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STATE-SPONSORED HOMOPHOBIA

2019

13th Edition

LUCAS RAMÓN MENDOS

ilga.org



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Author	Lucas Ramón Mendos
Main Research Assistants	Daryl Yang Lucía Belén Araque
Research Assistants	David J. Godfrey Martina Olivera Alejandro Hilarión Moncada Ezequiel Steuermann Nahuel Grayani Estanislao Segurola
Footnote Editor	Juan Francisco Mareque
Project Assistant	Felipe Da Silva Oliveira
Proofreader	Aengus Carroll
English Translation	Jordan Beyga



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Provisions in force

A new Penal Code came into force on 14 February 2018. While the new legislation was welcomed as a “a milestone in the country’s criminal justice reform”,¹ it explicitly criminalises same-sex sexual conduct though the punishment has been reduced. Previously, Article 427 of the 1976 Penal Code imposed a long imprisonment term for the offence of “pederasty”. Furthermore, all sexual contact outside marriage was punishable with a maximum of the death penalty and a high-profile Islamic scholar has claimed that “there was broad consensus amongst scholars that execution was the appropriate punishment if homosexual acts could be proven”.² Notably, the practice of the practice of *bachabazi* - which involves the sexual abuse of underage boys - is now explicitly criminalised under Chapter 5 of Book 4 of the new Penal Code.³

- ▶ **Penal Code** (2017). Book Number Four: Crimes against Chastity and Public Morals.

Chapter Two: Adultery and its Penalty.

Mosaheghe

Section 645. Mosaheghe.

A person who commits “Mosahege”⁴ with another person, each of the former shall be sentenced to small imprisonment, not exceeding one year.

Chapter Three: Sodomy and its Penalty.

Sodomy

Section 646. Crime of Sodomy.

- (1) A person who commits sodomy with another female or male, shall be punished in accordance with the provisions of this chapter.
- (2) For the purpose of this section, sodomy happens by the penetration of a male sexual organ into a female or a male anus, not considering the depth of the penetration.

Penalty for sodomy

Section 647.

Those who commit sodomy, shall be sentenced to medium imprisonment not exceeding two years.

Aggravation of sodomy

Section 648.

In one of the following cases commitment of the acts, specified above, is considered to be aggravating conditions and shall be sentenced to medium imprisonment, exceeding two years:

¹ “UNAMA welcomes Afghanistan’s new penal code - Calls for robust framework to protect women against violence”, UNAMA (website), 22 February 2018.

² Aria Ahmadzai, “Afghanistan LGBT community living under threat of death”, BBC News, 7 October 2016.

³ Sayed Jalal Shajjan, “The revised Afghanistan criminal code: an end for Bacha Bazi?”, South Asia @ LSE (website), 24 January 2018.

⁴ Mosaheghe / مساحقه = traditionally feminine same-sex sexual relationship does not involve penetration, it is all about touching both sexes and sexual pleasure.

- (1) In the case where the person against whom the crime has been committed is one of the temporary or permanent “Maharem” (*with whom marriage is prohibited according to rules of Islam*) of the offender.
- (2) In the case where the offender is a tutor, teacher, or servant of the person against whom the crime has been committed or the latter has, one way or another, has authority or influence over the former.
- (3) In the case where the person against whom the crime has been committed is affected by the genital disease because of the offenders disclaim of having sexually transmitted diseases.

Tafkhiz**Section 649. Tafkhiz.**

When the male offender commits “Tafkhiz”⁵ with another man, the former shall be sentenced to small imprisonment (three months to a year).

Chapter 4. Ghavadi.**Ghavadi****Section 650. Ghavadi.**

- (1) “Ghavadi” is to incite two or more people to commit adultery or “sodomy” by introducing them to each other or finding them a place to do so. In recognition of the crime “Ghavadi”, repetition is not important.
- (2) Those who are convicted of “Ghavadi” shall be punished in accordance with the provisions of this chapter.

Human rights situation

LGBT people face significant violence and discrimination from the State, their own families, and society at large. However, there is sparse evidence, anecdote and data being reported on the situations of sexual and gender minorities in the country, and there are no SOGI advocacy organisations or networks known of.

In 2004, an American adviser to the Afghan government was purportedly arrested for consensual same-sex sexual acts with a local man.⁶ In 2011, a video of police officers harassing a transgender person was published online.⁷ Police violence is not uncommon, which includes the use of “honey traps” to arrest persons because of their perceived sexual orientation.⁸ LGBT people have also been victims of “honour killing” by their families.⁹ Such a practice is perpetuated by Article

398 of the Penal Code, which provides a reduced sentence for murder in cases of honour killings. In 2015, it was reported that a parallel justice court sentenced three gay men, including one boy who was 17-year-old, to execution by “wall-toppling”. The 17-year-old survived and was allowed to live.¹⁰

However, same-sex sexual relations, both amongst men and amongst women (vastly under-reported) are not uncommon in the country. A researcher noted that men in Afghanistan would sometimes have consensual same-sex sexual relations, though they would not identify as gay in the Western sense; these relations are culturally accepted, as encapsulated in a common phrase that “women are for babies, men are for sex”.¹¹

⁵ Tafkhiz تَفْخِيز = (masculine or feminine) same-sex sexual relationships not involving any penetration criminalized in article 649.

⁶ “American Arrested in Afghanistan on Suspicion of Homosexuality, Soliciting, Officials Say”, *PakTribune*, 1 September 2004.

⁷ Nushin Arbabzadah, “Will Afghanistan learn that cross-dressers are not criminals?”, *The Guardian*, 13 November 2011.

⁸ “Fear, secrecy and danger a way of life for Afghan gays”, *Inquirer.net*, 5 November 2016.

⁹ “Fear, secrecy and danger a way of life for Afghan gays”, *Inquirer.net*, 5 November 2016; Frud Bezhan, “‘Fake Life’: Being Gay In Afghanistan”, *RadioLiberty RFE*, 12 September 2017.

¹⁰ UN Assistance Mission in Afghanistan, *Afghanistan Annual Report 2015: Protection of Civilians in Armed Conflict* (2015), p. 51.

¹¹ Michael Luongo, “What It’s Like Growing Up Gay in Afghanistan”, *The Daily Beast*, 7 December 2016.

In addition, the practice of *bachebazi*—which is a socially-embedded form of male paedophilia—continues to operate, especially among the upper echelons of society as well as the police and security forces.¹² According to a 2017 shadow report to the Committee against Torture, young boys are kept in slave-like conditions to be sexually abused by their masters and others.¹³ This practice is now criminalised under Chapter 5 of Book 4 of the Penal Code, and prohibits a person from keeping a boy (or *Mokhanas*) for such a purpose, forcing a child to perform this practice, organising or participating in a *bacha bazi* party.

Yet across Afghanistan, people who identify as gay or LGBT, particularly if in any way public, are faced with significant discrimination. For instance, in 2013, a gay Afghan man, Nemat Sadat, was the first person to come out publicly on social media, which led to his being pressured to resign from his position as a professor at the American University of Afghanistan and leave the country.¹⁴

Following the 2016 shooting by Afghan-born Omar Mateen at a gay club in Florida, USA, a news report found that many Afghans supported his actions on the basis that “homosexuality” was wrong.¹⁵

National Human Rights Institution

Although a senior member of Afghanistan Independent Human Rights Commission (AIHRC) attended the Workshop on the Role of NHRIs in Promoting and Protecting the Rights and Health of LGBTI in Asia and the Pacific in 2015, there has been no mention of sexual orientation or SOGI in the work of that Commission,¹⁶ or in its 2018 submission to the Universal Periodic Review.¹⁷

UN voting record

Afghanistan was not a member of the Human Rights Council between 2011 and 2016, and therefore did not participate in the vote for the three HRC resolutions on human rights, sexual orientation and gender identity in 2011, 2014 and 2016. At the session of Third Committee of the UN General Assembly held in November 2016, Afghanistan voted against the LAC amendment to remove Operative Paragraph 2,¹⁸ and in favour of the African oral amendment to block the IE SOGI at the UNGA Plenary Session on 19 December 2016. Additionally, Afghanistan voted in favour of the amendment which tried to block financial resources allocated to the IE SOGI.

International advocacy and supervision

Universal Periodic Review

In its 2nd UPR in 2014, the only recommendation regarding SOGI that Afghanistan received was not accepted: Norway urged to decriminalise.¹⁹ A Joint Submission (SRI, IFPP, and AFGA) made a reference to men who have sex with men (MSM), and this appears to be the only mention of SOGI-related material in Afghanistan’s entire 2nd cycle UPR.²⁰

Afghanistan’s 3rd UPR review is taking place at time of writing.

Treaty Bodies

In 2011, the **Committee on the Rights of the Child (CRC)** expressed “grave concern” about widespread sexual abuse and exploitation of children.²¹ It urged the State to ensure that child victims of sexual abuse or exploitation are treated as victims and no longer charged and detained as offenders”, and to address the sexual exploitation of children.²²

¹² Afghanistan Independent Human Rights Commission, *Causes and Consequences of Bacha Bazi in Afghanistan* (2014).

¹³ Civil Society and Human Rights Network, *Shadow Report to the Committee against Torture on the Occasion of the Examination of the Second Periodic Report of Afghanistan at its 60th Session* (2017), p. 6.

¹⁴ Frud Bezhan, “‘Fake Life’: Being Gay In Afghanistan”, *RadioLiberty RFE*, 12 September 2017.

¹⁵ Tim Craig, “After Orlando attack, prevailing view is there are ‘not any gays’ in Afghanistan”, *The Washington Post*, 19 June 2016.

¹⁶ “Promoting and protecting the rights of LGBTI people in Asia and the Pacific”, *The Asia Pacific Forum of National Human Rights Institutions*, 23 February 2015; “Afghanistan Independent Human Rights Commission”, *Official Website*.

¹⁷ Afghanistan Independent Human Rights Commission (AIHRC), *Stakeholder submission to the 32nd Session of the Working Group on the UPR Human Rights Council, Jan-Feb 2019*, UPR-info website.

¹⁸ Operative Paragraph 2 was an attempt by the Africa Group to defer consideration and action on HRC Resolution 32/2 under the pretext that further consultations were needed to determine the legal basis upon which the IE SOGI would operate on. For more information, see: Out Right, ISHR, ILGA and ARC International, *Defending the independent expert on protection against violence and discrimination based on sexual orientation and gender identity at the 71st Session of the United Nations General Assembly* (2017), 4.

¹⁹ *Report of the Working Group on the Universal Periodic Review: Afghanistan*, A/HRC/26/4, 4 April 2014.

²⁰ Afghan Family Guidance Association (AFGA) et al., “Universal Periodic Review of Afghanistan 18th Session” (2014).

²¹ Concluding observations on Afghanistan’s initial report to CRC, *CRC/C/AFG/CO/1*, 8 April 2011, para. 70.

²² Concluding observations on Afghanistan’s initial report to CRC, *CRC/C/AFG/CO/1*, 8 April 2011, para. 71.