countries who are also interventionist, but not following the most conservative parts of society.



## Session Three

### Sexual Minority Perspective

#### Sexual and reproductive health and rights of sex workers in Kenya

**By Mary Frances Lukera (Law, LPS, Sussex)**

Lukera's paper is drawn from the experience of the sex workers she interviewed during her fieldwork 2015. She gave a brief background of the current legal framework in Kenya. Kenya's legal framework changed with the 'new' constitution, which was promulgated on 27<sup>th</sup> August 2010. The Kenyan Constitution is inspired by the constitutions of Ghana and South Africa. It directly recognises international human rights treaties in its Article 2(4) and (5) - provides that the general rules on international law and any treaty ratified by Kenya shall form part of the Kenyan law. Before the 2010 Constitution, accountability was minimum. Historically Kenya had ratified a number of international human rights instruments but they didn't necessarily translate into rights and accountability was minimal. Among other things the old constitution broadly defined the right to life. She notes Articles 19-59 embodied in the Bill of rights including the right to health...including reproductive health care as well as Article 26(4) which allows abortion where life or health or a mother is in danger or if permitted by any other written law.

Lukera questions the guarantee of sex workers' sexual and reproductive health rights under the criminalised environment. Through interviewing sex workers and analysing a number of laws pertaining to sex and health, Lukera suggests that there is the potential for the protection of sex workers' SRHR – but only if these laws are properly implemented. However, sex workers know the constitution is there but they don't understand it fully. For instance, there was a legal awareness in terms of pleading not guilty. Sex workers also reported sex worker friendly clinics, as well as more expensive private clinics, which they attend rather than public centres. There is also advocacy and increasing awareness (e.g. condom use, and prioritising own health over the client). Referrals, the influence of family and children, increasing safety and engagement at local, national and global levels, as well as the law on prevention of HIV have all promoted SRHR.

The main SRHR barriers include police arresting both sex workers and care providers and high levels of corruption. Health care providers also stigmatise sex workers and their children creating inter-generational cycles of shame. Sex work is criminalised and there are a number of contradictory laws and bylaws (e.g. loitering or indecent exposure), which make SRHR challenging to acquire. Violence in all manifestations is problematic for SRHR, e.g. forcing women to have sex with dogs. Sex workers are treated as criminals and built in to whole communities and institutions. Religion plays a role too, e.g. Muslim women disguising as activists. Sex workers believe that the best opportunities to improve SRHR lie in the decriminalisation of sex work, rather than decriminalising the client as in Nordic models. There are opportunities to repeal by-laws now that Kenya has a county structure, and at a community level there can be more training on laws and strategic engagement.

## The Right to Health of Sexual Minorities: A Perspective of the Relationship between Minority Stress and Health Inequity

**By Po-Han Lee (Law, LPS, Sussex)**

Lee focused on how international law address health inequalities in sexual minorities. He briefly introduced how the issue has been discussed in the World Health Organisation. In May 2013, WHO secretariat produced the first report on improving the health and wellbeing of LGBT persons. The report shows a great concern regarding health disparities for LGBT persons. A long debate resulted in the removal of the item from the agenda due to opposition from a number of members. Those reasons are: some states' health system, denial that there are LGBT persons living in their countries and even when they are, some states have argued that it is for the UN Human Rights Council to deal with this issue and not WHO. Some states argue that sexual and gender deviance itself is a wrong choice of a healthy lifestyle. It is not a matter that a global action should be initiated. WHO admitted that there's no sufficient evidence globally to this regard and called for a systematic review of the literature. Lee explores the intersection of international human rights law and global health governance.

First, the challenging step is on how to qualify of institutional discrimination and social stigma that cause health inequality among LGBT people. Second, how such disparities should be addressed as a health inequality and potentially a human rights violation. He noted that before the 1980s most health studies focused on the cause of homosexuality and how to cure these people until the American psychiatry association and WHO removed homosexuality from their diagnostic disorder classification. However today sexual orientation disturbance and some sexual preferences are still medicalised in the latest revision of International Statistical Classification of Disease. Until recently, health researchers had not recognised sexual and gender minorities as population with distinct health issues except sexually transmitted diseases. A systematic review by Michael King et al in 2008 found that LGBT people are at higher risk of mental disorder. Further reviews have found worse results for gay people and nothing for transgender people. There's very little evidence on the physical health of gender minorities. Invisibility, lack of investigation into sexual orientation and gender identity are proven social determinant of health. Bisexual individuals experience worse psychological distress than people who are gay or straight and therefore they have a higher mental health risk because of the bias judgments from both homosexual and heterosexual peers.

To date the available systematic reviews concerns populations in Western societies. Other research either translated to Chinese from English literature without any local data overproduced by small scale qualitative studies which can hardly satisfy the requirements of epidemiological evidence. Lee utilises the Minority Stress and Health Disparity model to explain health as a human right and also considers Mears concept of minority stress, which is based on the premise that queer individuals living in heterosexist society are subject to chronic stress related to their stigma. In terms of mental health major depression and generalised anxiety, disproportionate alcohol, tobacco, and illicit drug use, higher risk for attempting or completing suicide, deliberate self-harm, family rejection, counsellor's insensitivity, SOGI-related blames etc. On the other hand, the physical health disparity included violence, bullying, humiliation and any form of harassment, acute physical symptoms; chronic health conditions, higher prevalence and younger onset of disabilities, more asthma diagnoses, and severe pain and fatigue, heightened rates of STDs, urinary tract infections, and Hepatitis B and C, higher risk and diagnoses of certain cancers, clinical rejection, wrong diagnoses, harassing questions etc. Lee utilised the Minority Stress and Health Disparity model to explain health as a human right.

There's a disparity between sexual minority health rights and the rights of their heterosexual peers in WHO work and yet it is in WHO's capacity to deal with LGBT needs. Lee assesses the intersections between global health law and health inequalities in LGBT populations, and its relation with human rights violations. LGBT people are identified as being at a greater risk of mental health problems, as well as physical issues – particularly bisexual people due to judgement from both hetero- and homosexual peers. These reviews are largely Anglo-American centric and few Chinese studies use qualitative techniques. Global health and health equity are indivisible and the discursive power of human rights norms and institutions need to be internationally accessible via accountability. Lee also suggests that active agency is essential for particularly vulnerable people. A human rights based approach to a global health paradigm is the way forward. Lee points out that this is not about pathologising LGBT people, but strengthening health rights for minorities. Hence, whether or not sexual minorities exists in the eyes of the state does not matter in this case, rather these people are empowered in their access to rights through this approach.

#### Unsuitably Modern: Sexuality, Dissidence and Law in Nepal

**By Paul Boyce (Anthropology, Global Studies, Sussex)**

Boyce explored social, legal, constitutional in the context of same sex and transgender people's experience in Nepal. The paper was drawn from different projects and experiences. The paper raised thoughts about ways in which sexual rights action are recognised both internationally and specifically in Nepal. The paper was developed out of 2 studies recently undertaken under the Institute of Development Studies on the sexuality, law and poverty programme. The programme involved a number of comparative studies looking at an angle sexual rights, livelihood programmes among heteronormative sexual subjects in different parts of the world. Nepal was chosen because over the last decade, it has made significant legal advances in terms of rights for sexual and gender minorities. Specifically, in December 2007, the Supreme court of Nepal issued a judgment in the cast of *Sunil Babu Pant and Others v Government of Nepal and Others* declaring full fundamental human rights to all sexual and gender minority; lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. In addition, it ordered the government to scrap all discriminatory laws. The court legally established a gender category in addition to male and female calling it 'third gender'. The third gender resonates with particular kind of cultural frame of third gender in South Asia.

Most recently, Nepal has passed legislation that will make it possible for Nepal citizens to select third gender on their passport. In view of these important and impressive legal changes, Nepal has come to be represented as one of the progressive states for sexual rights in the world. This work has been synonymous with the actions of the sexual rights activists and campaign by the interim governmental body charged with establishing the constitution. Boyce noted that there isn't constitution promulgated into law as yet in Nepal. Boyce discussed the role Blue Diamond Society, an international recognised NGO in Nepal and one of its international experts played as part of the formative meetings that led to the application of human rights law to the abuse suffered by LGBTI people around the world. He particularly noted Pant, the former director of Blue Diamond Society who has been at the forefront of LGBTI tourism in Nepal. For instance, Pant started a company which offers LGBTI tourism packages to Nepal – associated with gay weddings etc. Boyce recognises Pant and colleagues instrumental role in securing same sex and transgender rights in law in Nepal, and in the ongoing development of the constitution. Boyce related this, as one of the consequences of the 2006 pre-democracy movement in Nepal which gave social and political legitimacy to rights based policy based on a range of claims – to cast identity, gender, ethnicity and ultimately sexuality. The Blue Diamond

Society successfully lobbied to include recognition of third gender to identified people in the 2011 national population and housing census. The electoral commission has also included the third gender as an option for voter registration. The Ministry of Education in coordination with the Blue Diamond Society also has plans to include same sex and gender minority issues within the new sexual and reproductive health education curriculum in schools in Nepal.

The Supreme Court recently mandated a survey committed to investigate the possibility of same sex marriage and/or civil marriage policies. Boyce observed that the aspirations to reconfigure the contrast between people, law and polity have created a space within which new discourse of sexual minority rights have emerged and consolidated in the constitutional vacuum. Legal discourse inevitably involved essentialism in naming sexual subjects. The 1990 people's movement in Nepal brought to an end the absolute monarchy and opened social spaces and opportunities to discuss issues of sexuality, gender identity that had previously been suppressed. New recognition of minorities and gender rights have played an intrinsic part of multi-party government, though changes in caste distinctions still slow. Rights are important but they are always insufficient—rights always reproduce their limitations (Corea, Petchesky & Parker). Generally used to discuss those who do not have them. Any construction carries its own deconstruction. Rights do not secure livelihood or security. Precarity and how the body becomes expendable, e.g. of Nepalese migrants in the Middle East, what's the point of a third gender when their labour is so precarious? Necropolitics.

**Discussant: Maria Moscati** (Law, LPS, Sussex)

Discussion involved how the change in law (third gender) emerged in a political vacuum, highlighted the tension between the objective and subjective dimension of law and the transplant of law and legal thinking from other legal cultures, and the aspect of law and otherness.





## Session 4

### Key Reflections

Building on the day's discussions, this session provided a reflection on sexuality, reproductive health rights and the law by Róisín Ryan-Flood and Cheryl Overs on lesbian and gay families and the lack of significant changes to the law on sex work.

Sexuality, Rights and the 'Gayby Boom': Queer parenting and sexual citizenship

**By Róisín Ryan-Flood:** (Director, Centre for Intimate and Sexual Citizenship, University of Essex)

Ryan-Flood reflected on queer parenting and sexual citizenship. She explored the ways in which lesbian and gay families challenge conventional understandings of the two-parent norm and examined the challenges that arise for lesbian and gay couple separate and continue to negotiate parenthood together. She pointed to the tremendous shift around sexual citizenship LGBT rights in the last 20 years and more so in the last 10 years. A lot of campaigns have been about same-sex marriage and equality but not so much around separation and divorce. She questioned what happens when lesbian and gay parents break-up? What arrangements do they develop? What are the theoretical and policy implications? Not so much work has been done on lesbian and gay parent divorce either with or without children. It raises questions where often there isn't legal recognition of one parent or more. There's a lot of research focusing on children of these families, looking at psychological and development outcome for children in these families. This research has played a political role in challenging homophobic myths the idea that being lesbian and gay is incompatible to being a parent, that the children are likely to grow up being lesbian and gay. This research has helped inform policy development and in some places created equitable parent rights for gay and lesbian people. Some researchers have argued that the incredible emphasis on normativity – looking at the way the children as just like the children of anyone else. Children of gay and lesbian parents often describe themselves as more aware of difference, more tolerant – a positive sense of their self-identity. Julian Don suggested that lesbian couples find creative new ways of sharing housework and childcare equitably. Studies find heterosexual couples by and large tend not to share childcare and housework equitably even when professional couples when they express a commitment to gender equality, it does tend to be women who are doing the bulk of childcare, domestic work and organisation labour of the household. Don and others have argued lesbian couples do tend to share equally and even in the context of for example UK where there's little support for subsidised childcare, they've found new creative solution rather than revert to one breadwinner one care giver model that associate traditionally with heterosexual couples that they choose both work less than fulltime so that they can participate equally in paid work and in the childcare. There have been criticisms on focusing on professional couples.

Weaks et al. described the emergence as a kind of egalitarian ethic. Stephen Hicks noted that the idea that lesbian couple, gay families somehow magically accomplish this is very utopian. Similarly, other scholars argue that this egalitarian ideal that has become associated with LGBT-parent families raises questions of power and difference. There's a lot to support the transformative egalitarian ethic but difficult questions have to be asked around questions on inequality. Ryan-Flood in her research on lesbian, gay couple in two European countries where she specifically looked at lesbians who have children after coming out. Lesbians and gay men have always been parents but traditionally they have become parents in the context of heterosexual relationships and then come out later. In recent years there has been emergence of lesbian-gay baby boom where lesbians and gay men have children after. They are building two generational families in the context of openly lesbian-gay parent lifestyles. Ryan-Flood is often asked why she chose Sweden and Ireland in a comparison of this type. Basically Sweden

was one of the first countries to have recognition of same sex partnerships through its registered partnerships law back in 1995. The same laws expressly prohibited any parenting possibilities. It was clear, you could have your partnership recognised but you couldn't have access to assisted reproduction, adoption, fostering. The laws were subsequently changed although they are not equal you can still access assisted reproduction, adoption if you are a same sex couple but not for single women. At the time of the research Ireland didn't have any possibility for recognition of same sex partnerships although since 2015 it now has same-sex marriage. However, it was possible for lesbians to access donor insemination through private clinics because it wasn't such a high profile political issue and therefore it wasn't expressly prohibited by law as in Sweden. Gay and lesbian people were recruited as foster carers not because of their support but due to shortage of foster carers.

The cross-cultural contrasts that emerge from Sweden and Ireland are that although lesbians in both countries had a strong preference for non-donor, they liked to know who the donor was and they would like to be able to impart that information to a child. They often reference adopted children's needs to know their parental origins. However, Swedish lesbians typically chose a donor who would also play an active parenting role. He would also be an-engaged father. It would typically a gay friend or maybe a gay couple. Their children were conceived and had three or even four equally participatory parents although often the lesbian couple would be the primary custodial parents but the gay father(s) were very involved as well. Irish donors who simply donated sperm but the agreement was that when the child was older e.g. 18 years and they were curious about him, then they would make contact with him. He wasn't completely anonymous donor. This has implications when thinking about divorce and co-parenting.

Opponents of lesbian and gay marriage often refer to instability of lesbian, gay relationships. It has become part of good citizenship – the idea of the good becoming bound up with customs of monogamy and long-term relationship stability. Bourgeois has argued that same-sex couples are similar to heterosexual counterparts in terms of their likelihood of divorce. A study in Norway and Sweden found that the same factors contributed to likelihood of divorce e.g. age-gap of 10 years or more, cross-cultural relationships etc. The legal recognition of same-sex has relatively been for short number of years in various countries, the data is limited and long-term conclusions can't be drawn yet. This raises questions such as if lesbian couples have the potential for more egalitarian relationships, what are the implications of post-breakup? Does that still hold or not?

Lesbian parents may face unique challenges in terms of lack of legal recognition for co-parents. In her sample, only the birth mother or the biological father had the legal rights. How has this managed the post-separation? Ryan-Flood carried out interviews with 68 lesbian couples in Sweden and Ireland with a focus on lesbians who have children after coming out. At the time of her research 7 families had already experienced the breakup and they were co-parenting after separation. A few years later, in a follow up research another 4 families' relationship had ended. The writing of a moral contract prior to birth of the child was common among these families. They were conscious of the fact that not all of them had legal rights and they wanted to clarify prior to birth what the rights and obligations for affected parties were. Often these included discussion of custody arrangements in the advent of relationship breakup. This took place at birth or even conception. Writing of a moral contract was very common prior to the birth of a child. Discusses one informant who continued living with ex-partner post breakup, and they even decided to have another child together so that their son could have a brother. Cooperative co-parenting after separation exemplifies Weston's work. Second parent adoption is an important aspect of contemporary lesbian parenthood, but two-parent model is insufficient. (The "lost horizon of same-sex parenting" that Butler talks about). Separation presents

new challenges for egalitarian model of parenting. Need to rethink sexual citizenship to be more inclusive of new and transitional life experiences.

No Bad Women Just Bad Laws: three decades of sex workers struggle for law reform

**By Cheryl Overs:** (Michael Kirby Centre, Monash University; Visiting Fellow, IDS, Sussex)

[Cheryl Overs](#) has been a sex worker rights activists since the 1970s when she began campaigning for decriminalisation of sex work in her home town of Melbourne Australia. She reflected on the lack of legal recognition of sex work as legitimate occupation and the lessons that can be learnt. The contemporary sex worker movement began in France with the occupation of a church in 1975. About 60 women [occupied a church near Lyon](#) to protest police violence and harassment and to demand safe places to work.

Sex workers law reform demand is important to understand. It is not limited to removing laws against selling sex but against “pimping” as well, which may explain why it is so difficult to gather support for it. Referring to a [map on global sex work law](#) she developed last year, Overs pointed out that in most countries in the world selling sex is not illegal unless it involves public soliciting but that living off immoral earnings and operating brothels are illegal almost everywhere. There are some exceptions. In very few countries it’s illegal to sell sex under all circumstances – the UA, the Gulf states, Pakistan, Saudi, Mongolia are some examples. But, she says, it is laws against organising sex work that are problematic because it is those laws that effectively prohibit safe, legal workplaces for sex workers.

She drew on Msosa’s discussion on colonial laws that apply to sex work. English jurisprudence was set in 1957 by Lord Wolfenden who said that while law doesn’t govern sexual behaviour and morality it does seek to that protect citizens from that which is injurious or offensive. To put Wolfenden’s point bluntly, organising sex work is seen as injurious and walking around in a miniskirt on the streets is seen as offensive. In the wake of the French church occupation a movement of sex workers developed and the International Committee on the Rights of Prostitutes was created. By 1983 the ICPR was vocalising demands for decriminalisation of sex work and for freedom from violence and discrimination and oppressive public health measures. These demands were codified into the [World Charter of Prostitutes’ Rights](#).

Feminists were driving the inception of the sex worker rights movement and genuinely supporting sex workers to speak out, but the partnership was rocky. Some women became uncomfortable as sex workers developed and pushed for their idea of decriminalisation – total removal of laws including those against managing and organising sex workers – which many saw as the legitimate crime of ‘pimping’. Some were uncomfortable with male and transgender sex workers which is logical for anyone who believes that sex work exists purely a result of the subjugated status of women. Such an analysis is very hard to sustain if not all sex workers are women. At that time many feminists did not accept transwomen and this was reflected in the decisions of the ICPRs strongest institutional supporter, a Dutch NGO named [Mama Cash](#). By the early 1980s the ICPR had all but dispersed.

Then the coming of HIV then subsumed the whole issue of sex workers organising. At that stage there were sex worker organisation in place in Thailand, US, Australia, Germany, Netherlands, Brazil, Ecuador and Italy (among others). These organisations took up HIV prevention and education, developing between them a global model for peer to peer support for safe sex and injecting that was quickly recognised by the World Health Organisation. As this model expanded throughout the developing countries community groups of sex workers were created, primarily by health agencies.

(Further information can be found in [Priscilla Alexander's book 'Sex Work'](#).) Organisations working with sex workers on harm reduction (as it was not yet called) formed a network ([the Network of Sex Work Projects NSW](#)) which quickly began to advocate for sex workers rights in the context of a disease control. That was, and to a large extent still is, an environment in which epidemiological paradigms detection, surveillance, isolation and control predominate.

Overs said 'The first stones that were thrown at us about organising for rights as a response to HIV/AIDS was that the sex workers rights concept was a western or northern thing, relevant only to privileged white women who were proud to be sex workers and for whom it was a choice.' On the other hand, women in poor countries who were seen as enslaved or are forced which in turn meant that rescue was appropriate, not human rights. But sex workers from developing countries contradicted this argument by talking about the impact of the law and sex work stigma on them - police brutality, clients and managers controlling them, exclusion from services and discrimination. The slogan 'sex worker's rights are human rights' turned out to be universal and the demand for law reform was global.

Having said that, it is crucial to understand that liberation from the laws against prostitution will look different from every country. A key difference is that in many countries citizenship is not automatic, and of course many migrant sex workers are excluded from citizenship which limits access to justice, credit, freedom of movement and health and welfare services. Overs reported that in [her study in Ethiopia](#), she discovered that lack of an ID card meant it was impossible for sex workers to function independently – to buy a sim card or a train ticket, to rent a room or claim any charitable benefits. Another example of lacking citizenship she cited was in humanitarian crises. The sex workers affected by the 2004 Asian tsunami were not registered to be in that part of Thailand and therefore didn't benefit from humanitarian efforts which, as one sex worker commented, were only there to re-build lives they saw as worth having in the first place.

The right to sell sex legally and safely has parallels with the right to legal abortion both involve the right to life, liberty, security of the person, equality, privacy, free speech, and conscience. In the case of sex work, the right to free expression and association. In many cases sex workers are prohibited at law from associating with each other (this is the case in Victoria, Australia where sex work is legal, so is not an issue confined to poor or badly governed places.) Overs emphasises that just removing the law doesn't fix everything. Just like abortion, when sex work is criminalised, choice is reduced.

Sex worker's successful participation in the response to HIV/AIDS was curtailed in 2004 by PEPFAR (the President's Emergency Plan For AIDS Relief), which imposed an 'anti-prostitution pledge', which was a contractual commitment that bound organisations that received money from the US for HIV to condemn sex work and banned them from supporting its legalisation. PEPFAR also imposed abstinence model. These moves proved disastrous for sex workers because the entire architecture of advocating for sex worker's rights was bound up with HIV funding. The machinery of human rights activism around sex work had been permanently disassembled. When the anti-prostitution policy fell into disuse under the Obama administration the rights discourse that re-emerged was limited to health related rights and it was no longer driven by sex workers but by 'allies' (non sex workers that support sex workers) who selected which sex workers could participate and in which way. The driving philosophy also shifted from demands for comprehensive human rights under the rule of law to a pragmatic notion of rights grounded in the instrumental formulation of harm reduction for public health.

Overs gave an example of the difference between harm reduction and human rights. Harm reductionists have lobbied police not to confiscate condoms from sex workers and celebrated where this has been successful while human rights advocates see the arrest themselves as unacceptable regardless of the conditions of evidence.

Overs saw large challenges remaining when we think about sex work law reform, in both theory and in practice. Decriminalisation refers to the removal of bad laws but that is a negative. What happens if the criminal law is removed? That doesn't mean that other laws aren't needed to govern sex work and make it safe. Unfortunately, the institutions that have supported some version of law reform such as UNAIDS, WHO and Amnesty International have been unable to produce a formula that can influence governments for whom criminalisation of the sex industry is seen as the main way to reduce human trafficking for sexual abuse. Since it is now configured to echo the precepts of the public health organisations that fund it, the sex worker's rights movement does not appear to be in a position to significantly influence global or national thinking either.

However, she concluded that this is a space to watch. As effective medications have changed the nature of the HIV epidemic and responses to it, funding for targeted sex worker interventions and organisations is on its 'last legs' according to Overs. She said that although this is decried by those within the organisations providing health services to sex workers, there is cause for optimism and a hope that that an authentic sex workers rights movement will emerge to re-assert itself away from the constraints of the neoliberal ideology of harm reduction and the allies whose job it has been to corral, interpret and instrumentalise sex worker's voices.

**Discussant: Alex Conte**, Director, Sussex Centre for Human Rights Research

Moscato wondered if the lesbian couples used mediation or negotiation and how they came to an agreement. In response Ryan-Flood stated that they didn't use lawyers because there was no legal protection. Despite animosity and heartbreaks, they still managed to co-parent amicably. Ryan-Flood points that there's room for more research to find out what makes their arrangement work. However, she thinks a lot of it has to do with flexibility, a lot of dialogue and cooperation. In contrast to heterosexual couples, gay and lesbian people maintain connection post breakup which translates into effective co-parenting, people don't remain friends often in heterosexual relationship. What happens to issues of nurture in this debate? Lesbian couple has one person who is a biological mother and the one who isn't and how does that difference play out in co-parenting whether as couple or not? The law tends to prioritise biology. However, she pointed to the earlier case discussed by Bremner of where child custody was given to a gay couple. 20 years ago gay parents would not be given custody. She thinks that probably the courts have advanced – they aren't being homophobic. Another question to Overs focused on what she foresees in absence of HIV and AIDS discourse. In response Overs reiterated that the focus on HIV alone has had some negative effects and hopes it'll flatten out to health. On human rights, new demands will emerge around gender, male sex workers, civil rights and in developing countries, around citizenship. Citizenship issue is not upfront because HIV and AIDS agencies aren't interested in it. It should be found out from sex workers - sex workers need to have a say in international policy making forum mediated through HIV NGOs and public health agencies then it shall be seen what emerges. However, Overs noted it has been 30 years.

## **Follow-up Workshop**

This report was presented at a follow-up CORTH Research in Progress Workshop held on the 27<sup>th</sup> of June 2016. A summary of this workshop can be found here:

<https://www.sussex.ac.uk/webteam/gateway/file.php?name=27th-june-workshop-programme.pdf&site=447>

