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GAZA – OCCUPIED PALESTINIAN TERRITORY

The British Mandate Criminal Code Ordinance, No. 74 of 1936 is in force in Gaza.

Section 152(2) of the Code criminalises sexual acts between men with a penalty of up to 10 years. ***[SEXUAL ACTS BETWEEN MEN]***

"(2) Any person who:—
(a) has carnal knowledge of any person against the order of nature; or
(b) has carnal knowledge of an animal; or
(c) permits a male person to have carnal knowledge of him or her against the order of nature,
is guilty of a felony, and is liable to imprisonment for ten years."

This Code was in force also in Jordan until 1951 and in Israel until 1977, before they adopted their own Penal Codes. Note that in the West Bank (including East Jerusalem) the Jordanian Penal Code of 1951 (modified in 1960) is in force, having no prohibition on sexual acts between persons of the same sex.

Since the 2007 governance of Gaza by Hamas, the Gazan legislative body has attempted to amend or replace the British Mandatory Penal Code. The proposal from 2013 purported to be "Islamic based", and included flogging for adultery and cutting off an offender's right hand for theft. While a complete draft of the proposal was never published, it is highly likely its treatment of same-sex acts would have been far more severe than even the current law. The code failed to pass the Gazan legislature.

INDIA

Penal Code, 1860. Section 377.

Unnatural offences ***[AGAINST THE ORDER OF NATURE]***

"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description or a term which may extend to ten years and shall also be to fine.
Explanation: Penetration is sufficient to candidate the carnal intercourse necessary to the offence described in this section."

Although the law is technically only applicable to men, women in India are in fact subject to it (at p. 12), and are subject to its significant 'chill factor', and resultant stigmatisation. In 2009, Section 377 of the Indian Penal Code was given a more limited interpretation by the Delhi High Court, lifting the ban on same-sex sexual activity among consenting adult men in private (see comment). However, on 11 December 2013, in *Koushal v. Naz Foundation*, a two-judge bench of the Supreme Court of India upheld Section 377 as constitutional. Therefore, private consensual sexual activity between two men is still a crime in India. The judgment also said that the legislature should decide on this issue, not the courts, yet attempts at introducing such a Bill before parliament have not been unsuccessful.

In terms of India's recent performance regarding international human rights law at the UN, its 2nd cycle UPR responses (May 2012) suggest the country's current regard to its obligations: India accepted a level 3 (i.e. 'to consider') recommendation to "[s]tudy the possibility of eliminating any criminalisation of same-sex relations", despite the concerns that the Criminal Law (Amendment) Bill 2012 that was approved by the Cabinet retained Section 377 of the India Penal Code. In the same UPR session, India rejected a general recommendation for non-discrimination, particularly in employment, based on sexual orientation. India's 3rd UPR cycle commences in May 2017.

In *Naz Foundation* (2009), the Ministry of Home Affairs justified retention of Section 377 on the grounds of protection of health and morals, but the High Court of New Delhi found (at p. 11) that public morality is not a legitimate State interest and held that, although protection of public health was a legitimate State interest, the law at issue was not rationally connected to this legislative end. In this case, the High Court relied on the practice of regional and international human rights mechanisms, via *Dudgeon* and *Toonen*, to derive this important principle.

The Supreme Court has issued two contrasting judgments. The Section 377 judgment in 2013 refused to apply fundamental constitutional rights to decriminalise same-sex sexual conduct, stating that decriminalisation is a question for parliament, not the courts. On the other hand, a Supreme Court judgment in *National Legal Services Authority v. Union of India and others* a few months later found that transgender people do enjoy constitutional rights and the Supreme Court required the government to implement measures in recognition of these rights. On April 15, 2014, in this case, the Supreme Court of India upheld the constitutional rights of transgender persons under Articles 14, 15, 19 and 21, which guarantee the right to equality, the right against discrimination, freedom of speech and expression, and the right to life with dignity respectively.

The UN Rapporteur on Human Rights Defenders has twice noted problems in relation to SOGI in India, in 2009 and 2012. In 2014, the Committee for the Elimination of all forms of Discrimination Against Women (CEDAW) urged India "[t]o make efforts to eliminate any criminalization of same-sex relations by studying the possibility, as accepted by the State party during its [U]niversal [P]eriodic [R]eview [...],and to take note of the ruling of the Supreme Court (*Suresh Kumar Koushal and another v. NAZ Foundation*, 2013) in this regard". In April 2016, the International Commission of Jurists (ICJ) released a Briefing Paper on the Section 377 Curative Petition laying out the validity of the Supreme Court reversing its earlier decision.

It was reported that nearly 1500 people were arrested under Section 377 in 2015. However, it appears that over 800 of these were assaults on minors, and a further number were arrests of under-age persons.

INDONESIA (TWO PROVINCES ONLY)

Same-sex sexual relations between consenting adults are not prohibited according to the 1982 Indonesian Penal Code (which finds root in the Netherlands Indies Penal Code). However, at the national level there are stigmatising Regulations that apply nationwide: for example, Government Regulation 61/2014 on Reproductive Health stipulates that; a "Healthy sexual life ... b) free from sexual orientation dysfunction or deviance,, ... and e) in accordance with ethics and morals". Reports throughout 2016 and early 2017 indicate a heightened threat from both State and non-State actors to LGBTI human rights defenders and their work.

At the provincial level (between two bordering provinces Ache and Sumatra), there are areas and municipalities that penalise same sex sexual relations through local Ordinances amongst which:

- **Provincial Ordinance on the Eradication of Immoral Behavior (No. 13/2002) in South Sumatra**: classifies and penalises same sex relations as "immoral behavior".
- **Local Regulation** [City Ordinance] **Batam City No. 6/2002 about Social Ordinance, Social Order Article 9**: forbids the setting up of LGBT associations (explicitly mentioned).
- **Local Regulation** [City Ordinance] **Palembang City No. 2/2014 about the Abomination of Prostitution, Chapter V. Prohibition Provisions, Article 8**: outlaws "homosexual" "prostitution".
- **Local Regulation** [City Ordinance] **about Prevention, Eradiction and Action toward Social Ills (No. 9/2010) in Padang Panjang, West Sumatera**: its definition includes same sex relationships within its scope (paid, or not paid for).
- **District Ordinance on Social Order (No. 10/2007) in Banjar, South Kalimantan Province**: mentions "abnormal" homosexual and heterosexual acts (in addition to "normal" ones) in its definition of "prostitute". No explanation is given for "normal" or "abnormal" acts. It also prohibits the formation of organisations "...leading to immoral acts", that are "...unacceptable to the culture of [local] society". These are later explained by giving examples of lesbian and gay organisations "and the like".