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Sexuality and the Law: Case Studies from Cambodia, Egypt, Nepal and South Africa Synthesis

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1 Introduction

This paper provides a synthesis of five case studies on the relationship between sexuality and law. These case studies were undertaken as part of the Sexuality, Poverty and Law theme of the DFID-funded Accountable Grant that explores, among other things, the relationships between sexuality and development. The Sexuality and Law work aims to identify policy options and strategies for activist engagement with law and to inform the realisation of sexual rights. The work is particularly concerned with people negatively affected by laws on sex, gender and sexuality; with gaps in policy and inadequate implementation of laws that negatively affect people and their sexuality; and with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ)¹ activism around legal and human rights issues.

Citizenship is essential for all people in the world and is a central component of development, yet it is often harder for sexual minorities to obtain the benefits of citizenship (Phelan 2001). Citizenship is deeply connected to the legal context, and sexuality has come to assume a centrality in debates about citizenship, self-identity and law (Kapur 1999; Richardson 2000). The state determines the legal framework within which certain types of sexual relationships and procreation are deemed legitimate and others are seen as illegal or illegitimate. The relationships deemed legitimate are then privileged through rules, policies and processes such as benefits for married couples or inheritance rules (Rose 1987). These processes are, however, not straightforward or self-evident. As Kapur (1999: 362) reminds us, 'culture and sexuality are not uncontested categories in law'. Richardson (2000: 258) similarly emphasises the need to recognise diverse interpretations of what sexual citizenship means, with conflicting claims over what might be considered to be 'sexual rights' and diverse views on its political utility. Rather these categories are sites of negotiation, contestation, construction and reconstruction. Issues of sexuality are thus often implicated in notions of citizenship and are contested through citizen and state action. For example, in Egypt, Tahrir Square has emerged as a symbol of a new form of citizenship, which challenged gender hierarchies, and in which women are politically active and not confined to the domestic sphere. This challenge to conventional politics – and indeed to women's positions as enshrined within previous Egyptian constitutions – has, however, resulted in a backlash where, as part of the official exercise of power, women and men are sexually assaulted as a means of control (Tadros 2013).

Activism around sexuality is deeply interconnected with the experience of citizenship and occurs in diverse spaces – social, cultural, economic, political and legal. Thus authors have spoken of 'sexual citizenship' (Evans 1993²; Richardson 2000) or 'projects of citizenship' (khanna 2009).³ In relation to sexuality, the role of law is thus highly significant yet ambiguous: historically the law and its associated legal structures have acted as tools for the regulation of sexuality and gender, yet, at the same time, civil society in many parts of the world see in law the potential for their emancipation.

There is a long history to the topic of sexuality and law in contexts outside western Europe and English-speaking North America, particularly in terms of the use of law as a means to exclude people with nonconforming sexualities. Colonial powers are generally seen as

¹ In several parts of the world, unlike in European and North American contexts, sexual desire does not define types of people. For instance, in South Asia, men might have sex with other men but not think of themselves as any different for that fact. There are thus movements that go beyond identity-based politics and address the politics of sexuality beyond simply the question of 'equality' between different 'sexuality types' (khanna 2009). The term 'queer' is a more appropriate descriptor of such movements and activism.

² While Evans was particularly concerned with membership of sexual communities, and with the rights and privileges associated with individuals' moral worth as consumers, others such as Giddens (1992) and Weeks (1995) have sought to explore citizenship through the lens of sexual intimacy.

³ 'Projects of citizenship' refers to those interventions and activism that are concerned with the attainment of rights, entitlements and resources accorded to citizens in the juridical register, i.e. the acknowledgement of the subject as citizen.

having criminalised same-sex activities and restricted opportunities for gender plurality (Human Rights Watch 2008; Ako 2010), using law as a means of determining ‘acceptable’, appropriate categories of behaviour and to discourage other behaviours. As Eppecht notes, a ‘highly complex relationship’ existed between colonisers and their subjects, which involved colonists’ fascination, suppression and exoticisation of African people’s same-sex practices in seeking to generate conformity with their own ideologies, practices and understanding of gender and sexuality (2006: 197). There are, however, many examples of both oppressive and accepting attitudes to nonconforming sexual behaviour, however defined, that are not linked to colonialism (Afary 2009; Shannahan 2010). These include, for example, Islamic countries that have traditionally criminalised homosexuality (Blackwood 2007; Bucar and Shirazi 2012) and the majority of societies that have stigmatised or punished transgenderism and female sex work (Hammad 2011). Nevertheless the legacy of European colonial homophobia remains an important feature in many of the 80-plus countries that still criminalise adults who undertake same-sex sexual activity in private, consensual arrangements (Ako 2010; Fredman 2013). These penal or sodomy laws criminalise homosexuality, and encourage discriminatory, stigmatising and violent behaviours towards LGBT⁴ people, which can sometimes lead to imprisonment or killing. Activism against laws and legislation that discriminate on the basis of sexual activity is often contentious, with high stakes involved (Fredman 2013). In many cases, the opportunities to shift entrenched legal positions appear slim in places such as Uganda, Ghana, Kenya, The Gambia⁵ (ILGA 2013; Ako 2010; *Huffington Post* 2013). Yet, there are also some positive examples where activists have been able to engage with the law and to shape outcomes in favour of sexual minorities in countries such as Turkey, Brazil and Uruguay, among others (Başak and Yasan 2011; Carrara 2012; Howard 2011). Much of the work on sexuality has been stimulated through development responses to HIV/AIDS (Cornwall and Jolly 2009). This has provoked a new interest in sexuality, and a recognition of the need to ‘rethink the treatment of sexual minority rights in Africa’ (Ako 2010: 35). International donors and multilateral agencies are now far more aware of different audiences and seek to ensure the participation of ‘key populations’, including sex workers or men who have sex with men in national HIV-coordination bodies. This has opened up new spaces for the engagement of sexual citizenship but has also, as is discussed later in this synthesis, served to close down some avenues of engagement.

Thus, in order to better understand the scope for changing legal structures around sexuality, the Development and Law sub-theme began with an open-ended case study approach. The following five case studies (all from 2013) were selected which covered a wide spectrum of legal positions and activist engagement:

- the public and sexual harassment of politicised men and women in Egypt before the fall of President Mohamed Morsi is explored by Tadros;
- Overs examines recent changes to the laws on sex work and human trafficking in Cambodia and their implications;
- in Nepal, the introduction of progressive legislation around sexuality, the social context and sexual subjectivity is assessed in detail by Boyce and Coyle; and
- in South Africa, an examination of the undermining of HIV-positive women’s sexual and reproductive health rights in relation to sexuality, contraception, HIV testing and fertility is undertaken by Muller and MacGregor; while Lewin, Williams and Thomas explore criminal violence, and the associated legal processes, as experienced by lesbian women and gay men.

⁴ This synthesis uses the term LGBT, an acronym for Lesbian, Gay, Bisexual, Transgender, to refer to a diverse group of persons who do not conform to conventional or traditional notions of male and female gender roles. It is used here as an inclusive category which includes Intersex, Questioning people or LGBTIQ. In the case studies which inform this synthesis, the authors use slightly different acronyms, such as LGBTI for example.

⁵ Nearly 40 countries in Africa continue to criminalise homosexuality (see Ako 2010 for more details) and are frequently accompanied by arbitrary arrest, imprisonment, discriminatory laws and practices, lack of access to health care and failures to address HIV (Ndashe 2011; see also www.gaylawnet.com/index.htm).

The cases were chosen in order to elicit critical reflection and a sharing of perspectives, approaches and strategies in relation to sexuality and the law. Thus, all the case studies reflect on engagement with the law, on the possibilities for realising rights – despite in many cases laws that constrain sex/sexuality – and on the scope for mobilising for sexual justice. An inductive approach has been taken to these investigations of sexuality and the law in order to explore emerging issues rather than to constrain investigation through a predetermined focus. Nonetheless, all researchers were mindful to explore the subjective experiences of law and what the law might mean to them. As components of the Sexuality, Poverty and Law theme of the Accountable Grant, these case studies were also selected for their contributions towards the development of practical policy and programme options for strengthening the implementation of existing laws and legal protection for those marginalised by laws and policies governing sexual conduct. Drawing on the framework provided by Sumner *et al.* (2011) which identifies powerful factors that shape research impact on policy, the case study investigators also examined, where possible, the ideas and discourses associated with policy processes and legal institutions, the actors and their networks, as well as the institutions and contexts which framed the issues of sexuality and law under investigation.

2 The rule of law

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly disseminated, applied equally, independently judged and which are in accordance with international human rights. The rule of law is thus dependent on a 'fair and effective justice system' (DFID 2008: 4). This includes regulatory frameworks, the legal system, and the constitution. Taken together, these provide the terms of citizenship.

All laws play a particular role in shaping and determining sexuality. As Levesque (2002) argues, varied aspects of legal systems regulate sexual development and resultant behaviours, attitudes and outcomes; they influence sexuality through controlling media, schools, social services etc.; and they control how individuals shape their own behaviour – and in turn influence relationships and social environments – through criminal and civil law which regulates what families may or may not do. Thus, he argues, through definitions of adulthood, childhood, through access to condoms or abortions, and through state education, sexual activity and its consequences are regulated. Campaigns and laws aimed at deterring men from buying sex also provide a particularly clear example of law and policy as vehicles for messages about sexual behaviour (see for example Galusca 2012 and www.stopdemand.org/wawcs0154993/prostitution.html). Yet for most citizens, these regulations go 'unnoticed, unmarked and unused' (Levesque 2002: 47).

As suggested above, the law can be seen as an ambivalent source of power for most people. On the one hand, it acts as a protector and the arbitrator of justice, allowing citizens to demand their rights and secure the benefits of citizenship. On the other hand, for many people marginalised because of their sexual behaviour, status and gender, the law can be extremely powerful and difficult to challenge. In 1999 Boyd thus argued that 'it is crucial to bring the political economy of sexuality and gender more firmly into our analyses of law's contradictory role in emancipatory politics' (1999: 370).

Legal systems often shape notions of 'acceptable' sexuality, by contributing to a 'climate of abuse' for those who do not conform. This includes:

- the sodomy or penal laws which criminalise same-sex relations between consenting adults;
- direct criminalisation of particular forms of consensual sexual activity such as sex work, transactional or intergenerational sex; and
- laws determining appropriate public behaviour associated with morals, decency or public scandal and criminalising other behaviours (Long 2001).

Legal discrimination is multidimensional and can refer to three complementary processes of exclusion. First, there is inequality before the law or *de jure* discrimination that is written into the legal formal or customary code. Second, legal discrimination can be caused through differential treatment on the grounds of identity, gender, disability, sexuality, race, poverty and so forth. Finally, legal discrimination can also be effected through the discriminate use of policies, practices or rules to bring about the under-representation of certain categories of people in institutions, employment or representative forums (Fredman 2013). In addition, legal discrimination can enhance or reinforce stigmatisation when individuals fail to conform to the standardised behavioural expectations associated with their gender.

This synthesis examines five issues of sexuality and law in four countries (Cambodia, South Africa, Nepal and Egypt) in order to arrive at some overarching conclusions about sexuality and the rule of law. As suggested above, each of these countries is uniquely positioned in relation to the rule of law and a different issue relating to sexuality is examined in each.

These are: sexual harassment of politically active men and women (Egypt); criminalisation of sex work or its recategorisation as trafficking (Cambodia); the progressive legislation around sexuality and how this plays out in social contexts (Nepal); HIV-positive women's sexual and reproductive health rights and access to contraception and childbirth services (South Africa); and homophobic violence against lesbian women and gay men (South Africa). Each case study shows significant gaps between the content of legislation, associated policy and enforcement.

There are many different notions of what the rule of law comprises (see Kleinfeld Belton 2005). The World Justice Project, authored by Agrast, Botero and Ponce, identifies nine dimensions to the rule of law, namely: 'limited government powers; absence of corruption; order and security; fundamental rights; open government; effective regulatory enforcement; access to civil justice; effective criminal justice; and informal justice' (2011: 7). It recognises that no country has ever achieved the rule of law to perfection. There are, however, no universally accepted definitions of any of these terms or categories. DFID⁶ identifies the key elements of the rule of law to be as follows: 'the supremacy of law; equality before the law; accountability to the law; fairness in the application of the law; separation of powers; participation in decision-making; legal certainty; avoidance of arbitrariness; and procedural and legal transparency' (2008: 5).

The World Justice Project sees the rule of law as being based on four universal principles. In combination, these principles offer a balance between 'thick', substantive (rights, freedoms) and 'thin', procedural (formal rules and procedures) dimensions of the rule of law. The four principles are as follows:

1. The government and its officials and agents are accountable under the law.
2. The laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property.
3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
4. Access to justice is provided by competent, independent, and ethical adjudicators, attorneys, or representatives and judicial officers who are of sufficient number, have adequate resources, and reflect the make-up of the communities they serve.

(Agrast *et al.* 2011: 9)

These four principles closely align with the five socially desirable ends that Kleinfeld Belton identifies as comprising the basic components of the rule of law: '(1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, and (5) human rights' (2005: 5).

To varying degrees, all of these are evident within Nepal, Cambodia, South Africa and Egypt, and in all these countries the rule of law is imperfect. The situations described vary, and include those where the rule of law has broken down in the context of an immediate crisis (Egypt), is chronically very weak (Cambodia), and where it is marginally stronger but still not perfect (South Africa and Nepal). In the last two, the legal systems are developing in the context of new constitutions and constituent reforms across key institutions in the wake of political upheaval.

South Africa's constitution is well known for the protections it offers its citizens (Fredman 2013). Unlike many other constitutions, it makes explicit mention of sexual orientation. This has, over the years, formed the basis of successful legal cases that have established that – because discrimination on the grounds of sexual orientation is unlawful – same-sex relations

⁶ Based on the UN Secretary General Report, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004).

should not be criminalised and no discrimination in marriage, immigration, adoption and employment on those grounds must be permitted (Fredman 2013). The constitution also compels courts to consider international law and this has meant that international human rights jurisprudence also pertains to sexual rights in South Africa (Ako 2010). South Africa's constitution has often been upheld as one that respects the rights of all its citizens and does not marginalise people on the basis of their sexuality. South Africa ranks well in terms of its rule of law outcomes: it offers 'government accountability, effective regulatory enforcement, and access to justice' (Agrast *et al.* 2011: 34). Judicial independence and fundamental rights are also robust (Mangcu 2012). Yet, South Africa is unable to achieve equal enforcement of law across all segments of society and a higher proportion of people from low-income households complain of police abuse. Crime and a lack of security remain problematic (Agrast *et al.* 2011). According to the World Bank's Rule of Law Index, which sees 2.5 as strong and -2.5 as weak, South Africa scored 0.1 in 2011 (see Figure 1 below).⁷

In contrast, **Cambodia** is characterised by a weak legal and institutional environment and is not seen as having effective limits on government powers (Agrast *et al.* 2011). For some, Cambodia is not a country with a weak rule of law, but rather one in which the government has explicitly rejected the concept of the rule of law, as indicated in the government's subversion of democratic principles and the use of policies which deny people their livelihood and dignity (Ghai and Cotterill 2010). Corruption is a significant problem for Cambodia, earning it the worst ranking in the world (Agrast *et al.* 2011). Overs describes Cambodia's judicial system as 'corrupt, inaccessible and inefficient' (2013: 10). In addition, there is little protection of labour rights and the police of Cambodia do not always know the content of the law. The consequences of this, for sex workers, is that they are vulnerable to: substandard working conditions; underpayment; deprivation of property, liberty or livelihood; as well as the violation of free association and vulnerability towards rape and other forms of institutionalised violence. The lack of the rule of law means that redress in courts is almost impossible. As indicated in Figure 1, Cambodia ranks worst of the four countries examined in terms of the rule of law, with a World Bank score of -1.03 in 2011 (World Bank 2011).

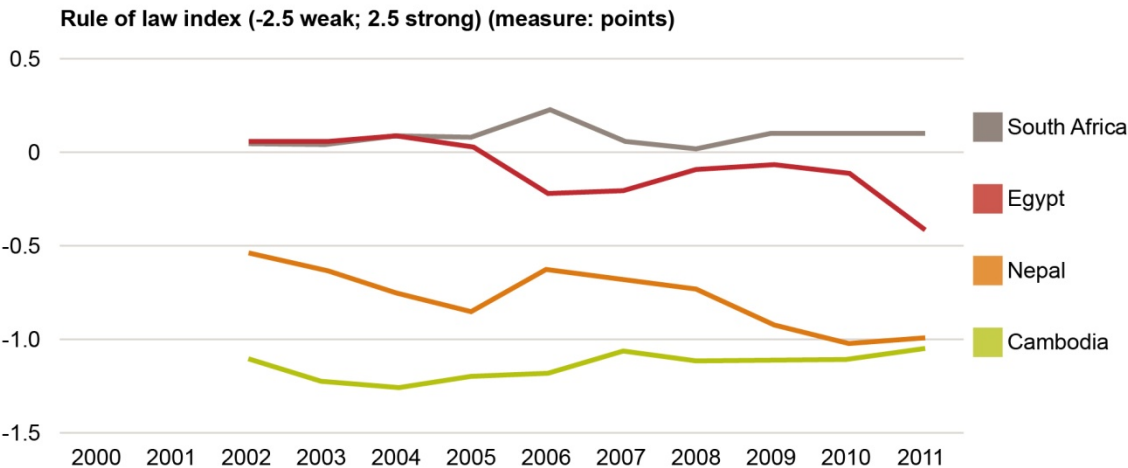
In 2006, after its civil war ended, **Nepal** signed the Comprehensive Peace Accords (CPA) and developed an interim constitution in 2007. This constitution was intended to manage Nepal's transition from a constitutional monarchy to a federal republic as well as to establish an elected body to draft a new constitution within this federal republic framework. The constitution created new quotas and affirmative action policies for women, and ethnic and caste minorities. New social and political spaces also opened up for marginalised communities that had previously lacked political representation. Accompanying these political processes has been a debate about representation, particularly whether disenfranchised ethnic and caste groups would receive official recognition in the new constitution. The new constitution was scheduled for promulgation in May 2010, but political disagreement has delayed this process. In July 2013, at the time of writing, Nepal's interim constitution had expired and the Constituent Assembly was dissolved after the failure to ratify a new constitution. This political and legal vacuum culminated in November 2013 with the election of a new Constituent Assembly. In terms of the rule of law, Nepal has had a very poor record in recent years, with allegations of corruption in the judiciary common, and few believing that the law treats all people equally (USAID-Nepal 2006). Many people in Nepal perceive and experience the law as failing to uphold equality for all citizens and as failing to demonstrate independence of law-implementing agencies (Bhatta 2013). The rule of law has declined in Nepal since 2006 and in 2011 Nepal ranked marginally better than Cambodia in the World Bank's Rule of Law Index, with a score of -0.99 (see Figure 1; World Bank 2011).

There are challenges to assessing **Egypt's** position in relation to the rule of law, particularly given that 'changes to the legal framework governing elections, political parties, the media, and other important institutions are in constant flux' (HIIL 2012: 22). Following protests in

⁷ In comparison, the United Kingdom scored 1.67 and the United States 1.6 (the Global Economy, World Bank Indicators).

Cairo’s Tahrir Square and the military’s intervention and removal of Mohamed Morsi as president, the United Nations in July 2013 called on Egypt to seek to restore the rule of law and a system of governance that embraces equal human rights for all citizens as quickly as possible (UN News Centre 2013). Although there is some evidence that Egypt has made progress regarding women’s rights and welfare, women’s political representation in state institutions, and in terms of laws promoting greater equality of citizenship (HIIL 2012), others argue that Egypt’s legal provisions continue to discriminate explicitly against women in both customary and civil law (Fredman 2013). Challenges to Egypt’s rule of law include: its use of emergency law to control non-violent political protest and associated detentions; recurrent detentions; violations of court orders; and the use of military law for civilians’ trials. Egypt has seen a decline in the rule of law since 2010. In 2011, it scored -0.42 on the World Bank’s Rule of Law Index (see Figure 1; World Bank 2011). This places it between South Africa and Nepal and Cambodia. However, as suggested above, all countries have imperfect rule of law and rather than ranking them in terms of better and worse, this paper seeks to explore how this plays out in relation to issues of sexuality.

Figure 1 Comparison of the rule of law in the case study countries, 2000–2011



Sourced from TheGlobalEconomy.com, The World Bank (govindicators.org)

The rule of law has been seen as interlinked with the broader concepts of development and international cooperation, including human rights, gender equality, good governance, decentralisation, poverty reduction, economic development and peace-building (SDC 2008). The idea of law being central to the development process gave rise to the ‘law and development’ movement that emerged from leading US law schools in the 1960s. Within a few years it had generated hundreds of reports on the gap between the law on the books and the law in action in developing countries and the contribution that better governance could make to economic development. It posited law as an instrument to reform society and suggested that with the right education, lawyers and judges could serve as social engineers (Trubek 2003). Between 1990 and 2005 billions of dollars of development assistance was spent on law reform projects in developing and transition countries. However, the law and development movement has also been heavily criticised for its guiding assumptions about western rationality and its focus on property rights and enforcing contractual agreements (Nyamu-Musembi 2005).⁸ These were seen as being aimed at making countries more attractive to foreign investment and development aid rather than promoting the interests of the poor or social justice (Trubek 2003). Some critics assert that the law and development

⁸ Indeed, even countries with liberal constitutions and exhibiting the rule of law have been shown to use these concepts flexibly and not always to respect the foundational premises of liberalism, namely that all people are equal before the law.

movement was grounded in a naive belief that the US legal system (and US legal culture generally), or 'liberal legalism', could be easily transplanted to developing countries (World Bank 2005). The idea of law as an engine for social reform and lawyers and judges as social engineers has also been questioned (Merryman 1977). The failure of many institutions intended to further development through the rule of law has also led to criticisms of this approach (Boanada Fuchs 2013).

There are many other ways in which law and development interact, including legal pluralism (Goodale and Merry 2007; Seidman 2007), transnational law and transitional justice (Aoláin, Bell and Campbell 2007). These approaches offer diverse perspectives on the relationship between legal frameworks and development, while also emphasising the role of local communities and citizen action at local, national, regional and international levels. They also suggest that the rule of law may not be the only legal approach to bringing about positive change. There is however a substantial history within the topic of law and development demonstrating that lawyers are not always best placed in relation to development issues and do not always prioritise the interests of the poor or marginalised. Moreover, legal institutions and laws do not operate well in all contexts and cannot simply be transferred and implemented for development gains (Nyamu-Musembi 2005). Nonetheless, as this synthesis shows, issues of democratisation and sexuality are deeply interwoven. Discussions about development and law need to be revived – not to reflect on neoliberalism, but rather to focus on the intersections between sexuality and social, political and economic marginalisation. Thus, despite an awareness of all these challenges, the rule of law has been seen as playing a significant role in relation to both economic development and democracy. In the following sections, we explore the dimensions of the rule of law in relation to sexuality and development as described in the case studies in order to draw out common themes and potential for policy influence and change. Each case study has been published independently, available at: www.ids.ac.uk/idsresearch/sexuality-poverty-and-law-programme.

3 Legal institutions and sexuality

The law is one of the key instruments of the State in its exercise of power. The rule of law defines and legitimises the behaviour of State authorities and their relationship with citizens. It establishes rules for access to resources and for political, economic and social interaction.

(SDC 2008: 5)

3.1 Country case studies and the rule of law

The rule of law requires a hierarchy of laws, dominated by the constitution, and a legal framework with substantive coherence (SDC 2008) and a respect for human rights. A further element is the principle of nondiscrimination and equality enshrined in law. All citizens should be treated equally, and there should be no discrimination against any specific categories or groups of people. The South Africa and Nepal case studies illustrate strong legal proscriptions against sexual discrimination. In Egypt, the penal code, initially drawn up in 1937, does not explicitly define rape, sexual assault or harassment, nor does it recognise the multiple ways in which people are subjected to sexual violence or the multiplicity of actors who undertake such acts of violence (for example, the state itself or religious bodies). As a consequence, there are limited possibilities for redress through the legal system. Cambodia's constitution states that all citizens are equal before the law and should have equal access to rights and freedom. Yet, for the past five years and at the behest of the United States, Cambodia's legal system has criminalised all activities associated with commercial sex. This includes human trafficking, soliciting for prostitution and providing sex workers with accommodation, transport or advertising. As a consequence, sexual services are sold under the guise of entertainment and the women involved have been reclassified as 'entertainment workers'. At the time of writing (July 2013), Egypt was undergoing a rule of law crisis with the constitution signed in December 2012 then suspended in July 2013. The research undertaken for this case study occurred under Mohamed Morsi's rule and under the constitution of December 2012 which has been criticised for its conservative position on women's rights including the: imposition of familial and societal obligations; the failure to legislate against discrimination on the grounds of sexuality; and the constraints to freedom of expression for all citizens (Al-Ali 2012). South Africa's constitution has been lauded for recognising the rights of gay, lesbian and transgendered people yet, as the two case studies make clear, the stigma of homosexuality and conservative attitudes to women's sexuality combine with poor law enforcement to undermine the sexual and reproductive health rights of women living with HIV and to make gay men and lesbian women highly vulnerable to homophobic attacks.

Notwithstanding South Africa and Nepal's constitutional specifications on sexuality, all the case studies demonstrate instances of discrimination, human rights violation and/or violence against people who exhibit different sexualities. These instances are based on a range of factors, including historical, cultural, political and economic factors, as well as on negligence, misplaced good intentions, malice, lack of education, training or resources, misogyny and homophobia. Some are deliberate and systematic while others are opportunistic in that they occur because of opportunities that arise as a result of a lack of respect and because legal protection is absent. However they are all influenced by weaknesses in the rule of law.⁹

The case studies all demonstrate the degree to which, in each of the countries, institutional alignment is lacking. In addition, there are examples of significant gaps between the content

⁹ The rule of law needs also to be contextualised and challenged, and other legal frameworks may provide alternative entry points into addressing sexuality and development. This includes legal pluralism (religious law, customary law) which emphasises a case-by-case approach and transnational law which has been successfully applied to challenge sexuality-related issues, such as women's rights, sex workers' rights and sexual and reproductive health rights (Merry 2009; Kampadoo 2001).

of legislation, policy and enforcement. The South African case studies demonstrate that good policies and progressive constitutions are not enough to shape societal values and sustain the rule of law. Muller and MacGregor's case study (2013), which draws on previously published research and activist reports as well as interviews with key stakeholders, describes how South African women living with HIV are constitutionally protected from discrimination and how a wide array of policies seek to ensure provision of related services (for gender-based violence, fertility, maternal health, sexually transmitted infections, sexual health etc.) within a legal framework that reflects its commitment to sexual and reproductive health (SRH) rights.

Nonetheless, the case study reviews research and accounts of SRH advocates and activists which suggest that practice and implementation differ markedly from the legal and constitutional ideal. Not only do women experience unprecedented rates of sexual and gender-based violence, but the evidence indicates that women living with HIV are highly vulnerable to legal and constitutional violations. For example, women's access to contraception is outlined in the *National Contraception Policy Guidelines - Within a Reproductive Health Framework* (NDoH 2001) and the *National Contraception Service Delivery Guidelines* (NDoH 2003). These documents aim to improve sexual and reproductive health, and facilitate 'informed choices' (DoH 2004: 15). They are based, as are all reproductive policies, on human rights principles and framed in accordance with section 12.2(a) of the constitution which asserts that everyone 'has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction' (Republic of South Africa 1996). South Africa's National Strategic Plan for AIDS commits to increasing SRH services for people living with HIV (South African National AIDS Council 2011: 14).

Yet evidence being collated indicates that, in practice, women living with HIV have been coerced into sterilisations, or have been sterilised involuntarily (Mthembu 2012; Strode, Mthembu and Essack 2012; see also Muller and MacGregor 2013). Sexual and reproductive health advocates suggest that this and other violations have been facilitated by negative attitudes on the part of health care workers (which most likely mirror general societal attitudes) regarding the sexual activity and fertility of HIV-positive women. This, in turn, translates into inadequate practices to ensure true autonomy of consent in consultations. Such conditions are exacerbated by the constraints of an under-resourced health system. Research has shown that health care workers present sterilisation as a birth control option because of the women's HIV-positive status and misinform women about the need for sterilisations. (In one documented case, a woman was told that if she had another child she would die.) Furthermore, women have been compelled to sign consent forms without explanation under highly stressful circumstances, such as while they were already in labour or being wheeled into theatre. In addition, reproductive health advocates argue that women living with HIV have found their reproductive choices constrained as they are discouraged from bearing children, with health workers emphasising contraceptives and abortion as 'appropriate' given their concerns of risks of pregnancy and risks to the unborn child. Such decisions are also informed by the lack of knowledge and resources for fertility options for HIV-positive couples in the state health sector. The lack of institutional alignment in South Africa is also apparent in relation to provider-initiated counselling and testing for HIV. This is occurring in the context of targets set to attain the government's aim of ensuring that all South Africans are tested for HIV. Reports of inadequate consenting practices that appear to verge on coercion, especially in antenatal clinics, have prompted concerns. Muller and MacGregor (2013) report on research and activist reports regarding situations where women are forced to undergo HIV tests in order to access contraceptives or treatment for sexually transmitted infections (STIs). In addition, health care workers can deny women access to family planning, contraception or STI treatment if they do not undergo testing. This coercion stems from the disjuncture between reproductive health policies and the policies aimed at scaling up HIV testing through provider-initiated testing. Thus health care workers

have considerable influence over women, strongly encouraging them that, as mothers, they have a moral responsibility to be tested. Thus, while emerging out of a genuine public health concern, such HIV testing gravely violates women's rights to autonomous decision-making about their own bodies.

The case study on LGBT hate crimes in South Africa also demonstrates significant gaps between the content of legislation, policy and enforcement as well as failures of institutional alignment (Lewin *et al.* 2013). A 'political climate permissive of overt verbal attacks on LGBT people' in South Africa (Rothschild 2004: 170) is evidenced by the casualness with which high-profile public figures vilify and voice prejudices against LGBT people – apparently without any sense of personal or institutional accountability to the principles of the constitution and other laws. The lack of institutional alignment is evident in the state's failure to understand the contexts in which LGBT people live. As suggested above, the rule of law aims to ensure that laws are enacted, administered and enforced in accessible, fair and efficient ways (Agrast *et al.* 2011). Yet, as this case study by Lewin *et al.* shows, despite considerable legislation offering protection,¹⁰ in the case of LGBT people, the very act of seeking legal justice for violent crime and the associated media coverage frequently places additional members of this community at risk.

The offences examined in this case study, which the authors argue should be considered as hate crimes, reveal the inadequacy of the legal system in dealing with crimes relating to sexuality. For example: the investigating police failed to appreciate the nature of the cases and did not collect appropriate evidence; the state does not provide counselling or other forms of support; magistrates do not have experience of homophobic hate crime cases and do not necessarily understand the evidence presented before them. Furthermore, the media failed to report these crimes in sensitive and responsible ways. Instead, by publishing photographs of the victims' friends, it exposed additional community members to threats of violence.

3.2 The law and barriers to justice

Guilt, shame, embarrassment and fear of being labelled homosexual prevent people from reporting sexual crimes (Sable 2006). As well as confirming that these factors form particularly significant barriers to justice for sexual minorities, the case studies illustrate that they are particularly potent when they combine with realistic fears associated with the consequences of submitting to an adversarial public process.

Criminalisation and social engineering can create injustice for sexual minorities. When combined with bad governance and weak institutions, accountability is drastically reduced and, as a result, the possibilities to address these injustices and change the conditions that create them can be severely limited. In the Cambodian case study, Overs (2013) explores the changing legal context and shows how the criminalisation of sex work in the late 2000s has been accompanied by arrests of sex workers and the closure of brothels through police raids across the country. Government agents characterised these arrests as 'rescues' and women kept in detention were described as being in 'rehabilitation'. Human Rights Watch (2010) observed that 'rescued' women were regularly exposed to abuses by police, municipal park guards and employees at government-run social affairs centres. Those who refused to be sent to shelters as victims of trafficking and sexual exploitation, were 'asked' (forced) by staff of the Phnom Penh Municipal Social Affairs Office to sign an agreement to 'improve' themselves as 'good citizens' and to cease their 'indecent' activities. Although not legally binding and having no legal basis, sex workers signed because they were scared and wanted their freedom.

¹⁰ These include: the constitution and the Bill of Rights, which expressly forbid discrimination on the basis of sex, gender, race and sexual orientation; the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA); the Sexual Offences Act of 2007; the Domestic Violence Act of 1998; and the legalised rights of lesbian partners to adoption as co-parents, to the extension of partner benefits to same-sex partners, and to marriage (through the Civil Union Act of 2006).

In Egypt, Tadros (2013) argues that the politically motivated sexual assaults aimed to instil fear in the wider polity and to dampen people's desire to engage in public protest. Revolutionary forces, those opposed to the Egyptian government, and the independent media have been concerned that publicising these assaults will perpetuate the spread of fear and, as a result, they have not highlighted, or have delayed publicising, these experiences.

In the South African case study on lesbian women's and gay men's experiences, survivors of hate-driven assault frequently did not report their experiences to the police – in part because they did not expect to be taken seriously, in part because they feared further victimisation from the police and fear of reprisals by perpetrators. This represents, as Rothschild has noted, an additional burden for human rights coverage, namely that 'documentation must render visible the very communities who sometimes seek safety in invisibility' (2004: 169).

In addition to the lack of desire to publicise experiences of sexual violence and discrimination, and concern about further stigmatisation from the police themselves, the case studies all demonstrate failures in legal action and redress. It is clear, in both South Africa and Egypt, that the state does not always take appropriate legal action, although the context and the reasons for this are very different. In Egypt, law enforcement actors are seen as complicit in the acts of sexual violence and there is no political will to address sexual assault. Thus Tadros documents the involvement of military police in arresting, detaining, beating, humiliating and stripping women as well as subjecting them to forced virginity testing (2013). Moreover, the law does not offer possibilities for redress. The penal code, which dates from 1937, makes only limited reference to sexual assault and has not been revised since 1937. Of the 400 provisions that represent the penal code, only articles 267, 268 and 269 deal with sexual assault. These articles provide very limited definitions: for example, Article 267 defines rape as penile penetration of a vagina, and fails to recognise non-consensual acts such as non-vaginal penetration, non-penetrative sexual assault, non-penile penetration or attempted rape. The articles do not address harassment or attempted rape or acknowledge men's experience of sexual violence.¹¹ In addition, as Tadros demonstrates, when people have sought redress through legal institutions, Egyptian military courts have acquitted the alleged perpetrators.

Tadros points to Egyptian rape law as a barrier to justice for victims of sexual assault. Perpetrators go free because rape is defined as vaginal penetration without women's consent. Proving vaginal penetration is always difficult in rape cases and is more so where women do not have the support necessary to gather the evidence police and prosecutors require. Tadros (2013) argues that this means that many reports of serious sexual assaults are dismissed as not provable or because they are seen as causing minimal damage. Victims of sex crime in Egypt are unlikely to receive appropriate legal support and the case study shows that this is even less likely when the sexual assault is politically motivated.

Tadros notes that perpetrators of sexual crimes were reported to police along with evidence including witnesses and some charges were laid but no cases brought to court. The General Prosecutor's office delayed the process, citing the need for more evidence. Tadros suggests that this may signify the indefinite retention of these cases.

The Egyptian experience, demonstrating inadequacies and malpractice in the legal system, is echoed in all the other case studies. For instance Lewin *et al.* (2013) show how the South African police failed to make arrests in relation to hate crimes, despite the presence of witnesses; Overs (2013) reports unlawful arrests of sex workers and failure to arrest perpetrators of violence; Boyce and Coyle (2013) report arbitrary detentions of people who might be identified as LGBT by the police in Nepal who inappropriately and excessively use

¹¹ Tadros cites, for example, the El Nadim Centre's reports of male protesters who were stripped naked, beaten and who experienced forced anal penetration. While this is recognised as rape by the World Health Organization, this is not the case in Egyptian law.

public nuisance and bail charges to target sexual and gender minorities, among others. Nepal's third-gender population regularly faces police discrimination.

Discrimination because of sexuality occurs not only in legal processes associated with the police or in the courts. Sexuality discrimination also arises in matters governed by administrative law. Discriminatory application of regulations can reduce access to services, welfare, finance, housing, and legal aid; it prevents people from registering to vote, marrying or travelling. Claims in relation to these matters can be pursued through mediation or by administrative institutions and procedures. In criminal cases protection may be available through court orders that ensure, for example, the anonymity of victims. Such an arrangement would, for instance, have benefited the two South African victims of hate crime described by Lewin *et al.* (2013).¹² Advocacy and activism therefore play important roles in relation to legal services and provide advice, representation and education for women and other sexual minorities (discussed in Section 5).

In all the case studies, negative attitudes displayed by the police towards women and sexual minorities are echoed to some degree by others in positions of power and reflected in key legal institutions: health services, the judiciary, political parties, non-governmental organisations (NGOs) and government departments. This is coupled with failures to follow legal process: those accused of crimes are not arrested or are acquitted, trials are delayed and states fail to protect the victims. This undermines the human rights of people affected by laws on sexuality and sexual behaviour. It also routinely causes marginalisation and vulnerability and can lead to fatalities.¹³ Moreover, it threatens institutional alignment and further strains the rule of law in these countries. These factors point, in turn, to the dangers of relying solely on the legal system to promote particular kinds of behaviour. If those in power and the operators of the law do not agree with the legal proscriptions, little implementation of the law is likely to take place.

Overall, in all the case studies, there was some access to the justice system and to the legal spaces around it, such as legal counsel and education, but there were also barriers associated with entry into these spaces. In particular, civil society, NGOs, activists and communities experienced difficulties accessing legal spaces and learning the language and skills to negotiate in legal contexts. This is evident in the exploration of hate crime in South Africa by Lewin *et al.*, where NGOs struggled to become familiar with the legal terrain, undertaking background research, appearing in court as expert witnesses or *amicus curiae* as well as providing psychosocial support or legal counselling.

All the case studies emphasise the lack of education in terms of legal rights, appropriate language and a lack of capacity to take on legal challenges. They all spoke of the need for a process where the broader population is educated on sexuality, rights and legal procedure. The case studies also reflect on the challenges that NGOs and other activists experience when taking their own governments to court. In some instances, they worry about the impact of such action on their donors; in others it is difficult to seek enforcement from officials who are themselves complicit in the failure to respect legal institutions. Sometimes they experience fear of reprisals from those in power and sometimes concern about the broader societal repercussions of their actions that constrain people from engaging in legal challenges and legal activism.

¹² Deric Duma Mazibuko, a gay man, was assaulted in a bar and Zoliswa Nkonyana, a lesbian woman, was brutally murdered. Both were young and black. In the first case, a civil society organisation led evidence as a friend of the court (or *amicus curiae*), but was not ultimately able to influence the magistrate in a way that led to the case recognising the experiences of sexual marginalisation and the vulnerability of LGBT people in South Africa. In the second case, civil society organisations were called by the state to give evidence as expert witnesses in the trial. These organisations formed a civic alliance that testified to the nature of the crime as a hate crime, and therefore one that had particular ramifications, not only for the victim but for the victim's family and community.

¹³ While the case studies refer to particular countries, violations such as these are found across the globe (see, for example, Long 2001).

3.3 National law and the international context

The case studies describe the ways in which national legal and policy environments in these four countries are linked to international discourses and law in diverse ways. Not only does the global context feed into national debates and situations, but the national-level work also has global implications. These links can be used to drive repressive law or policy, or act as a tool to help communities, activists and others to resist the law. In the case of Egypt, Tadros (2013) shows that the politically motivated sexual violence was internationally condemned and reported in international media as well as by Amnesty International (2012). In addition, many civilians and informants were aware that the sexual assaults were human rights abuses. Egyptian human rights organisations gathered evidence of the assaults, argued that the government needed to be more accountable and lobbied for reform of the legal system. Yet, at the same time, the Egyptian process alerts the international actors to the need to expand their discourses and understanding of sexual violence and harassment in order to recognise that men can be victims of sexual assault and to develop responses when it occurs.

South Africa is a signatory of various regional and international conventions and treaties. These include the International Covenant on Civil and Political Rights (ICCPR), the African Charter on Human and Peoples' Rights (ACHR), the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on the Rights of the Child (1989), the Convention on the Rights of Persons with Disabilities (2006) and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol). South Africa has also signed international consensus agreements, such as the Programme of Action of the International Conference on Population and Development (United Nations 1994) and the Platform for Action of the Fourth World Conference on Women (United Nations 1995). South Africa's constitution, its commitment to sexual and reproductive health and rights, and various government organisations (including research units based at universities) are thus aligned to international commitments and trends. Yet, the case studies demonstrate severe failure on the part of the government to fulfil its obligations under those agreements (Lewin *et al.* 2013; Muller and MacGregor 2013).

Nepal's progressive stance towards gender and sexual minorities has been informed by transnational discourses and practices. The legal discourse in Nepal makes reference to comparative international cases in order to assert that gender variants and third genders are 'natural' (rather than unnatural behaviours) and therefore deserving of citizenship and rights (Boyce and Coyle 2013; discussed in more detail in Section 4.2 below). At the same time, Nepal has been at the forefront of international debates and has been influential in terms of promoting legal status for people who practise same-sex sexualities or who self-identify as transgendered or 'third gender'. While Nepal is internationally acknowledged for its progressive policies, these ideas do not always resonate within the country. Instead, the Nepalese government has recently increased state discrimination and intentional targeting of sexual and gender minorities. As is the case in South Africa, Nepal's progressive legislative arrangements are somewhat removed from, and do not resonate among the populace, with the result that widespread stigmatisation and social marginalisation is still experienced by sexual and gender minorities in Nepal.

Finally, in Cambodia Overs demonstrates that laws and policies on sex work are strongly influenced by the US policy of withholding aid from countries that do not enact US-approved prostitution laws and by the US policy of only funding organisations that oppose prostitution to provide HIV prevention and care services to sex workers (known as the PEPFAR anti-prostitution pledge).¹⁴ This particular funding and policy context has undermined the potential for sex workers to mobilise and challenge government law (discussed in more detail below). Conversely the international context has also been important in terms of challenging the law,

¹⁴ See www.pepfarwatch.org/the_issues/anti_prostitution_pledge/

and a campaign has sought to attract international attention and media to the consequences of introducing the Law for the Suppression of Trafficking and Sexual Exploitation in 2009, focusing particularly on the negative implications in terms of HIV prevention services.

To sum up, it is clear from the case studies that controversial laws and disparate policies threaten institutional alignment, and this in turn strains the rule of law. In addition, it is clear from all the case studies that although the national context is critically important, there are clear resonances – and at times dissonances – with the discourse among international activists and institutions. The relationship between legal institutions (including parliaments) and society in general is critical to all the case studies, as is the notion of contested domains. All four case studies show the relationship between law and attitudes in society – as expressed by government ministers and officials, police, judges, health providers and by ordinary members of society through stigma and discrimination. All recognise the possibility that the law may flounder if it departs too radically from public opinion or runs up against sociocultural ambivalence. Thus, while improved law and legal rights are highly important, they are not a total solution. As Rothschild (2004) argued, ‘to address law and policy change, studies must be presented in ways seen as legitimate by human rights, government and policymaking audiences.’

This suggests that working on issues of sexuality only at the national level is insufficient. It is necessary to locate sexuality issues and struggles both in terms of what is happening nationally and locally, and in terms of regional and international conventions, policies and processes. In addition, at different times, these international and regional conventions can influence how national policy is formed and implemented in diverse, and sometimes contradictory, ways. Thus all attempts to influence the rule of law progressively to positively address sexuality and/or protect people from unfair laws that discriminate on the basis of sexual behaviour or sexuality require a detailed understanding of local, national and international contexts. Such attempts also need constantly to chart and oversee practices employed by diverse legal operators working within and across different contexts.

The above discussion also reveals the limits of the law. Even in contexts such as South Africa and Nepal, where highly progressive constitutions and legal frameworks seek to acknowledge and protect gender and sexual difference, the case studies demonstrate the challenges associated with implementation including, at times, a lack of political will to address failures of implementation. This suggests that promoting the rule of law and appropriate legal structures is not, in itself, sufficient to guarantee that people will not be marginalised or discriminated against because of their sexuality. As the sections below show, civil society, social movements and other forms of advocacy and activism are necessary. In addition, recognition of the ways in which law intersects with identity and sexuality – and the complexities associated with this – is also necessary. Thus careful reflection and review is needed – with a focus on the objective – as progressive policies do not always result in the expected outcomes and funding flows may work in contradictory ways. In addition, good policies and appropriate laws need to be further supported to ensure appropriate implementation, with sufficient resources, skills and political will within civil society to undertake advocacy and hold governments to account.

4 Sexuality, identity and law

4.1 Transgressive behaviours and stigmatisation

Across the case studies, there were several examples of how laws on sexuality have the potential directly to persecute people who transgress sexual norms by their actual or perceived sexuality, gender identity or sexual behaviour. In the Egypt case study, Tadros describes politically motivated sexual assaults facilitated by the ruling government and associated with the Muslim Brotherhood. Thus as well as being designed to ensure that people conformed to conventional gender roles and norms, they were also aimed at discouraging political resistance against the government. Women protesters were cast as being sexually deviant, staying in tents overnight, and using drugs. They were depicted as 'other', atypical, promiscuous, lacking in respectability and 'not like daughters of mine'. The result was that the women were portrayed as being to blame for the sexual assaults. As suggested above, South Africa remains deeply conservative, despite its progressive constitution. Hate crimes are explicit attempts to force gay men and lesbian women to conform to mainstream gendered behaviours. Lewin *et al.* (2013) describe how Deric Duma Mazibuko was assaulted in a bar. Kicked, punched, hit over the head with chairs and a metal spanner, the assault was accompanied by homophobic hate speech, telling Mazibuko that as a gay man he had 'no reason to live'. Zoliswa Nkonyana paid for her failure to act in accordance with gendered expectations with her life. She was accused of 'acting like a man' and making advances towards another woman. As a consequence of these accusations, as she was leaving the tavern, she was attacked by a group of men, severely beaten, stabbed and killed. These cases leave no doubt as to the depth of homophobic feeling against gay men and lesbian women in South Africa and of the attempts to 'punish' men and women who are identified as such.

Cases like these occur throughout the world, demonstrating the virulence and persistence of hate against LGBT people. In South Africa they occur in spite of constitutional and juridical guarantees. Nkonyana's case was the first South African legal case in which sexual orientation and identity were recognised as aggravating factors in a murder trial. In Cambodia, arrested sex workers were characterised as 'carrying out indecent acts that affect morality, tradition and public order' and were instructed to seek to be 'a good citizen living in society as others do'. In Nepal, those whose sexuality is socially visible experience stigmatisation and social marginalisation most directly, despite the presence of legal statutes (Boyce and Coyle 2013). For example, men who identify as *metis*¹⁵ are more likely to be identified because their gender identity and expression – which emphasises female or effeminate attributes – contradicts social expectations of male behaviour. In contrast, *metis'* male partners' sexuality is often not visible. This is because they identify and act like men and because they conceal their relationships with *metis*; they conform to societal expectations and are able to escape stigmatisation.

These acts of violence and discrimination, in South Africa, Egypt, Cambodia and Nepal, are not only aimed at disciplining the individual, but also at policing the behaviour of the collective. As activists who gave evidence at Nkonyana's trial argued, such murders 'terrorise the collective by victimising the individual'. Thus attacks on people's sexuality are used to communicate a message about what types of citizenship will be considered appropriate (Lewin *et al.* 2013). In Egypt, women are expected to be nonpolitical, chaste, protected within the home and saved from the sins of drugs, alcohol and prostitution (Tadros 2013).

¹⁵ The term *meti* refers to a man who self-identifies with feminine behaviours, has sex with other men and is typically portrayed as the more 'feminine' partner. *Metis'* partners, referred to as *ta*, assume a more masculine role in the relationship and in their public personae.

4.2 Sexual identity and sexual citizenship

There is, as Richardson argues, a growing literature on sexuality, citizenship and identity that stresses the importance of 'equal rights' for all people regardless of their sexuality and behaviour. Through active processes of 'sexual politics' and social movements' claims, '...“sexual citizenship” is currently in the process of being defined' (Richardson 2000: 256). The case studies sought to demonstrate the ways in which citizenship is constructed along, and institutionalised through, heterosexual principles and, through this to draw attention to and analyse the inequalities experienced by those people who have transgressive sexualities and behaviours. Although 'sexual politics' embraces all sexualities and advocates and promotes universal inclusion, in practice much of the emphasis has been on lesbian and gay communities and less so on sex workers and the various kinds of communities of transgendered people. However, tensions exist between the desire for a universal definition of the 'sexual citizen' and the need to recognise and accommodate difference. Weeks (1998) points to the challenge of constructing a common purpose while at the same time balancing diverse communities' claims and finding ways to live with this diversity. Richardson points out, however, that sexual rights is a contested concept with 'competing claims over what are defined as “sexual rights”, and in terms of differing views over its political utility' (2000: 258).

Sexual citizenship and the demand for equal rights are premised on the idea that sexual identities are 'essential' characteristics of individuals. Underlying this essentialism is the conviction of biological determinism, which fails to acknowledge the ways in which identities are constructed or the contestation over modes of sexuality and associated rights claims (Richardson 2000). Most of the case studies do not focus on this issue directly. Instead they highlight how people, whose behaviours and identities give rise to multiple forms of discrimination, experience the ensuing exclusion and lack of citizenship. Thus, while the South African case study on hate crime focuses on the experiences of black gay and lesbian people, the other focuses on poor, black women's experiences and discrimination in relation to being HIV-positive. This case study argues that poor, black women's access to sexual and reproductive health services is undermined by the conservative ideological stance on the sexuality and fertility of HIV-positive women, as well as by anti-poor, sexist and ageist prejudices (Muller and MacGregor 2013). The Cambodian case study by Overs (2013: 13) challenges sex work as something women are 'coerced, recruited or forced into by poverty'. It argues, instead, that sex work should be seen as a legitimate occupation and subject to the same occupational legislation as other forms of employment, in order to prevent abuse and exploitation. Overs further argues that the new law, which is concerned with sexual exploitation and thus makes all forms of sex work illegal, operates to facilitate further health threats and economic exploitation of the women in sex work – or, more recently, 'entertainment work'. Finally, Boyce and Coyle's case study (2013) on transgender and same-sex sexuality in Nepal shows how transgendered people, and particularly *metis*, find it hard to secure employment in the formal sector and tend to work in a narrow range of professions associated with beauty or entertainment.

The Nepal case study provides an in-depth exploration of the relationship between sexuality, identity and law. Because the Nepalese legal discourse is referenced to international cases and precedents, it focuses on 'gender-variants', which it sees as 'natural'. In using the terminology of LGBT, Nepalese legislation creates potentially rigid categories, characterising these identities as unchanging and part of people's essential essence. Boyce and Coyle (2013) argue that a tension arises between, on the one hand, a progressive legal process which aims to promote gender and sexual difference in Nepal as something natural, and, on the other, a progressive approach which recognises that identities are not essential, natural and unchanging. Identities, rather, are constructed in relation to social and economic transformation, as well as to enduring cultural values. For example, sexual identities are not always binary and do not act as clear categories or labels. A person does not adopt one sexual identity and exclude all others. Thus, in Nepal, many men and women may engage in

same-sex activities or sexualities, or may identify as transgender, but may also be heterosexually married. Indeed by satisfying social obligations to conform to social norms and to have a family, heterosexual marriage may paradoxically also provide a degree of freedom that enables same-sex sexuality. In addition, while people may identify as LGBT at specific times – such as in relation to the research for this case study and to foreign researchers – people also have other identities that portray other sexual feelings. Thus sexual identities vary according to the context and the particular interactions, rather than operating as fixed labels. These are not inherent, given, fixed or linear identities; rather people portray different versions of themselves in different contexts and may (but equally may not) emphasise a particular sexual identity. This has particular implications in relation to the above discussion on law and rights. The danger of legislating for particular sexual categories such as ‘gay’, ‘lesbian’, ‘intersex’ or ‘trans-sex’, or as is more common, for LGBT, is that it will inevitably include some people and exclude others or it may only partially represent people’s experiences. As Faucette so clearly explains:

Even as the acronym expands (QUILT BAG¹⁶ is the largest I’ve seen so far), the use of an acronym itself alienates those who can’t claim one or more letters and the movement still tends in reality to focus on the L and the G, and much more infrequently, the B and T.
(Faucette 2011)

Legal parameters tend to view sexuality as a constant, unchanging throughout life. Thus the Nepalese Supreme Court statement in 2007 links same-sex orientation to gender at birth and to desires for gender transformation. As such, same-sex preference is represented as something over which people have little choice and as determined by nature. The law does not recognise that, while for some people this may be experienced as an essential part of their selfhood and as predetermined by nature, for others it is a particular expression self-consciously chosen for a specific context but avoided in other social contexts.

Thus the legal frameworks cannot deal with the fluidity of sexual identities that people exhibit in their daily lives. Moreover, this essentialised interpretation of sexual difference – the idea that people do not have any choice in their sexuality and that it is inherent within them – has provided the basis for legal protection, mirroring progressive legislation that identifies caste, tribe and ethnic identity as essential indigenous identities and rights in Nepal. Once again, this produces a reified and fixed notion of identity and makes sexual identities appear as if they are ‘clearly discernible, immutable and explicitly self-identified’ (Boyce and Coyle 2013: 14).¹⁷ As much research shows, this is clearly not the case in Nepal (Boyce 2013), South Asia (Khanna 2009) or in Africa (Epecht 2006).

While the other case studies speak less to the issue of sexual identity, all four cases illustrate the need for a specific law that protects against discrimination and for a constitution that guarantees access and relevant protection for both citizens and noncitizens.¹⁸ Recognition of citizenship, or personhood before the law, is emphasised as a key way of achieving this, but as the Nepal example shows, this is not straightforward. Sexual identities, as this section has shown, are shaped by diverse contexts (international, national and local) and the intersections between these contexts; by the ways in which labels or terms are used and who

¹⁶ This acronym stands for Queer/Questioning, Undecided, Intersex, Lesbian, Trans (Transgender/Transexual), Bisexual, Asexual, Gay.

¹⁷ The variable nature of sexual identity does create problems with passports and this may potentially be resolved with the official recognition of a ‘third gender’ called other, which exists in addition to male or female. Boyce and Coyle cite the example of Blue Diamond Society’s vice president who was ‘questioned when travelling through the Middle East for an international conference because her passport reflected a masculine identity’ (2013: 26). Within Nepal, some banks now recognise third gender categories on their applications and further legal reforms may develop along these lines.

¹⁸ Although not raised in any of the case studies, national laws also have an impact on a wide range of visitors to the country. This includes migrants, refugees, ethnic minorities, donors, multinational corporations and NGOs. Further investigation is required to explore the effects of national legislation on the sexualities of non-citizens and foreigners to developing countries and what this means both in terms of the visitors’ own identities and sexualities and how this impacts on development. See, for instance, Jevne (2006).

uses the terms; by societal expectations of behaviour; by individual desires and by legal framings. By way of concluding this section, it is worth quoting directly from Boyce and Coyle:

Sexualities are culturally constructed, via terms through which a sense of sexual subjectivity may be described and 'known' as one's own. In as much as a sense of sexual subjectivity may be claimed as intrinsically personal or intimately relational, sexuality is also lived in respect of the wider 'scripts' or cultural framings of sexuality that people encounter in their day-to-day experience. Put simply, people will not identify as gay, lesbian, transgender or so on unless they are living in a socio-cultural context wherein such terms might be popularly used or available as means to come to an understanding of oneself as sexual.
(Boyce and Coyle 2013: 17)

It is precisely because sexualities are culturally constructed, as well as socially and economically informed, that the intersection of class, race, gender and sexuality features in different configurations in all case studies and always needs to be taken into consideration in relation to sexual citizenship. In Nepal, many middle class, urban, young people – many of whom have migrated out of Nepal – have embraced the opening up of space for same-sex sexualities and transgender identities, while many other people remain silent about their sexuality. In South Africa, it was HIV-positive women, who are more likely to be black, who were forcibly sterilised. Similarly, violence in South Africa, in the form of hate crimes, is aimed primarily at black gay men, transgenders and lesbians. In Cambodia poor, young rural women go to cities to work in bars as 'entertainment workers' and live and work under conditions that place them in danger. In Egypt, women, including middle class women, and sometimes men were targeted for their political activism through sexual assault. These synergies have given rise to different alliances, networks and partnerships that have worked hard to put sexuality on the agenda and to develop strategies for political recognition.

Because, as the above section has shown, sexualities are culturally constructed and socially and economically informed, because laws and policies around sexuality are a potent force for a range of oppression and because of the significant risks associated with open discussion of sexualities, all advocacy and development work should seek to engage with and understand the perspectives of in-country partners. The studies also illustrate that working with, and through, partners and alliances provides a means of ensuring that development initiatives are constructively received and used alongside grassroots advocacy strategies. This involves providing support for a broad approach to human rights in the context of sexuality, but also being flexible about the labels and analyses that shape work on sexuality.

5 Alliances, advocacy strategies and constraints

5.1 Activism and networks

As the previous sections have demonstrated, the law offers some protection towards people with marginal sexualities. While the law also influences how these people are received within society, the cases demonstrate many failings of implementation. Law – and particularly the identification of specific categories of inclusion – also risks creating tensions between reified identities and the fluid, non-essentialised ways in which people live their lives and experience their sexual identities. It is thus clear that law alone cannot protect and enhance the rights of people marginalised because of their sexuality. This section explores the role of civil society, through activism, social movements, NGO activities and other opportunities. Its aim is to provide greater understanding of the context in which activism occurs and identify positive contributions and ‘sexual politics’ that can make a difference. Ironically, in challenging the heterosexual bias in law and society, activists too turn to legal systems as a key site of engagement with the state and for securing their rights. Nonetheless, engaging with the law around sexuality is often contentious and seldom straightforward.

Most of the case studies explore the ways in which activism and protest have built momentum. This is different in each case study, but a common theme throughout is the emphasis on linkages, networks and relationships, and embedded within this, tensions between what was considered local or foreign. Activism around issues of sexuality, in South Africa, Cambodia, Egypt and Nepal, has emerged out of three main activities, or some combination thereof, namely: HIV-related activities; attempts to mobilise around women’s rights and empowerment; or political resistance to state repression. Yet none of the case studies report the presence of large-scale, well-organised and powerful social movements working on issues of sexuality. Rather, each case study shows dimensions of what the Nepalese activist Sunil Pant describes, and which Boyce and Coyle term, ‘shared-difference’. This refers to the necessity of networks and linkages between sexualities and gender identities that balance difference and sameness in order to influence legal process and obtain rights (Boyce and Coyle 2013: 24).

In Egypt, alliances and protests against politically motivated sexual harassment have been highly spontaneous and diffuse with lots of small groups coming together informally. There has been no clear leadership and people have not gone onto the streets in order to create an organisational presence. Nonetheless, there are examples of specific actors who have aligned themselves in protest against the government-orchestrated sexual harassment and violence. A coalition of women’s rights groups organised interventions and collected signatories which ‘named the acts as politically motivated, and shamed the actors whom they held responsible: the Muslim Brotherhood and the government’ (Tadros 2013: 23). Alliances and networks formed a significant part of South African activists’ strategies in relation to hate crimes against LGBT people. In the case of Mazibuko’s assault, lawyers and activists worked together for the five years that it took for the trial to conclude. Similarly, in the case of Nkonyana, the organisations involved formed a civic alliance that was differently constituted at different times because of the extensive length of the trial period. Comprising numerous different organisations, with different strengths and skills,¹⁹ the alliance lobbied and protested throughout the trial period. Muller and MacGregor interviewed sexual and reproductive health advocates who reflected upon how critically important national networking has been since democratisation in terms of making positive gains in women’s reproductive health in South

¹⁹ Namely the Social Justice Coalition, the Treatment Action Campaign, Free Gender, the Triangle Project, Campaign 07-07-07, the Women’s Legal Centre, the Equality Project, and Sonke Gender Justice.

Africa. However, this networking and mobilisation have declined over the past decade as a result of the changing political climate, the lack of adequate funding and gaps in leadership and management. Many of the progressive NGOs and health care providers that were part of this network have had to close down (Klugman and Budlender 2001).²⁰ At the height of their success, these networks were enhanced by the political context as actors occupied multiple positions and networks within government, in academic and civil society organisations. This created a sense of comradeship or 'soft boundaries' (Stevens 2000) and provided access to national decision-makers. Recently there have been signs of renewed activism and networks around women's sexual and reproductive health rights (Myer and Morroni 2005). There are other civil society organisations, such as the well-known Treatment Action Campaign, which offer some potential for activism against legal violations and social justice. These legal networks and advocacy campaigns have not tended to deal with sexual and reproductive health rights but instead focus on HIV. New strategic alliances, such as that which has brought to light the cases of coerced sterilisation discussed in Muller and MacGregor's case study (2013), are however now emerging.

In Cambodia, the Cambodian Alliance for Combating HIV/AIDS (CACHA), which comprises a network of NGOs and HIV agencies, undertook to expose the conditions under which entertainment workers were operating and the challenges they experienced since the banning of sex work. The network's research has challenged assumptions that sex work is irrevocably interlinked with trafficking, while exposing entertainment workers' new vulnerabilities. The Independent Democratic Informal Employees Association (IDEA) is an NGO that advocates and provides services to workers in Cambodia's extensive informal sector. It is funded by a combination of membership fees and small grants. Members include garbage collectors, moto-taxi drivers, snack vendors, cleaners, cooks and entertainment workers. Similarly, IDEA is seeking to create alliances to protect sex workers operating in informal settings. Other organisations of sex workers have had alliances with the LGBT community, garment workers and groups struggling against land evictions.

Alliances and networks in Nepal reveal yet another way of building 'shared-difference'. Blue Diamond Society (BDS) is a registered health promotion and HIV prevention organisation that also works on rights and advocacy for sexual and gender minorities in Nepal. Its strategy of networking has enabled various different oppressed voices to come forward. As this has occurred, activists have found mutual strength and support through the networks. This strategy was important as BDS realised that isolated voices from Kathmandu would not be sufficient to build political visibility. BDS staff thus visited settlements throughout Nepal and created networks of people who were marginalised because of their sexuality. At the core of these networks are third-gender people who are willing to be public about their sexual identities. BDS also provides a source of employment for sexual minorities in Nepal, and currently employs more than 750 peer outreach workers, giving it considerable leverage. BDS's network has been driven by public openness and this has helped it develop its advocacy work. It has established itself and secures large-scale funding as the only nationwide organisation working on HIV and sexuality issues in Nepal. BDS has also used its social and organisational networks to: promote greater social and political inclusion; tackle sexual issues that are less visible; and create a gay advocacy group in response to the growing number of men in Kathmandu who, having met or heard about 'gay' identified foreigners, have come to identify themselves similarly. Through the activities of its former director, Sunil Pant, who is also a former member of parliament in Nepal's constituent assembly, BDS has also been able to establish important political networks.

Sexuality networking within Nepal has also sought to develop common ground with other identities. The legal recognition of sexual identities in law has created strong parallels between ethnic, tribe and caste identities and sexual identities. As Nepal has explored the

²⁰ Such as the Progressive Primary Health Care Network, the Women's Health Project (WHP) and the Reproductive Rights Alliance.

possibility of a new federal system, due to be implemented alongside the new constitution, there has been considerable debate about these different identities and about how they will be recognised within the new federal model. In anticipation of greater involvement in political processes and in recognition of historical marginalisation, the government has made material resources available to low caste groups, women and marginalised communities. This has included the creation of educational scholarships, the creation of ethnic lobby groups, developing quotas in the constituent assembly and so forth. In order to secure state recognition, communities have had to articulate an 'authentic' cultural heritage that sets the group apart from other Nepalese ethnic communities. This process has also been adopted by campaigners of sexual identities, as a way of establishing their legitimacy and justifying their political claims. Thus sexual minority activists have articulated their rights in terms of a shared group identity, which has a cultural heritage, traditions and history. Sexual identities are thus sometimes referred to using the same terms as caste or ethnicity, both by people participating in these identities and by outsiders as a way to understand the differences. They have applied the state's understanding of ethnic and tribal minorities to sexual minorities. BDS's advocacy work was thus not (or at least not until recently) informed by an international LGBT discourse, but rather by Hindu and Buddhist scriptures, histories, traditions and festivals. It reinforced the idea that sexual minorities are an integral part of Nepal's history and culture, and that these communities deserved official state recognition in line with that being offered to ethnic communities.

5.2 Barriers to activism

The insecure nature of funding for civil society, NGO or activist work that is related to sexuality is a particularly limiting factor. Three of the four case studies – Cambodia, Nepal and South Africa – report funding difficulties for civil society and activist activities. In Cambodia this is linked to the constraints of US funding that effectively bars organisations from supporting sex workers. The result is that organisations like SiRCHESI (Siem Reap Citizens for Health, Educational and Social Issues) that provide condoms, education and social support to sex workers in Cambodia are dependent on an ever-changing set of small donors which is time-consuming and difficult to sustain over the long term. This points not only to the need to invest considerable time in fundraising, but also to the need for enhanced knowledge, skills and resources to negotiate the international funding environment. As Overs (2013) makes clear, sex workers' lack of literacy about the NGO world (in terms of how grants work, English language skills, organisational procedures, and leadership) inhibits their ability to lay claim to funding, even within the organisations where they hold membership, but often not leadership positions, such as the Women's Network for Unity. Ultimately, international funding is seen by Overs (2013: 34) as needing reform, because the current funding context undermines local initiatives by creating dependency and competition for resources between, and within, NGOs, between sex workers and between sex workers and non-sex workers. This runs the risk of privileging elites and external priorities while silencing the voices of those most affected by casting them exclusively as beneficiaries of NGO-administered programmes. An exception to this is the member-funded Cambodian Food Service Workers' Federation (CFSWF) which has begun actively recruiting entertainment workers and providing them with services. It rejects the association between sex work and trafficking as illegal and immoral. Instead it focuses on entertainment workers as legitimate workers and strives to achieve a living wage and better working conditions through the channels that are available within the context of Cambodia's weak labour rights and rule of law.

In Nepal, Boyce and Coyle report that government harassment has limited civil society organisations' ability to operate. BDS, for example, was founded in 2001 and was instrumental in the 2007 Supreme Court decision to legislate for the protection of sexual identities. Despite the organisation's significant achievements, the local government had, at the time of research, refused to renew its licence to operate (on grounds of alleged

corruption). Although subsequently resolved, this put BDS in a very precarious and vulnerable position as it could not legally receive any funding at the time until its licence and registration were renewed, despite significant international support and available funding.

South Africa's strong civil society movement emerged in relation to the country's democratic transition in 1994 and women's empowerment. However, the movement subsequently declined due to a lack of leadership, funding shortages and the perception that the primary goals had been achieved (Klugman and Budlender 2001; Mokoetle and Klugman 2012). An activist movement for the rights of people living with HIV emerged in the late 1990s and achieved vital support for the rights of these people, most notably the Treatment Action Campaign's legal activism that successfully lobbied the South African Department of Health to provide women living with HIV with antiretroviral treatment to prevent HIV transmission from mother to child (Robins and von Lieres 2004). But sexual and reproductive health work remained unpopular with funders and is also constrained by US aid policy – in this case its laws against funding services that promote abortion, commonly known as 'the gag rule'.²¹ As a result sexual and reproductive health rights (SRHR) organisations struggled to remain functional and many closed (Mokoetle and Klugman 2012). Recently, there has been a revival of SRHR organisations and their networks, and new advocacy strategies have emerged, but much of this is still in its infancy. SRHR organisations are also limited in terms of their skills, particularly around the use of litigation strategies for SRHR abuses and discrimination (Muller and MacGregor 2013). In terms of legal activism and engagement around hate crime, funding deficits also led to the closure of special South African courts for sexual offences in 2007/8. This increased the burden that civil society organisations and NGOs take on. At the same time, activists and organisations have also experienced cutbacks in funding with international philanthropic giving on the decline as funders change their agendas and funding priorities. Well-established organisations such as Rape Crisis face closure due to the lack of funding and many other organisations are in disarray as they try to diversify their funding sources. Organisations working on law and sexuality in South Africa are also in need of skills training, particularly in terms of engaging with legal processes. As a result, activist organisations are thinly stretched, and trying to fulfil multiple and diverse roles. Lewin *et al.* (2013) report that civil society organisations and groupings are 'burnt out' and morale is low.

The challenges associated with funding have also meant that there is significant turnover of organisations and institutions that work to support communities marginalised because of their sexuality. These organisations come and go as funding dictates, and vary in terms of their capacity, skills and ability to adapt to changing funding priorities as well as changing political and social circumstances. There is nonetheless some evidence that indigenous organisations grounded in local communities are most sustained over time – with examples such as Rape Crisis in South Africa, BDS in Nepal and the CFSWF (see next section) in Cambodia showing the most durability in terms of securing funding and determining their own political agenda.

²¹ For more discussion on this, see Solinger (2013).

6 Policy spaces and the rule of law

Opportunities for citizens to shape policy processes and to seek to influence government processes are increasingly identified as ‘spaces for change’ (Gaventa 2006). Such spaces emerge around the world in all kinds of governments and are often encouraged in government and development contexts, with policy instruments, legal frameworks and support programmes offering additional support and promotion (Cornwall 2004). These new spaces offer considerable scope for public participation, yet remain deeply imbued with power relations (Arnstein 1969; Cornwall *et al.* 2007; Gaventa 2006). Spaces for engagement can be bound in time (by limiting the duration during which engagement takes place), in terms of who participates (by controlling who may participate), by the forms of participation (for example, whether participants engage in writing policy documents or comment on drafts). The nature of the spaces in which activists seek change or justice reveals underlying ‘relations of power and constructions of citizenship that permeate any site for public engagement’ (Cornwall 2002: 1). Spaces for engagement and participation can present very different opportunities – they can offer citizens power to shape policy or can be highly tokenistic (Arnstein 1969). Spaces can be closed, can be claimed by citizens, or people can be invited to participate (Gaventa 2006). The process of engagement is far from linear. It is instead convoluted, unpredictable, bargained and negotiated across a range of levels and influenced by many diverse actors, some of whom have the power to influence without participating in spaces of engagement (Keeley and Scoones 1999). All four case studies reveal different kinds of policy spaces and varying opportunities for engagement and activism around issues of sexuality. The democratisation process can present opportunities for civil society and NGOs to push through progressive legislation and this has been the case in both South Africa and Nepal. In Nepal, Boyce and Coyle argue that the legislative changes associated with the shift from a monarchist state has ‘created spaces within which “new” discourses of sexuality and rights have emerged and consolidated’ (2013: 11). Yet, as they go on to show, the relationship between democracy and these discourses is contested. The new spaces in which law and policy are shaped are equivocal, difficult to access, changeable and in some cases dangerous.

The rule of law does not automatically ensure that opportunities for engagement are available or that citizens are able to take advantage of and sustain such opportunities. Thus, in exploring the relationship between policy spaces and democracy, as revealed through the case studies, paradoxes become evident. The first paradox concerns transitions to democracy and the tensions inherent in this. The second concerns the ways in which HIV/AIDS and related funding opens up spaces for addressing law and policy around sexuality but can at the same time limit their value by setting the terms of engagement.

Spaces created by transitions to democracy have clear transformational potential: in both Nepal and South Africa, democracy and constitutional reform have opened up spaces for people with marginalised sexuality to campaign for laws and policies to realise their rights and to resist discrimination, violence and other abuses of human rights. In Nepal, activism associated with the 2006 Pro-Democracy Movement – which emphasised rights-based policy measures in relation to caste, gender identity, ethnicity and sexuality – coupled with a writ filed by BDS, Cruseaids and other activist organisations, led to the 2007 Supreme Court order that Nepal should remove discrimination associated with sexuality. This was a highly significant reform that resulted in discussions about sexuality, gender identity and ethnicity, which were previously suppressed. It also opened up new social and political spaces that enable previously unrepresented and marginalised communities to engage in national forums and political institutions. Finally, new public spaces have emerged in which minorities, including people marginalised because of their sexuality, are able to make public assertions of their identities and, in some cases, to link these identities to traditional and ethnic minority identities. In Nepal, there have been many positive gains associated with democracy. These

include moving beyond binary categories of men and women in official documentation, including in the 2011 national population and housing census; in voter registration; in school curricula and the provision of sexual and reproductive education; and a review of the possibility of same-sex marriage or union policies.

In South Africa, democratisation has similarly opened up new possibilities for activism and engagement. Activists have, as Lewin *et al.* (2013: 3) make clear, 'successfully driven an agenda for social change through law and policy' which has ensured a constitution that contains within it an equality clause in the Bill of Rights, and strives to end discrimination on the basis of sexual orientation as well as curbing human rights violations for all South Africans. Substantial legislative and institutional frameworks have been put in place to facilitate this human rights approach. Democratisation has also opened up spaces for activist and NGO negotiation in relation to feminist concerns, as well as sexual and reproductive health rights (Stychin 1996; Sarkin 1999; Hassim 2005). As Muller and MacGregor (2013: 4) report, during the 1990s, a 'strong and strategic civil society movement' made the most of the political spaces available to it, ensuring that a new abortion act was passed. However, as both South African case studies make clear, it has been very hard to sustain the spaces for political negotiation and the gains in civil society activism. Constraints include: a sense that key goals have already been achieved; a lack of leadership; funding limitations and constriction of funding; new agendas which distract attention from sexuality issues; thinly stretched activism; a lack of activist engagement with the law in relation to sexual and reproductive health and a reluctance to undertake strategic litigation.

While democratisation has opened up opportunities in South Africa and Nepal, the same cannot be said for Egypt or Cambodia. In Egypt, democracy has meant a closing down of spaces for political engagement. As Tadros (2013) has shown, the democratic elections have resulted in men and women who protest or demonstrate in Tahrir Square – a place now synonymous with 'a new form of citizenship' – experiencing incidences of sexual assault designed not only to intimidate individuals, but also to suggest that all women's activism is dangerous, that only deviant 'others' occupy this space and that all 'respectful' men and women should not be there. In Cambodia, efforts to improve the rule of law are progressing very slowly. Many of the Cambodian government's current policies undermine democracy and the rule of law. Some policy and advocacy spaces, such as those focusing on gender or HIV/AIDS, are not directly accessible to sex workers who routinely lack the necessary educational and advocacy skills to compete with more literate and skilled compatriots. As Overs (2013: 24) says,

... since there are no official spaces in which they [sex workers] can speak on their own terms and they have limited control over the organisations that represent them in policy discussions, Cambodian sex workers occupy, at worst, the lowest rung on Arnstein's ladder – there only to be manipulated, cured or educated – or, at best, the second lowest – to be informed and consulted.

The second paradox concerns the manner in which funding and opportunities around HIV/AIDS-related matters have provided scope for civil society to mobilise around sexuality issues.²² As the case studies show, these spaces are neither automatically inclined to progress sexuality issues nor indefinitely available and can, ironically, also operate to close down opportunities.

²² HIV/AIDS has been the main avenue through which development has addressed sexuality issues along with corresponding issues of regulation and risk management (Cornwall and Jolly 2009). It has also, as Ako argues, served as a 'wake up call to rethink the treatment of sexual minority rights in Africa' (2010: 35). Yet failures in HIV/AIDS policies have revealed the limited nature of such policies which have, for example in many African countries, failed to acknowledge – or address – men who have sex with other men. Boyce *et al.* argue that these limitations stem from an 'inadequate conceptualization of human sexuality' within HIV/AIDS work (2007: 1).

As suggested above, the strong and strategic civil society movement that emerged at the time of democratisation in South Africa, and which focused on sexual and reproductive rights, has not been sustained (Muller and MacGregor 2013). This has been due to the lack of leadership, a lack of funding, and a political setting in which civil society activists have been drawn into government posts. Instead a strong activist movement that seeks to ensure the rights of people living with HIV has emerged.²³ In South Africa, HIV/AIDS has significant political and organisational momentum, with a lot of 'power and resources' being invested in this area of work by international and bilateral donors (Muller and MacGregor 2013: 14). Sexuality, fertility, reproduction and sexuality-related violence are not, however, particularly high on the agenda for HIV-related funding or organisations. These organisations struggle with the 'massive questions of coping with daily life, for both their leadership and members' (Klugman, cited in Muller and MacGregor 2013: 14). The most famous of these organisations is the Treatment Action Campaign which secured antiretroviral treatment for all people living with HIV, and which has developed into a mass grassroots education campaign and policy advocacy organisation around HIV.²⁴

Cambodia, like South Africa, has had a strong HIV-prevention programme since the early 1990s. This has been particularly associated with most at-risk populations of sex workers, drug users and men who have sex with men. It included subsidised condoms, STI diagnosis and treatment, education and HIV testing. Since 2004, this has included free antiretroviral therapy. HIV-related work has provided space for sex workers to explore issues of sexuality and rights. For instance, several donors supported a sex worker organisation, the Women's Network for Unity (WNU), to enlist members, mobilise outreach workers, distribute condoms and provide information, as well as take on legal challenges to ensure sex workers' rights.²⁵ Having initially had NGO support, the WNU became independent in 2009 and continued to address poverty, sexuality and human rights. However, it found independence – and the associated need to raise and manage funds – difficult to sustain. Although the WNU still exists in theory, and claims large numbers of members, it has little presence among workers in the entertainment industry whose health needs are now served by other health agencies.

In South Africa, Nepal and Cambodia, international donors have supported HIV- and sexuality-related work, yet at the same time, activists and organisations can also be swamped by the demands of fundraising, monitoring and reporting to donors. They can also be thwarted by policies held by some international donors that deliberately or accidentally constrain advocacy. In particular, the US Agency for International Development (USAID) implements conditionalities which limit the scope for comprehensive reproductive rights by opposing any work on abortion rights through the President's Emergency Plan for Aids Relief (PEPFAR).²⁶ In Cambodia, the concern with trafficking and the associated charges have meant that sex work has become illegal and all sexual services are now privately negotiated, because of their illicit nature, or disguised as 'entertainment work'. It has also meant that any public attempts to deal with HIV – such as through the distribution of condoms – can be seen as facilitating sex work. This poses a particular dilemma in relation to issues of HIV and sexuality. If organisations do not agree that prostitution is always exploitative and have a formal policy opposing it, they are excluded from the funds needed to reduce HIV and to address sex workers' other health needs. As Overs argues in the case study: 'In Cambodia, as elsewhere, this provision means that significant HIV funding is not available to sex

²³ South Africa has extremely high rates of HIV, with almost 30 per cent of all pregnant women and more than 17 per cent of all adults (aged between 15 and 49) being HIV-positive. This is coupled with very high unemployment, more than half the population living in poverty, extremely high rates of sexual and gender-based violence, patriarchy and gender discrimination (Muller and MacGregor 2013).

²⁴ Other HIV-related organisations or activist associations include the AIDS Legal Network, the HIV Positive Women's Network, the Her Rights Initiative, the Wellness Foundation and the Women's Legal Centre. Academic institutions also involved include the Women's Health Research Institute, the Reproductive Health and HIV Institute, and the Health and Human Rights Programme. Also significant in terms of HIV-related policy and activism is the South African National Aids Council.

²⁵ In 2004, the Women's Network for Unity successfully challenged the conditions under which sex workers were to participate in an HIV-preventative medicine trial.

²⁶ For more discussion on this, see Ditmore and Allman (2013).

workers' groups and there are preset limits on the advocacy that groups associated with HIV agencies can do' (2013: 9).

Organisations that do not rely on US funds, such as SiRCHESI, are supported by small independent donors and operated by volunteers and part-time local staff. SiRCHESI focuses on the health conditions of women in Siem Riep's entertainment venues and has lobbied beer companies on the issues of alcohol consumption, sexual harassment and a living wage. There are also grassroots organisations, some of which appear to be quite limited in their scope for policy engagement around sex workers,²⁷ while others have been able to create some political space for policy engagement on issues of sex workers and sexuality. Most promising, however, in terms of advocating for improvements to sex workers' conditions, is the CFSWF. This is not an NGO, nor a development organisation. Rather it is an independent trade union that serves workers in the entertainment sector, be they formally employed or not. The CFSWF sees sex work as a legitimate form of labour and seeks to ensure that, given Cambodia's weak rule of law and weak labour rights, the labour rights of workers in the entertainment sector are protected. Nonetheless, the CFSWF struggles to represent its members. This is because it operates within an 'NGO culture', in which people expect to receive expenses, per diems, and other benefits in exchange for their attendance and allegiance. CFSWF, which raises its own funds from membership fees, thus struggles to compete against externally funded NGOs and organisations. As a 2010 study suggests, this arises in part from this 'culture' in which grants enable NGOs to distribute incentives as expenses and per diems to beneficiaries (APHEDA/ILO 2010) and so to 'buy' short-term allegiances. Thus international funding can limit rather than expand the potential for grassroots organisations to develop their own allegiances and to occupy 'policy spaces'.

In summing up, community mobilisation for justice on sexuality-related matters is constrained where funding streams are inadequate or where they sideline those most affected – namely stigmatised women and men with marginalised sexualities. This was raised in the context of Nepal and Cambodia where dependence on foreign donors has led to advocacy being professionalised and embedded into HIV service provision. Much of the work on sexuality justice has stemmed from international development work on HIV or women's empowerment (Cornwall and Anyidoho 2010). While this has brought important benefits, there is also the risk that other issues relating to sexual minorities are crowded out by public health concerns related to sexuality or by international social and economic development perspectives which do not focus on the vulnerabilities associated with sexuality (Cornwall and Jolly 2006; Camargo 2008; Petcheskey 2008).

²⁷ For instance, the National Network of Entertainment Workers aims to organise around areas of common concern, but has done little since its 2011 elections for a national coordinator and for regional representatives.

7 Conclusions

Engaging with the law and seeking policy reform is potentially a dangerous activity especially in countries which do uphold the rule of law or where laws are in rapid flux and have little correspondence to lived social realities. This is particularly clear in the Egyptian and South African examples where people – with reason – fear for their lives. When done on limited resources, with low levels of education and with little capacity, this is additionally challenging and difficult. In addition, the broader social contexts in which these communities survive are not generally supportive. The language of stigma and prejudice abounds in the public sphere, and is often echoed in the bureaucratic and governance spheres of society. This means that members of the communities described in this synthesis have less social capital, fewer support networks, and ultimately fewer resources to draw upon. That said, despite potent obstacles, there are many success stories about sexuality activism in these case studies and beyond. All contain accounts of opportunities and spaces that have opened up and provided platforms for activism and policy change as well as community interventions to support victims of violence and discrimination. Although the case studies all examine very different issues relating to the law on sexual identity and behaviour in very different political and economic contexts, the following clear conclusions can be drawn.

The significance of sexuality in relation to law and development: In all the case studies, people with marginal sexualities are under pressure to conform to expectations of how men and women should behave and to idealised forms of citizenship. This creates a particular form of vulnerability and fragility that often results in marginalisation from mainstream society and exclusion from opportunities to benefit from economic and social development. Assumptions about conventional gendered behaviours are, in turn, often reinforced in law making it difficult for people to stand apart from the norm. Where the law does recognise sexual difference, in Nepal and South Africa, it does not provide mechanisms to access and implement the law.

The expansion of the category LGBT for development: The case studies demonstrate the need to explore sexuality as a broad concept and not to be confined by specific forms of categorisation of sexualities. This is not only because the categories, such as LGBT, do not always fit reality, but also because such a focus excludes the experiences of many people and sexualities (such as sex workers, HIV-positive people, unmarried women, men who do not identify as gay but do have sex with men and so forth). Conversely, however, these identities and constructs can also provide entry points and modalities for legal recognition, funding for essential services and other advantages. Thus the terms are both useful and problematic simultaneously and the power – for donors – lies both in providing opportunities to draw on international LGBT discourse, but also recognising times when this language is appropriate for voicing in-country claims and activism.

The inclusion of sexuality within broader development initiatives: Well-intentioned development initiatives, such as HIV-specific funding, and religiously informed funding such as PEPFAR, can open up space for activism and change. But they can also have the unintended effect of closing down grassroots initiatives by tying opportunities for advocacy to service delivery and limiting the policy space available for local organisations. Dependency on foreign donors can lead to the professionalisation of advocacy and other development work and can crowd out issues of sexuality. To begin to address this imbalance specific mandates to consider sexuality in relation to multiple other development initiatives are needed.

The role of the rule of law for safeguarding sexuality: Even when the rule of law is strong, this does not ensure that the law and legal processes are appropriate or accessible. In addition, legal activism requires skills, capacity and resources that are not always forthcoming to poor

and vulnerable communities. Encouraging the creation of spaces for engagement with the state and ensuring that civil society is adequately supported to take advantage of these opportunities is a vital means of ensuring that the rule of law is upheld and implemented in appropriate ways.

This synthesis demonstrates the need for donors to:

1. Have a broad perspective on sexuality and the rule of law. This involves being aware of the many and subtle ways in which law frames sexuality, makes assumptions of 'natural' and 'normal' behaviour and acts to reinforce these. It also involves understanding the many dimensions of sexuality, vulnerability and exclusion, and of the diverse forms of sexual exclusion. As this synthesis demonstrates, sexual exclusion can include pregnant women, political activists, men who have sex with men but do not identify as LGBT, people who are open about their gay identity, and sex workers.
2. Work closely with in-country partners and activists in a range of ways to promote awareness of sexuality and the law. Such an approach should not be defined by an LGBT approach, but should recognise many forms of sexual discrimination and improve the ways in which these are addressed through legal structures. Sexual violence, rape, homosexuality, gender transgression and sex work might all fall within the ambit of sexuality and rights. It is important to create space for partners to decide what language is appropriate – within a broad remit of sexuality – and when to adopt labels such as LGBT or when to reject them in favour of local expressions and associations.
3. Elevate the profile of sexuality across all sectors of international development. This involves developing a multi-pronged approach that encourages donors, their partners in governments, and civil society actors to acknowledge and identify the scope for addressing a range of sexuality issues. These include building recognition of the relevance of sexuality in relation to human rights, development, public health, governance, law and policy, and establishing greater awareness in all sectors within international development and in bilateral and multilateral agencies and sectors.

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