# Annex 1. Focus Region: South Asia. Report from roundtable discussion with Member Associations in India, Bangladesh and Sri Lanka

### Question 1.

Before colonial rule, South Asia was notable for its rich and diverse understanding of gender and sexuality, with societies acknowledging multiple genders and gender fluidity.

India: Pre-colonial India recognized hijras, people who don't fit into the male or female categories. This community had distinct roles and was often respected for its spiritual significance. Ancient Hindu texts like the Vedas and the Mahabharata referenced diverse gender identities, with the latter featuring the story of Shikhandi, born female but later identified as male. Furthermore, the androgynous deity Ardhanarishvara symbolized the union of male and female energies. Homosexuality wasn't seen as sinful but natural, depicted as joyful in the "Kama Sutra" and represented through sculptures in Khajuraho's temples. However, under British rule, homosexuality was criminalized in 1860 under Section 377 of the Indian Penal Code.

Sri Lanka: Indigenous cultures on the island acknowledged multiple genders and non-heteronormative sexual identities before British rule, with communities such as "napumsakas," the intersex community, playing recognized societal roles. However, British laws and Christian norms replaced these practices. In 1883, the British implemented Section 365A of the Penal Code, criminalizing 'carnal intercourse against the order of nature,' which persisted post-independence.

Bangladesh: Pre-colonial Bangladesh, like other South Asian cultures, adopted a more tolerant view of non-heteronormative sexual identities. The Hijra community had specific societal roles, especially in royal courts. Unfortunately, under colonial rule, laws against 'unnatural offenses' were introduced under Section 377 of the Penal Code, a law that remained even after Bangladesh's liberation.

Across South Asia, local traditions and beliefs from indigenous and tribal communities accepted diverse gender identities and sexual orientations without stigma, with Sufi Mysticism also contributing to a more inclusive and spiritual understanding of love. Though punishments for homosexuality did exist, they were less severe than those introduced under British rule. For instance, in Gujarat, India, the Maitri Karar acknowledged friendships as valid lifelong relationship contracts, reflecting a society that was generally more open towards diverse sexual orientations before the British invasion.

### Question 2.

British colonial rule significantly influenced the socio-normative perception of sexual orientation and gender identity in South Asia, including in India, Bangladesh, and Sri Lanka, primarily through legislation.

The most infamous law is **Section 377 of the Indian Penal Code** (IPC), enacted in 1860. This law criminalized any sexual activities "against the order of nature," including homosexual acts. Even though the law was initially introduced in British India, it was later incorporated into the legal systems of many British colonies including Sri Lanka, under **Section 365A of the Sri Lankan Penal Code**.

Section 377 of the IPC was largely based on the British 1533 Buggery Act, which outlawed sodomy in England. The language of Section 377 is notably vague and, as a result, was open to interpretation. It was used to prosecute not only consensual homosexual activities, but also a range of other acts. Its introduction and enforcement had a considerable impact on societal attitudes towards homosexuality in South Asia, marking a dramatic shift from many pre-colonial cultures that had a more tolerant view of such relationships.

Moreover, the **Criminal Tribes Act** of 1871 further affected the gender norms and sexuality perceptions. The Act labeled entire communities as 'innately criminal', and this included many who identified as Hijra, an umbrella term for eunuchs, intersex people, and transgender individuals in South Asia. The Act led to stringent monitoring, control, and stigmatization of these communities. This legal intervention significantly influenced the socio-cultural perception of gender identities and expressions.

The colonial authorities promoted these laws through the judicial system, the police force, and societal institutions. Religious missionaries and British education systems also played a role in spreading Victorian values that emphasized binary gender roles and heteronormativity. For instance, Ashley Tellis in his work, 'Telling Tales: The Trials and Triumphs of Lesbian and Gay Activism in India,' comments on the influence of missionary education in promoting these norms.

The consequences of these legal and social interventions by the colonial authorities were far-reaching. Homosexual and transgender identities were pathologized and criminalized, leading to their marginalization. These laws have had lasting impacts on South Asian societies, influencing contemporary attitudes toward sexual orientation and gender identity in the region.

### Question 3.

Colonial laws regulating sexual orientation and gender identity still exist in various forms in India, Bangladesh, and Sri Lanka.

Bangladesh: Similar to India, Bangladesh inherited Section 377 from British colonial rule, which remains in force to date. It penalizes homosexual activity with the potential for life imprisonment. The enforcement of this law is inconsistent and there are no recent records of prosecutions, but the existence of the law perpetuates a climate of fear, discrimination, and potential violence against LGBT people.

Sri Lanka: Sections 365 and 365A of the Sri Lankan Penal Code, established under British colonial rule, are analogous to India's Section 377, criminalizing "carnal intercourse against the order of nature" and "gross indecency." While rarely enforced, these laws create a hostile environment for LGBT individuals. A 2014 report by the Human Rights Watch documented cases where these laws were used to harass and physically violate LGBT people.

In terms of jurisprudence, these laws have often been upheld in the past, although the recent reversal in India signals a potential shift. On the other hand, customary law, largely informed by religious and cultural norms, tends to uphold conservative views of sexuality and gender, contributing to the persistence of these laws.

The continued existence of these laws has been justified on the grounds of moral, cultural, and religious traditions. Some argue that homosexuality is "unnatural" or "un-Asian," thereby aligning these colonial-era laws with traditional norms and values. These arguments often overlook historical evidence of diverse sexual practices and identities in pre-colonial times. Therefore, despite their colonial origin, these laws have been assimilated into societal norms and continue to shape the socio-normative perceptions of sexual orientation and gender identity in these countries.

### Question 4.

The decolonization process in South Asia (focusing on India, Bangladesh, and Sri Lanka) has had a complex impact on the rights and protections of individuals based on sexual orientation and gender identity. While there has been progress in some aspects, particularly in India, numerous challenges persist in these countries due to historical, societal, and cultural factors.

India:

Positive Impact: India has seen significant positive change since its decolonization, particularly with the landmark judgment of Navtej Singh Johar vs Union of India in 2018. The Supreme Court decriminalized homosexuality by reading down Section 377 of the Indian Penal Code (IPC), a colonial-era law. This decision marked a significant step forward in the protection of LGBTQ+ rights in India. There has also been recognition of transgender rights in India. The Supreme Court, in the NALSA judgment of 2014, legally recognized transgender people as a third gender, affirming their fundamental rights and directing the government to provide them with quotas in jobs and education.

Negative Impact: Despite these advancements, there remain many societal, cultural, and legal obstacles. The transgender protection law enacted in 2019 faced significant criticism for its problematic provisions, including a screening committee to determine transgender identity and lack of comprehensive anti-discrimination measures. Additionally, India does not legally recognize same-sex marriage, with the Delhi High Court as recently as February 2022 stating that marriage in India is only between a biological man and a biological woman.

Bangladesh:

Positive Impact: In Bangladesh, a significant stride was made when the country recognized hijras (a traditional cultural identity for transgender people in South Asia) as a third gender in 2013, granting them the full range of rights, including the right to vote.

Negative Impact: Nevertheless, the colonial-era Section 377 of the Bangladesh Penal Code, criminalizing homosexual acts, remains enforced. This creates a legal environment conducive to discrimination and violence against the LGBTQ+ community, even as cultural and societal acceptance remains low.

Sri Lanka:

Positive Impact: There has been some progress towards non-discrimination in Sri Lanka, with recognition of the rights of sexual minorities by the Supreme Court and the government. Certain anti-discrimination clauses have been enacted, even though specific language addressing sexual minorities is absent.

Negative Impact: Colonial-era penal laws, such as Section 365, criminalizing 'unnatural offences', still exist, even though the Supreme Court has ruled that these cannot be legally applied to consensual homosexual acts. Moreover, transgender individuals face discrimination through the application of the Vagrants Ordinance and other laws.

In all three countries, social stigma and discrimination persist against LGBTQ+ individuals, often influenced by traditional societal norms and religious beliefs. These attitudes may perpetuate violence and prejudice against sexual minorities, and while laws are critical in shaping society's approach, widespread changes in societal attitudes are also necessary. Progress has been made since decolonization, but the journey towards full acceptance and equality is ongoing.

### Question 5.

The regulation of gender, sexual orientation, and gender identity was not only instrumental in the imposition of colonial power in South Asia but also played a crucial role in its maintenance. This maintenance of power was predominantly achieved by subverting pre-existing norms and imposing a new socio-legal order that served to control and marginalize certain sections of society.

**Control and Othering:** The colonial rulers strategically used laws such as Section 377 of the Indian Penal Code to control and marginalize those who did not fit into their heteronormative worldview. By labeling certain sexual acts as "against the order of nature," they effectively othered those who practiced non-heteronormative sexualities, thus creating divisions within society and reinforcing their power. This regulation and criminalization of non-normative genders and sexualities can be seen as an extension of the colonial strategy of "divide and rule."

**Cultural Superiority and Legitimization**: The British, like other colonial powers, sought to assert their cultural superiority by depicting indigenous norms and values as primitive, backward, or immoral. The imposition of Victorian moral codes and binary gender norms served to paint the colonizers as more "civilized," thereby legitimizing their rule. The regulation of sexual conduct and gender identity thus became a means to reaffirm their supposed cultural supremacy and justify their continued colonial rule.

**Disruption of Social Order:** By disrupting and discrediting pre-existing social norms, particularly those related to gender and sexuality, the colonial rulers were able to destabilize and control the local communities more effectively. For instance, the Hijra community, which held a significant place in pre-colonial Indian society, was systematically marginalized through laws like the Criminal Tribes Act of 1871. This served to weaken societal structures, making it easier for the colonial power to maintain control.

**Erasure and Replacement of Indigenous Traditions:** The colonial rulers actively suppressed indigenous traditions that recognized and accepted sexual and gender diversity, replacing them with their own heteronormative ideals. This not only erased a significant part of the region's cultural history but also reshaped the societal norms to better align with colonial values and interests, making it easier for them to maintain their power.

### Question 6.

The continued existence and enforcement of colonial-era laws regulating sex and gender in South Asia have had significant impacts on the human rights of LGBT persons. Here's how:

**Criminalization and Legal Discrimination:** Laws like Section 377 of the Indian Penal Code, inherited by Bangladesh and Sri Lanka, criminalized "unnatural offences" – a term broadly interpreted to include homosexuality. Though India's Supreme Court decriminalized homosexuality in 2018, such laws are still active in Bangladesh and Sri Lanka. These legal strictures limit the rights of LGBT individuals to privacy and non-discrimination.

**Social Stigma and Discrimination**: The criminalization of non-normative sexual orientations has led to widespread social stigma and discrimination against LGBT individuals. Despite recent progress, such as India's recognition of the Hijra community as a third gender, societal attitudes have been slow to change. LGBT persons face discrimination in healthcare, employment, and education, and are more vulnerable to physical and sexual violence.

**Mental Health**: The social stigma and discrimination resulting from these colonial-era laws have serious implications for the mental health of LGBT individuals. They are at a higher risk of experiencing mental health issues like depression, anxiety, and suicidal ideation. This is further compounded by a lack of targeted mental health services and discrimination in healthcare settings.

**Impact on Activism and Advocacy**: The existence of these laws has a chilling effect on activism and advocacy for LGBT rights. For instance, in Bangladesh, the killing of two prominent LGBT activists in 2016, Xulhaz Mannan and Mahbub Rabbi Tonoy, sent a wave of fear through the community. Advocacy for LGBT rights is often seen as promoting criminal behavior, making such work incredibly difficult and dangerous.

The imposition of colonial laws on sex and gender profoundly shaped social and moral ideas about sexual orientation and gender diversity in South Asia. These laws enshrined a binary understanding of gender and heteronormative sexual practices as the moral and social norm. Non-normative genders and sexualities were thus positioned as deviant, immoral, and "unnatural." These perceptions have permeated societal attitudes, leading to the continued marginalization and discrimination of LGBT individuals, even after the decriminalization of homosexuality in places like India.

For instance, despite legal progress, societal attitudes often remain unchanged and negatively impact the ability of LGBT individuals to fully enjoy their rights. Discrimination persists in various sectors, such as housing, employment, and healthcare. LGBT individuals continue to face violence, harassment, and rejection from their families and communities.

### Question 7.

In India, the Rights of Persons with Disabilities Act, 2016, provides some legal protections for persons with disabilities, including LGBT individuals. However, the Act does not explicitly address the specific needs and experiences of LGBT persons with disabilities. This lack of targeted provisions often results in limited access to inclusive healthcare, education, employment, and social services for this intersectional group.

In the case of older LGBT persons in India, there is a lack of comprehensive legal frameworks that specifically address their rights and needs. The Maintenance and Welfare of Parents and Senior Citizens Act, 2007, does not explicitly include provisions for LGBT elders, leaving them vulnerable to neglect, mistreatment, and limited access to social support and healthcare services. This highlights the need for more inclusive policies and programs that recognize and address the unique challenges faced by older LGBT individuals in India.

Bangladesh has made some progress in recognizing the rights of persons with disabilities, including through the Persons with Disabilities Rights and Protection Act, 2013. However, the Act does not explicitly address the intersectional experiences of LGBT persons with disabilities. As a result, these individuals continue to face multiple forms of discrimination and limited access to support services, employment opportunities, and social inclusion.

In Sri Lanka, the Rights of Persons with Disabilities Act, 2016, provides some legal protections for persons with disabilities. However, similar to the situation in other South Asian countries, there is a lack of explicit provisions addressing the specific needs and experiences of LGBT persons with disabilities. This creates barriers to inclusive healthcare, education, employment, and social services for this population.

Regarding LGBT children, there are no specific laws or policies in South Asian countries that address their unique needs and rights comprehensively. In India, the Juvenile Justice (Care and Protection of Children) Act, 2015, prohibits the disclosure of the sexual orientation of children in institutional care. However, there is still a lack of comprehensive legal frameworks that explicitly protect the rights of LGBT children and ensure their safety and well-being in various settings, including schools and family environments.

### Question 8.

In South Asia, efforts have been made to address the legacy of colonialism and provide redress for historical injustices inflicted upon marginalized communities, including LGBT individuals. However, the specific consideration of violence and discrimination based on sexual orientation and gender identity varies across the region.

India has taken significant steps towards recognizing and protecting the rights of LGBT individuals. The landmark repeal of Section 377 in 2018 decriminalized consensual same-sex relationships, paving the way for greater recognition of LGBT rights and the inclusion of sexual orientation and gender identity in human rights discussions. However, comprehensive anti-discrimination laws specifically addressing violence and discrimination against LGBT individuals are yet to be enacted at the national level.

In Sri Lanka, efforts to address discrimination and violence against LGBT individuals have been made, but the legal framework remains inadequate. The Supreme Court has acknowledged the importance of protecting sexual minorities from discrimination and violence, and governmental and non-governmental organizations have advocated for LGBT rights. However, specific laws addressing violence and discrimination based on sexual orientation and gender identity are lacking. Comprehensive legal reforms are necessary to provide explicit protections for LGBT individuals and ensure their access to justice.

Bangladesh also faces challenges in recognizing and protecting the rights of LGBT individuals. While progress has been made in recognizing human rights, including those of marginalized groups, LGBT individuals continue to face discrimination and violence. Specific laws addressing violence and discrimination based on sexual orientation and gender identity are still lacking. However, civil society organizations have taken initiatives to provide psycho-social support and legal aid to LGBT individuals, raising awareness about their rights and advocating for their inclusion in national policies and programs.

Regarding transgender rights, both India and Bangladesh have implemented legislation and policies to recognize and protect the rights of transgender individuals.

In India, the Transgender Persons (Protection of Rights) Act, 2019, provides legal recognition and protection to transgender persons. The Act recognizes their right to self-identified gender and prohibits discrimination in various areas, such as education, employment, healthcare, and public facilities. It also establishes mechanisms for obtaining identity certificates and other documents that reflect their self-identified gender. However, the Act has faced criticism for certain provisions perceived as discriminatory and inadequate.

In Bangladesh, the Hijra Transgender Welfare Policy, adopted in 2013, acknowledges the rights and needs of hijras (transgender women) and outlines measures for their social inclusion, healthcare, education, and economic empowerment. It also provides for the establishment of a welfare fund for their socio-economic development. Additionally, the Ministry of Social Welfare introduced the Transgender Welfare Act in 2020, which aims to ensure the welfare, protection, and development of transgender persons and establish a national transgender welfare board. However, the Act is still awaiting passage by the Parliament and full implementation.

While these legislative measures in India and Bangladesh signify a growing recognition of transgender rights, challenges remain in addressing systemic discrimination, social stigma, and violence faced by transgender individuals. Continued advocacy, awareness-raising, and effective implementation of these laws are crucial to ensuring the full protection and enjoyment of human rights for transgender individuals in both countries.