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STATE-SPONSORED HOMOPHOBIA

2019

13th Edition

LUCAS RAMÓN MENDOS

ilga.org



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ILGA Co-Secretaries General' Foreword

By Ruth Baldacchino¹ and Helen Kennedy.²

As we celebrate ILGA's 40th anniversary, we are proud to launch the latest edition of the *State-Sponsored Homophobia* report to continue providing updates of this unique advocacy tool to member organisations and allies.

In the last few years, each edition of this report has sought to improve the quality and the breadth of the data included and this new edition is definitely no exception. Each section of the report has grown considerably, both in scope and in depth, as has the number of contributors coming from all ILGA regions whose voice adds another dimension to this world-size compendium.

Besides the analysis of legislation in force around the world and the human rights situation in each criminalising UN Member State, since 2012 the report has featured essays written by scholars and activists on the socio-legal situation in different regions around the world (Global Perspectives). This year, more than 30 voices paint the bigger picture of the progress and challenges encountered in the last two years by our communities in all ILGA regions.

As more international courts, bodies and agencies are becoming involved in establishing human rights standards on issues related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC), it is increasingly difficult to keep up with all of their decisions, cases, and materials. Additionally, the intricacies of legal terminology oftentimes become a barrier to many who are not familiar with the way in which these bodies write, interpret and present their arguments. Aware of these challenges, ILGA World has decided to incorporate a whole new section on International Human Rights Law, written in a more

accessible language. This chapter will become an invaluable roadmap to all the legal developments taking place at the multiple fora in which SOGIESC issues are being discussed.

The volume of information in this report is also higher than the previous editions as it covers the developments in the last two years (2017 and 2018). The report has been published annually since 2006 and not publishing a 2018 edition has generated increased levels of expectation among activists, scholars and even State officials. We are aware that many have been waiting for this edition and we are confident that they will not be disappointed (and may even be compensated for the long wait).

We are also aware that this report has become a prominent source of credible information for courts of law, governmental agencies and other bodies at local, national and international levels. In 2018, the Supreme Court of India cited this report in its momentous decision that decriminalised consensual same-sex sexual acts and since the launch of the latest edition of the report in 2017, more than 4,500 media outlets have reported or cited it, as well as many hundreds of academic citations. Moreover, since 2015 the EU Asylum Support Office (EASO) includes *State-Sponsored Homophobia* and its maps among the key sources to conduct Country of Origin Information (COI) research to support asylum claims.

This level of reliance on our work comes with a great responsibility and leads us to put more efforts and resources into producing ever deeper and reliable data.

¹ Ruth Baldacchino has extensive experience in international LGBTIQ activism and research. Their human rights work started with the Malta LGBTIQ Rights Movement, where Ruth served on the Executive Committee for several years. Ruth has served on a number of boards in the past years including IGLYO, ILGA World and ILGA-Europe. Ruth is Senior Program Officer of the Intersex Human Rights Fund at the Astraea Lesbian Foundation for Justice. Prior to joining Astraea, they worked at the Maltese Ministry for Civil Liberties in the areas of human rights and integration, where they were an active part of the process that led to the passing of the Gender Identity, Gender Expression and Sex Characteristics Act.

² Helen Kennedy became Egale's Executive Director in 2007. She joined the organization with 22 years of experience in politics both as an elected city councillor and a political staffer. She is a founding member of Canadians for Equal Marriage, widely regarded as the most influential public policy lobbying campaign in Canadian history – which ultimately resulted in Canada being one of the first countries in the world to legalize same-sex marriage. Helen's work includes the Climate Survey on Homophobia and Transphobia in Canadian Schools, the first national survey of its kind in Canada, and provides critical findings on bullying to schools, educators and governments.

After reviewing this latest edition, it has become apparent that the report has grown out of its title, as it progressively leaves behind a focus exclusively centered around issues of homophobia and sexual orientation, and starts covering broader issues related to gender identity, gender expression and sex characteristics. In this regard, this edition could well be defined as a *transitional* one, reflective of ILGA Word's ongoing discussions on how to rethink and streamline its research. These discussions are

continuing as this edition is released to the public and is concomitant of the discussions on the organisation's strategic plan for the next 5 years that will provide the framework for future research initiatives.

Our thanks go to all those who worked on this report, ILGA staff members and external contributors alike, and particularly to all ILGA members whose knowledge continues to sustain this report.

Author's Preface

By Lucas Ramón Mendos.¹

It's been two years since we published our last edition, so there are quite a few things to catch up on!

A roadmap for this edition

- ▶ *If you are reading the PDF version of this report, note that each section has been "bookmarked" so that the content can be easily accessed. Open the bookmarks tab to find a clickable tree with all the sections and pieces within each of them.*

As anticipated by our Co-Secretaries General, this edition contains two years' worth of information, covering events from March 2017 to December 2018. Therefore, the amount of information that had to be processed was significantly higher than in previous editions of the report. Moreover, a few new sections were added. This has led to a considerable increase in the number of pages of the report, so a clear roadmap to navigate this edition appears to be necessary.

Section 1: Introduction

Section 1 contains the main introductory essay written by **Cynthia Rothschild**. In her piece, Cynthia gives us an overview of the major events related to our quest for equality that took place between March 2017 and December 2018 in almost every corner of the world. Cynthia does an exquisite job of painting a big picture for our readers to appreciate what is going on, both in terms of progress and backtracking, and she shares her views on key issues related to global advocacy strategies, challenges and opportunities ahead. In this same section, **Elena Brodeală** and **Vlad Levente Viski** invite us to think about the implications of putting our rights to a vote and help us understand why there are several reasons for concern when such proposals arise. As we note in the "Criminalisation" section of the report, several countries have been considering launching

referendums, so this piece may come in handy for advocates who may need to work on the issue.

Section 2: International Human Rights Law

This is the newest addition to the report. In this chapter, scholars and activists brief us on the current state of SOGIESC-related human rights standards set by international courts, bodies and agencies. Well aware of the complexities and barriers that legalese may pose to all of us who are not familiar with the language used by courts or legal bodies, contributors have sought to explain developments in plain language, making international law less cryptic and more accessible to all.

We have the honour of having two signatories of the *Additional Yogyakarta Principles* (YP+10), **Mauro Cabral Grinspan** and **Julia Ehr**, explain this invaluable contribution to SOGIESC International Human Rights Law, an instrument that crystallises much of the work and progress made since 2007 in this field.

One of the major breakthroughs of SOGIESC advocacy at the UN has been the 2016 appointment of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. **Rafael Carrano Lelis** and **Zhan Chiam** were able to capture all the work that the IE has carried out so far and share their overall appreciation of the progress made thus far, anticipating the upcoming vote for the renewal of the mandate.

Diana Carolina Prado Mosquera offers us a privileged perspective of how the third cycle of the UPR is unfolding. In fact, these developments and the extensive opportunities offered by the UPR mechanism are present throughout the

¹ Lucas Ramón Mendos is ILGA World's Senior Research Officer. He is a lawyer, lecturer and researcher, specialised in international human rights law and sexual and gender diversity issues. He earned his LL.B. degree with a focus on international law from the University of Buenos Aires (UBA), Argentina, and his LL.M. degree on Sexuality and the Law from the University of California in Los Angeles (UCLA). He has worked as an attorney with the LGBTI Rapporteurship of Inter-American Commission on Human Rights (OAS) and the Williams Institute International Program. He has served as a defence attorney for asylum seekers with the Office of the Defender General and as an adviser on SOGIESC issues to the Human Rights Secretariat of the Province of Buenos Aires (Argentina). He has also consulted for LGBTI organisations, including ILGA and RFSL. He was the co-author of ILGA's 2017 *State-Sponsored Homophobia* report.

“Criminalisation” section of the report, in each of the entries for every criminalising State.

The jurisprudence of UN Treaty Bodies is among the least explored UN mechanism by SOGIESC advocates. In this edition, **Kseniya Kirichenko** captures forty years of Treaty Body Jurisprudence to give us a fine overview of what the collective record of individual cases looks like to date and invites us to think of how this mechanism could be better exploited.

UN Agencies are increasingly becoming active players on SOGIESC issues. Although not all of them could be captured, this chapter has specific essays on the specific work carried out by the International Labour Organisation and UNESCO. **Gurchaten Sandhu** and the **UNESCO team**, respectively, will brief us on the important work that is being carried out by each of these agencies.

At the regional level, Europe and the Americas have seen important developments.² While **Lucía Belén Araque** walks us through the momentous Advisory Opinion of the Inter-American Court of Human Rights on legal gender recognition and same-sex unions, **Luiza Drummond Veado** will help us appreciate the work carried out by the Inter-American Commission on Human Rights, especially through its Rapporteurship on the Rights of LGBTI people. Additionally, **Marcelo Ferreyra** offers us a valuable recap of the advocacy efforts that are being carried out before the political organs of the Organisation of American States (OAS).

On the opposite side of the Atlantic, the vast work on SOGIESC issues carried out by the many bodies of the European Council (including the Parliamentary Assembly, the Commissioner for Human Rights, the European Commission against Racism and Intolerance, the Committee for the Prevention of Torture and the intergovernmental sector's SOGI Unit) have been captured meticulously by **Sarah Burton**. In addition, **Constantin Cojocariu** summarises the main decisions issued by the European Court of Justice on SOGI issues. Last, but not least, **Arpi Avetisyan** invites to a comparative analysis of the decisions issued by the European Court of Human Rights (ECtHR), the European Committee on Social Rights (ECSR) and the European Court of Justice (CJEU).

Section 3: Global Perspectives

The Global Perspective section offers our readers the opportunity to become acquainted with the main events and realities our communities are going through in every ILGA Region. In this edition,

numerous scholars and activists add their voice to reflect the situation in their regions.

The big picture of what is going in each corner of the African continent has been collectively painted by eight activists and scholars: **Naoufal Bouzid, Khadija Rouggany, Eric Guitari, Ababacar Sadikh Ndoye, Emma Onekekou, Julie Makuala Di Baku, Jean Paul Enama, and Rui Garrido.**

ILGA LAC has very kindly assisted ILGA World in the coordination of the production of their Global Perspective section. The author's gratitude goes to **Luz Elena Aranda, Darío Arias and Pedro Paradiso Sottile** for their assistance. In fact, their collaboration makes it possible for us to learn about what is going on in Latin America and the Caribbean from a pallet of six different voices which include **Alba Rueda, Bruna Andrade Ireneu, David Aruquipa Perez, Gloria Careaga Pérez, Manuel Vázquez Sejido and Francisco Rodríguez Cruz.** Additionally, **Westmin R. A. James and Luciën D. Govaard** make their contributions for the English-Speaking Caribbean and elaborate on the legal peculiarities that lie within that sub-region.

The complexities of an effervescent region, as it is the case of North America, are explored and explained by **David J. Godfrey and Kimahli Powell.** The attempts of the Trump administration to roll back protections achieved by our communities in the USA, as well as their effects, both domestically and globally, are tracked and analysed in depth.

Capturing what is going on in a region as vast as Asia can be a huge challenge. To this aim, the following activists and scholars have set out to write on the lived realities of our communities from the Middle East to Japan and from Mongolia to Indonesia: **Lloyd Nicholas Vergara, Zach ZhenHe Tan, Minwoo Jung, Ripley Wang, Zhanar Sekerbayeva, Syinat Sultanalieva, Shakhawat Hossain Rajeeb, Nazeeha Saeed, Samar Shalhoub and Daryl Yang.** Additionally, **Arvind Narrain** will gently walk us through the decision of the Indian Supreme Court that decriminalised consensual same-sex sexual acts in Earth's largest democracy.

Manon Beury and Yury Yoursky are our hosts in Europe and help us understand the varying realities in a region marked by the contrasts of cutting-edge progress and worrisome regression.

Last but definitely not least, ILGA Oceania assisted ILGA World in producing the Global Perspective on that ILGA Region. The author's gratitude goes to the regional board members.

All in all, the contributions in this section provides a unique overview of where the world is at in SOGIESC issues.

² **Note:** for reasons that lie beyond ILGA World's control, the essay on the SOGIESC legal developments within the African Union could not be produced in time for the launch of this report. We expect to be able to add the essay on a future update of this edition.

Section 4: Global Overview

The Global Overview section was first included in this report in its 9th edition, authored by Lucas Paoli Itaborahy and Jingshu Zhu. In this section, the report covers the laws currently in force in all 193 UN Member States (and other jurisdictions) regarding sexual orientation.

The report covers 14 legislation categories classified into 3 major groups: (1) Criminalisation and restriction of rights; (2) Protection; and (3) Recognition.

Under the first group, we track the legality of consensual same-sex sexual acts. An interesting introductory piece on the global trends on the decriminalisation of consensual same-sex sexual acts since 1969, written by **Daryl Yang**, will give our readers a full perspective the progress achieved thus far in terms of decriminalisation since the Stonewall riots took place.

Legality of consensual same-sex sexual acts is broken down into two major categories: UN Member States that do not criminalise such acts and those that do. The latter category includes all the States in which laws criminalise same-sex sexual intercourse or other kind of same-sex sexual acts (usually captured under vague terms such as “indecent” or “immoral acts”). UN Member States with laws restricting the rights to freedom of expression on SOGI issues and freedom of association with regard to the registration or operation of sexual orientation related (SOR) civil society organisations are also included in this group.

In the protection group, the report lists countries under six categories related to protection from discrimination at different levels, criminal liability for offences committed on the basis of sexual orientation, prohibition of incitement to hatred, discrimination or violence based on sexual orientation, and bans on “conversion therapies”.

Finally, in the recognition group, we list countries under four categories: same-sex sex marriage, partnership recognition for same-sex couples, joint adoption by same-sex couples and second parent adoption by same-sex couples.

Section 5: Criminalising States Updates

In this section we analyse the provisions in force and we explore the human rights situation in each criminalising State (currently 70 in total) with a

special focus on the events that took place since our last edition. In this report, we particularly cover events between March 2017 and December 2018.

For the first time, in this edition we systematically include information on statements by public officials on SOGI-related issues, existing legal challenges before local courts, the work of the National Human Rights Institution on SOGIESC issues (where applicable) and information on the UN voting record of each State. In many cases, this information helps understand local realities and how local officials perceive SOGIESC issues. In many cases, this complementary information may provide an indication on the likelihood that authorities will effectively protect LGBTI people at risk.

Additionally, we systematically track the State's engagement with SOGIESC issues at the UN Universal Periodic Review (UPR) and other relevant instances of international and regional supervision, including UN Treaty Bodies and Special Procedures, as well as other regional bodies where applicable.

Main Findings of this Edition

As of March 2019, there are **70 UN Member States** (35%) that criminalise consensual same-sex sexual acts: **68** of them have laws that explicitly criminalise consensual same-sex sexual acts and **2** more criminalise such acts *de facto*.³ In addition, other jurisdictions which are not UN Member States also criminalise such acts (Gaza, the Cook Islands and certain provinces in Indonesia).

Progress (and backtracking)

Since the last edition of this report, Angola, Trinidad & Tobago and India repealed such laws. However, Chad has troublingly criminalised such acts in 2017.

Of the 70 UN States, 26 (37%) specifically criminalise only such acts between men. The rest of the 44 criminalising UN States criminalise consensual same-sex sexual acts among all genders.

Criminal Penalties

Six UN Member States impose the death penalty on consensual same-sex sexual acts, with three in Asia

³ “De facto” means that even though there are no *explicit* provisions criminalising consensual same-sex sexual acts in force, other legal provisions are used as the legal basis to prosecute and convict people for such acts.

(Iran, Saudi Arabia and Yemen) and three in Africa (Nigeria, Sudan and Somalia). In addition, the death penalty is a possible punishment in five UN Member States: Mauritania, United Arab Emirates, Qatar, Pakistan and Afghanistan. Though Iraq has been removed from this list following the elimination of the Islamic State (ISIL/ISIS), it remains as a *de facto* criminalising country due to reports of State prosecution using laws on public indecency, prostitution or others.

31 UN Member States (44%) impose up to eight years' imprisonment while the remaining 26 Member States (37%) impose even harsher penalties: between 10 and life imprisonment.

Legal barriers that restrict the freedom of expression and association

The data presented in this edition shows that *at least 32 UN Member States* (17%) have introduced or interpreted provisions to restrict the freedom of expression in relation to SOGI issues. This includes laws and regulations that prohibit media or web content as well as propaganda laws that prohibit the promotion of "homosexuality" or "non-traditional" sexual relations.

Additionally, **41 UN Member States** (21%) have laws that restrict the possibilities of registering or running NGOs that work on sexual orientation issues. The justification for these restrictions is usually on the basis that these organisations' activities are illegal, immoral or against public interest.

These two types of laws, frequently found in tandem, pose serious challenges to activists and human rights defenders on the ground.

Protection from discrimination

In terms of laws that protect people from discrimination based on sexual orientation, unchanged from the 2017 edition, there are **9 UN Member States** (5%) that constitutionally prohibit discrimination on the ground of sexual orientation.

In addition, a total of **73 Member States** (38%) have laws prohibiting employment discrimination on the ground of sexual orientation. Of these 73 Member States, **52** (27%) have broad legal protections (usually applicable to goods and services, health and education) on the basis of sexual orientation as well.

39 UN Member States (20%) have enacted laws that punish acts of incitement to hatred, discrimination or violence based on sexual orientation while **42 UN Member States** (22%) impose enhanced criminal penalties for crimes motivated by hate towards the victim's sexual orientation.

The number of UN Member States that have prohibited "conversion therapy" remains at three (2%) though considerable progress has been made at the subnational level, with a growing number of local legislatures in the United States, Spain and Canada having enacted such laws over the past two years.

Recognition of same-sex relationships

Since the 2017 edition of this report, four new UN Member States now also legally recognise same-sex marriage: Australia, Austria, Germany and Malta. This brings the total number to 26 UN Member States (13%). Most of these UN Member States are in Europe (62%) and North America (7%), with a small number located in Latin America and the Caribbean (19%) and Oceania (17%). South Africa remains the only UN Member State in Africa to recognise same-sex marriage.

27 UN Member States (14%) also legally recognise same-sex partnerships. 30 UN Member States (16%) provide for second parent adoption while 27 (14%) permit joint adoption.

Existing legal challenges

In this edition we were able to track almost 30 existing legal challenges currently litigated before local courts in more than 17 criminalising countries, including in Botswana, Gambia, Grenada, Guyana (concluded), Indonesia, Jamaica, Kenya, Lebanon, Malawi, Malaysia, Namibia, Nigeria, Singapore, Tunisia, the United Arab Emirates, Uganda and Zimbabwe. In these cases, local advocates and activists challenge various laws and regulations on consensual same-sex sexual acts, NGO registration, freedom of expression on SOGI issues, legal gender recognition, forced anal examinations, among others.

This list does not claim to be exhaustive. It is just an enumeration of several prominent cases on which we may be able to provide updates in future editions.

Authorship

This 13th edition of the report was authored by Lucas Ramón Mendos; with Daryl Yang and Lucía Belén Araque, as main research assistants.

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INTRODUCTION

STATE-SPONSORED HOMOPHOBIA 2019



Denigration, Distraction and Detraction: Forging Ahead, Even in Crisis

By Cynthia Rothschild¹

Since the publication of ILGA's last *State Sponsored Homophobia* (SSH) report in 2017, there have been great successes within our movements, as has been the norm over the last few years. Whether we call ourselves "lesbian", "trans", "intersex", "bi" or "gay" (or "gender non-conforming" or simply "allies" or "social justice advocates", for that matter), we can point to any number of victories in our local and global organising.²

These wins continue to come at all levels, of course with local specificity and without uniformity. In some places, national legislation shifts as States decriminalise sodomy. Fewer trans people are made to undergo forced divorce or sterilisation or other nonsensical interventions in order to change their legal gender. Public health authorities increasingly depathologise trans people in health classifications. Marriage in many places allows recognition of same sex couples. Same sex couples can sometimes adopt. Conversion therapy is under scrutiny as an unethical and illegal practice, as is the non-consensual surgical intervention used to ascribe gender or sex to intersex infants and young kids. And LGBTI organising remains vibrant from the local to the global—for instance, hardly a session of the United Nations Human Rights Council goes by now without a team of activists challenging governments about their stances on sexual orientation, gender identity and sex characteristics.

Situating our advocacy and our lives: the recent global context

Yet, the two years since the publication of ILGA's last SSH report have led many to conclude that these are challenging and draconian times all over the globe. The victories seem to be interspersed

with abject attacks; determining whether there is a "backlash" as a result of cultural change or simply a continuation of the "hard times that have always been" may not matter. People in many marginalised groups have become and/or still are targets for physical, psychological and verbal abuse in both global North and South alike. Spikes in hate crimes and other violent acts have been noted in many areas, and harassment and threats abound in social media. People unfairly targeted because of their relationship to gender or sexuality—or their appearance, or their expressions of love or desire—are in broad company. Women (generally), immigrants, sex workers, trade workers and union members, journalists, Indigenous Peoples, those with disabilities, poor people and increasingly people who simply identify on the left of the political spectrum face an outpouring of unpoliced hatred.³

Governments across regions and—more precisely, the unethical individuals that often comprise them—seem focused on undoing social justice gains of the last decades. It is, indeed, hard to tell whether this is "backlash" against positive trends or just the confrontation of new depths of obstacles. The legal and cultural landscapes are onerous. The human rights system is under attack—in many places, underfunded and maligned. Immigrants and refugees on several continents, including some who might call themselves LGBTI, are denied the legal right to seek asylum. But they are also rounded up, caged, deported and sometimes abandoned at sea. Children are separated from parents, families are broken apart or not recognised legally. Funds are sought and utilised to build walls, to create border checkpoints, to buy missiles, to enact tests of defence systems as acts of intimidation. Voter suppression, too, maintains kleptocracy,

¹ Cynthia Rothschild is a human rights, feminist and sexual rights activist. For over two decades she has been an advocate, a trainer / facilitator, and an author. She's worked with a million NGOs and occasionally with the UN Office of the High Commissioner for Human Rights and donors. Her most recent publications include "Sex at Dusk and the Mourning After: Sexuality Policy in the United States in the Years of Obama" and "Gendering Documentation: a Manual for and about Women Human Rights Defenders."

² This essay will use several acronyms, including LGBTI (lesbian, gay, bisexual, trans and intersex) and SOGIESC (sexual orientation, gender identity and gender expression, and sex characteristics). It remains true that "LGBTI" is not a proper umbrella term for all regionally specific and rich names for gender non-conforming people around the world. In occasional instances the term LGBT is used without the I; that is done with intention and for accuracy in terms of the specific references.

³ Of course, there are important nuances within these categories also.

corruption, poverty, xenophobia, racism and white supremacy. And the strategically-used rhetoric of political and religious-fundamentalist officials remains misogynist, homophobic, transphobic and often just stunning in its offensiveness.

In the last few years, and certainly since the last ILGA SSH report was issued, commitments to multilateralism and global governance have come to seem quaint and antiquated. Each day newspapers and the websites that present real news feature stories about conservative populist movements and the failures of and attacks on “cooperation”. Extreme nationalism and xenophobia, cultural and race supremacy and the “toxic masculinity” that has exploded (probably) everywhere are fuelling isolationist and self-righteous policies.

Brexit and the efforts by (parts of) the UK to wrest itself from the European Union have dominated European news since the 2016 public referendum. Some governments (and in particular, the United States) have pulled out from international human rights treaties and defence agreements. Right wing political discourse sometimes maligns the UN overall or regional agreements, including the North Atlantic Treaty Organisation (NATO), the International Criminal Court or the UN Human Rights Council. And governments have defunded, challenged the credibility of and otherwise undermined UN agencies and regional human rights systems in the period in question.

As an aside, it is important to note that despite the legal and regulatory protections some of the “institutions” or “systems” above provide, some people have had valid critiques of these systems for decades. None is or has been without bias. But overall, each has sought to serve a protective function of one form or another. Now, in the current difficult political climate, human rights defenders, including those who focus on sexual rights and gender, are increasingly organising not only to do our own social justice work, but also to strengthen these very institutions, organisations or alliances in the face of conservative political attacks against them. Our resources—already generally meagre—increasingly must go not only to SOGIESC-related organising but also to protecting civil society space all over. This is a shift that must be recognised by donors and others who support political engagement of activists.

This list of concerns above is both draconian and not exhaustive. There are a few additional current “social ills” that should be mentioned here to offer even more foundational context of the present

climate, though. None of these began in the last years, but each has spiked. “Corporate capture” marks the devastating influence of an economic elite and vastly skewed global inequalities. Perpetual land appropriation of local and Indigenous communities, much of it driven by “big business” profit seeking and political interests, remains a constant threat. Activists and journalists are antagonised (and killed) with impunity and State involvement in a global clampdown on civil society organising and expression. Climate change threatens catastrophe in both hemispheres as science and evidence-based analyses (about the environment and also about public health) are obscured and denied. And we learn, almost on a daily level, about ways media in all regions is manipulated—and private data is sold—for electoral outcome while “truth” and “fact” are made to blur with “propaganda” and “fake news”.⁴

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These concerns are both disparate and related. But together, and since the last SSH report, all shaped the world within which LGBTI and sexual rights activists formed our movements, priorities and alliances. All, in one way or another, had something to do with gender and sexuality (either overtly or subtly). Sometimes we are subjected to immediate violence and discrimination because of prejudices related to sexuality or gender. And sometimes we are targeted because we are simply engaged in being who we are in the rest of our lives, people with different histories who are of different races,

⁴ The concerns are not bound by geographic borders. Consider [this article](#) in the Guardian UK from February 2019, which links Cambridge Analytica, Facebook and election “meddling” with Russia, Ukraine, the United States, Nigeria and Israeli intelligence.

castes, classes, and nationalities who actively think about, act and sometimes resist in the world around us. Our communities have lived under these conditions; we have been targeted for violations, we have organised as defenders of many rights, we have also sometimes been the people who discriminate against and judge others, including those within our own movements.⁵

All of these realities were manipulated and shaped by right wing and conservative interests—ultimately, many of which are the same interests that deny human rights overall, and specifically the rights of women, LGBTI and gender-non-conforming people.

These global forces have been, and remain, deeply daunting. Yet, sexual rights, women's rights and feminist activists—including those focused on SOGIESC—have remained focused and strategic in putting forth our legal, political and cultural agendas. And we have partnered across movements to do our own work, to support the work of other social justice agendas, and to fight against the scourges above.

The purpose of naming the details in the section above is straightforward: it is not possible to see SOGIESC concerns and activism related to gender and sexuality in a silo. Nor is it possible to fully understand our successes—whether they are legal or cultural—or the obstacles we face without naming these contexts. Our movements' interests intersect and are shaped by the external world and specific nuances of region and social location.

When we have a deeper understanding of the forces at play that restrict human rights and rights related to gender and sexuality we can not only engage in deeper strategising, but also savour and celebrate the breadth of what we overcome.

The following overview highlights some of the specific challenges activists who promote SOGIESC and sexual rights concerns have had to grapple with in the period under review, which is generally the latter part of 2017 and 2018. And, critically, this synopsis will elaborate upon some of the significant "wins" of that time and some of the areas requiring more attention—because despite the backlash against us and the power of conservative forces and the global right wing, our movements will continue to grow, succeed and make positive change.

Accentuate the positive

It is not possible to delineate each of the positive changes that have taken place since ILGA's last

State-Sponsored Homophobia report. The shifts can sometimes be glacially slow, and they sometimes can come with remarkable speed. The following examples show patterns and trends—all of which rest on decades of mobilising and strategising by courageous individuals.

When we have a deeper understanding of the forces at play that restrict human rights and rights related to gender and sexuality we can not only engage in deeper strategising, but also savour and celebrate the breadth of what we overcome.

As this SSH compilation of data and analysis is developed, the ground we stand on shifts again. While these developments don't fit in the timeframe under review, they are too compelling not to mention: The High Court of Botswana is likely to issue its opinion on decriminalising homosexuality in March, 2019. In January of 2019, Angola revised its penal code, deleted language on "vices against nature" and in effect lifted sanctions against homosexuality. And Kenya may decriminalise homosexuality in coming months, as may Sri Lanka.

In terms of the main period of review:

- ▶ It is likely that the **striking of the anti-gay portions of Section 377 of the Indian penal code** is the most far reaching legal victory of 2018. Its importance will be felt by millions of people across continents, as activists and policy makers in other countries enduring the legacies of British colonial rule—and British colonial legal homophobia—will use this Supreme Court decision as a basis for their own legislative efforts to decriminalise adult consensual same sex sexual activity. Even just months after this court ruling, sodomy statutes

⁵ The "internal" harms within our movements compound those of the external environment, and include tensions around race, gender, class and North-South dynamics.

(outlawing, for instance, “carnal intercourse against the order of nature”) in a number of countries are being challenged -- with the repeal of 377 as part of the legal argumentation. The ramifications of the India 377 case stretch beyond the narrowest (but still foundationally critical) implications of people not being arrested because they’re gay, or assumed to be. One legal activist who was involved in this struggle for decades notes that while it is too early to draw categorical opinions about the impact of the repeal, courts already are “affirming the legitimacy of queer relationships with heartening frequency - so far mainly in cases of queer women couples approaching the judiciary seeking injunctions from intrusion and coercion by relatives towards their relationships.”⁶

- ▶ Less publicly heralded were the **decriminalisation of same sex sexual activity**⁷ (to be more specific, anal sex and the “buggery law”) in **Trinidad and Tobago, and the outlawing of SOGI-related hate crime in Mongolia.**
- ▶ **For the first time, the governments of the UK and Canada apologised for historic anti-gay laws and their aftermath. The Canadian government offered reparations to some survivors** (primarily civil servants and members of the military). Notably, the government set aside almost 90 million Canadian dollars for this process. The UK offered an apology for British colonial laws that variously outlawed “homosexuality” in Commonwealth countries.
- ▶ **The World Health Organisation (WHO) removed “gender incongruence” from its list of mental disorders** in the International Classification of Diseases (ICD), thereby validating the claims and activism of trans people demanding not to be labelled as ill. WHO now asserts that trans identity is a sexual health “condition” and “gender variant behaviour and preferences alone” are not a basis for diagnosing mental health. This change in the ICD will officially go into effect only in 2022, after what will likely be a confrontational battle at the World Health

Assembly in 2019. Ultimately, this shift will challenge the pathologising of and stigma directed at trans people, and presumably reduce violence and discrimination.⁸

- ▶ **Ireland elected its first openly gay head of state** as the conservative leader Leo Varadkar became Taoiseach in June 2017. **In Costa Rica, voters elected a “pro-gay” party in their federal election**, and lifted a staunch feminist ally to the LGBT community to the position of Vice President.
- ▶ **Botswana opened the door for trans people to more easily change their official gender on identity documents. The Inter-American Court called for countries to establish simple and efficient procedures allowing for these gender changes.**
- ▶ **The Council of Europe issued a resolution protecting rights of intersex people in late 2017**, with a focus on rights of children to be free from medically-unnecessary surgical interventions. This resolution was the first from this European body to focus on intersex issues.
- ▶ **Conversion therapy (sometimes called “reparative therapy”) continued to attract condemnation** from around the globe. In March of 2018, the European Parliament passed a resolution condemning the practice and urged member states to outlaw it. Brazil, Chile, Spain and Canada generated provincial level bans, and governments of New Zealand and Taiwan, among other states, outlawed at the national level. Several national psychiatric and mental health associations took stands against the practice.⁹

Same sex marriage remained a primary site of activism:

- ▶ Same sex marriage became legal in a number of countries in the period under review, including **Finland, Malta and Germany**. And in one instance of clear backlash, **same sex marriage became legal in Bermuda in 2017**, but was banned soon after, in 2018, then replaced by

⁶ Vivek Divan, in email, used with permission. See, also: “[Kerala High Court Lets Lesbian Couple Live Together](#)”, *The Times of India*, 25 September 2018 and Ashok Kini, “[Choices Of Sexual Preference Protected Under The Scheme Of Constitutional Morality: Calcutta HC](#)”, *LiveLaw.in*, 4 February 2019.

⁷ Generally, it is sex between men that is seen under the law as “same sex sexual activity”. Sodomy statutes tend to focus on male sexual partners, and acts of anal sex.

⁸ Despite the constructive shift in language addressing gender identity in particular, some were quick to note that the ICD maintains pathologising language related to people who are intersex.

⁹ Although conversion therapy in this article obviously focuses on sexual orientation and gender identity, any reference to the practices ought to note what in 2018 became a target of global outrage: China’s detention of and use of conversion therapy with possibly over a million Uighurs in anti-Muslim camps.

civil unions and then made legal again later in the year.

- ▶ **Taiwan's Supreme Court set the stage for that country to become the first in Asia to recognise same sex marriage by calling for existing laws to be amended within two years** (although there have been recent significant obstacles that may impede this process).
- ▶ **Australia spent millions of dollars in a public marriage referendum which saw a clear majority favouring legalising same sex marriage**; post vote, same sex marriage became legal in December of 2017.
- ▶ **Austria removed its same sex marriage ban**, which opened the door for legalisation in 2019.
- ▶ **An anti-same sex marriage referendum failed in Romania.**
- ▶ In another ground-breaking regional and binding ruling, **the Inter-American Court of Human Rights found that the right to marry should be extended to same-sex couples.** The Costa Rican case that moved through the Court led to the opinion in early 2018, yet the government of Costa Rica stirred controversy when it announced plans for an 18-month transition period to the new regulation.
- ▶ Also at the regional level, **the European Court of Justice ruled that Member States should recognise same sex marriages for residency purposes** when at least one partner is an EU citizen. The opinion rested on a case involving a Romanian national; soon after the ruling was announced, **Slovakia asserted it would recognise same sex marriages performed elsewhere.**
- ▶ Significantly, a bill was passed that **prohibited civil servants in South Africa from "opting out" of performing same sex marriage ceremonies** based on their perception of "conscience, religion and other beliefs". This is significant in light of the global trend toward allowing "religious freedom" exemptions in provision of health care and other services.
- ▶ **A new draft of the Cuban Constitution led to vibrant discussion about whether same sex marriage would be legalised.** Language referring to marriage being a union of "two people" rather than a "man and a woman" stirred pushback among conservatives; ultimately, there was no reference included to the subjects getting married, therefore, the

door remains open to same sex marriage in the future.

- ▶ **Various churches and religious networks also continued the trend toward allowing both same sex marriage** and in some cases (such as the United Methodist Church) lesbian and gay clergy. Scotland, Brazil, and New Zealand were among the places where religious orders took "gay-friendly" stances.

And finally,

- ▶ **At the United Nations level, the gains remained steady**, with treaty body comments and Special Procedures (including rapporteurs, who are independent experts in a thematic area or in a country) consistently integrating SOGIESC and sexual rights concerns into their research and reporting. The Universal Periodic Review process at the Human Rights Council also provided an opportunity for activists to work with and / or challenge governments on related issues, including comprehensive sexuality education, provision of non-discriminatory health services and a range of economic and social rights.
- ▶ Some advances linked the legal with the cultural, as in when **Kenya temporarily lifted its ban on the film "Rafiki", which has lesbian content, to allow it to be eligible for Oscar consideration** as the Kenyan entry for "best foreign film." Although the film was seen by Kenya's national film censorship body as promoting "homosexuality", a court temporarily allowed the film to be screened. While there were likely nationalist interests in the lifting of the ban, the film played to crowded enthusiastic audiences.¹⁰

Noting the negative

Other essays in this SSH compilation will go into more depth about some of the specific challenges that appeared or became more entrenched since the last publication. Yet, a few stood out as particularly daunting or disappointing. These included:

- ▶ **Anti-gay crackdowns** took place, with subsequent arrests and torture (generally of men), in Chechnya, Cameroun and Tanzania. Each "round up" was cause for domestic but also international outcry.
- ▶ Chad's new penal code went into effect in 2017 and **criminalised male and female same-sex sexual activity**; the Democratic Republic of

¹⁰ The film did not receive the nomination, but it did play at the Cannes film festival in France.

Congo and Cote D'Ivoire actively used penal code provisions on "public indecency" and "morality" to arrest and prosecute.

- ▶ In a widely-scrutinised federal election in Brazil, **homophobic rhetoric** helped catapult a right-wing candidate to the presidency. The effects of this evangelical victory will likely have deep impact in the region.
- ▶ Also in Brazil, Marielle Franco, a progressive Black feminist lesbian city councillor was assassinated in what has been taken by activists as a **politically-motivated killing**.
- ▶ In Israel, male same sex couples were **denied the right to adopt children through surrogacy** in an unusual legal blow to the LGBTI community.
- ▶ In a swing to the hard right, the United States **shifted its foreign and domestic policy** toward anti-SOGIESC positions, **appointed known homophobic, misogynist and transphobic people** to high level administrative posts to represent interests of conservative and religious right-wing NGOs, **denied civil rights protections** based on sexual orientation, and **created electoral wedge issues by suspending trans protections** in the US military and limiting legal protections regarding trans bathroom use.
- ▶ **Anti-propaganda laws** continued to present challenges in Russia and neighbouring countries. These efforts to "protect minors" continued to cut off information, limit counselling and place young people, as well as activists and mental health professionals, at risk.

Denigration, Distraction, Detraction

Exposing strategies, and identifying places needing our attention

It's hard to imagine a country in which attacks on feminist, sexual rights and LGBTI agendas did not take place in the last years. It's also hard to imagine a site where gender non-conforming people's bodies did not bear the brunt of brutal assaults. These manifested in many ways, including murder, torture, arbitrary arrest and rape. But other abuses were also evidenced in "administrative" attacks. These included office closures, freezing of bank accounts, denial of NGO registrations and travel bans. In these latter examples, generally government bodies or the police (or both) were responsible for the actions in question. In at least some of these examples, the motivating force behind the abuses was to elicit fear, to achieve a political outcome and / or also to project a national or cultural identity grounded in heteronormativity.

In some cases, government and religious authorities colluded not only to punish agendas or individual defenders, but to distract attention from other broader political issues such as corruption and unemployment.

As noted above, though, the violations against our communities are intrinsically linked to attacks on civil society organising overall, attacks on multilateralism, and attacks on the human rights system itself. The current political moment is a complicated one: economic interests and those of "national security" eclipse all other agendas. That is not new, in itself. But the linking of these interests with the clampdown on rights related to organising, including rights to assembly, political participation, information, speech and expression, to name but a few, makes for a daunting advocacy climate at local, national and global levels. Surveillance of defenders—both in physical terms and in social media—has become even more common, as have efforts to expose activists to risks and denigration. Add to this the fact that organising to challenge gender norms, to seek bodily autonomy and, indeed, to bring down patriarchal (and related racist and colonial) structures is always seen as a threat to the fabric of the family, the State and society overall. We are a dangerous lot, it seems.

Organising to challenge gender norms, to seek bodily autonomy and, indeed, to bring down patriarchal (and related racist and colonial) structures is always seen as a threat to the fabric of the family, the State and society overall. We are a dangerous lot, it seems.

Challenges in defending human rights

These efforts to dismiss us and the human rights agendas we promote are strategic. We and our demands are used as chess pawns in a broader geo-political game. In fact, even when governments put forward SOGIESC-friendly policies, they sometimes do so with other motivations in mind. "Pinkwashing" continues to provide cover and allow impunity for governments' anti-civil society policies

in various human rights arenas. And, of course, too many authorities continue to create and promote an anti-LGBTI national heteronormative identity for political reasons.

Unfortunately, these strategies are effective: punish the activists for bringing a “radical” agenda; dismiss their concerns as irrelevant or immoral; use the fact of their legitimate participation as a sign of failure in governance systems; challenge their participation as a means to deter other efforts and undermine the very systems they are trying to change. Ultimately, these tactics allow governments to deflect accountability in *all* human rights areas.

Although there no doubt were other examples of failures at the regional and global levels in the period under review, these two situations that took place in 2018 stand out for marking blunt attacks on civil society in intergovernmental spaces. Both reveal the lengths to which governments will go to project an identity, to intimidate those who resist “falling into line” and to protect what they see as ownership of the space and the discourse in it.

In June of 2018, the United States pulled out of the UN Human Rights Council because, it claimed, it did not have the support it sought for efforts to “reform” the UN. Days later, the US’ UN Ambassador sent a blistering letter to approximately 20 NGOs - many of which focused on sexual and reproductive rights and human rights, generally - asserting they had responsibility in the US’ departure because they were blocking a US agenda for the UN. At least two of these groups had a SOGIESC focus.¹¹ Some had a legacy of promoting women’s rights and access to safe abortion. This read to many as a thinly-veiled hostile attempt by the US to create cover for its own departure from this international human rights body.

Later in the year, the African Union’s Executive Council led the African Commission on Human and Peoples’ Rights to revoke the observer status of the Coalition of African Lesbians. In a throwback to a past era, the Executive Council of the AU implied that CAL promoted “un-African values” and therefore should not be allowed to continue its participation at African Commission meetings as an official civil society member. Despite CAL’s longstanding history of strategic work at the Commission, the Commission’s own work to further attention to violence and discrimination based on sexual orientation and gender identity/expression, and the Commission’s independence as a regional governance body,

pressure from the African Union (and the governments within it) proved too much.¹²

In both cases, governments penalised NGOs and their affiliated activists for exercising their rights to political participation, and certainly for having particular political agendas. These groups were used as scapegoats to demonstrate to other organisations that particular agendas and civil society participation in these spaces are at risk.

Other tactics have been employed to achieve the same repressive outcomes. Again, these are not new, but in the period of review were -- speaking euphemistically -- vibrant and omnipresent from local to global levels. Many of the strategies and tactics noted below are enacted by State and religious authorities. Health, education and other officials are also sometimes complicit, as the media can be, as well. In coming months and years, advocates and researchers will need to make deep investment in finding additional responses to these ploys and manipulations by those who oppose us.

- ▶ **Promotion of the “traditional family” and “traditional values”.** These efforts are quite prominent and rely on creating a mythical and beleaguered “perfect” patriarchal, heteronormative, gendered past. These are sometimes seen as responses to advances by women’s rights, sexual and reproductive rights and SOGIESC agendas.

For instance, the Human Rights Council and the UN Commission on the Status of Women provide annual playgrounds for those who promote these ahistoric ideas at the intergovernmental level. As governments negotiate language for resolutions and outcome documents, battle lines are drawn as to whether references to “families” (in the plural) will be allowed, or whether references must simply say not only “family” (in the singular), but be modified with the term “the”, implying there is just one: a monolithic heteronormative and paternalistic model.

It’s not just LGBT families who are denied recognition here; members of any family or kinship structure that falls outside the model of “the family” are rendered unworthy of rights protections. In this model, “the family” is mythically valorised as both the holder of rights and a site of safety; it is never a site of struggle, violence or discrimination, which all too often it is for those who defy gender roles or stereotypical gendered appearances.

In recent years, Russia (both the State and the Russian Orthodox Church) and the Holy See have

¹¹ ILGA was one of the groups that received this letter.

¹² See the related joint civil society statement [here](#).

spearheaded some of these efforts at the global levels. They go to great lengths to stifle the truth that around the world, many forms of family exist.

Inherent to these arguments are the ideas that parents are always best suited to make decisions for their children, which denies both the evolving capacities of young people (particularly in relation to sexuality) and the fact that parents are sometimes those who cause harm. This argument also gives parents ultimate authority in overseeing their children's education and therefore the rights to deny sexuality education and information about contraception, abortion, homosexuality, trans identity, bodily autonomy and condom use.

- ▶ **Deployment of “Gender Ideology” rhetoric.** This is closely related to the notion of tradition and family as noted above. Often put forward by conservative religious authorities and right-wing NGOs, this has taken root largely in Latin America and Eastern Europe. The Vatican has played a strong role here. In short, anti-human rights, conservative and religious groups have developed a tactic that undermines gender-related rights struggles by naming them as “ideological”. They argue that people who have a broad definition of gender beyond “sex” are using a dangerous “gender ideology”. They see any deviation from the pre-determined definitions and roles of “man” and “woman” as threats. They use vitriolic rhetoric to allege plots and conspiracies among defenders of women's rights and rights related to sexuality; they claim that our rights agendas will destroy the family, the State and the social order.

The language of “gender ideology” as it's used by detractors of rights twists truth backwards and inside out. It argues that gender as an idea is dangerous, as is believing that gender can be shaped by social factors and power relationships. It sees biology as determining roles and hierarchies.

Of course, this tactic in itself is also ideological, but that idiosyncrasy is best left for longer analyses. In short, this is a religious and political argument that creates an hysterical response to gender as a useful concept in understanding roles, dynamics, social expression and sexuality. The connections to the promotion of mythical ideas about “tradition” and “the family” as noted above are clear - these are intersectional building blocks in conservative religious agendas.

The language of condemning “gender ideology” has been very effective at local, regional and global levels. It is important for activists, policy-makers

and researchers to know that this strategy and these tactics in part have their roots in efforts that appeared decades ago, including at the “Beijing Fourth World Conference on Women” in 1995 and when the Rome Statute of the International Criminal Court was being developed in the late 1990s.¹³

This “gender ideology” strategy and these tactics to attack the very idea of “gender” in part have their roots in efforts that appeared decades ago, including at the “Beijing Fourth World Conference on Women” in 1995 and when the Rome Statute of the International Criminal Court was being developed in the late 1990s.

At these intergovernmental sites, the Holy See spearheaded efforts that continue to this day: they and others seek to focus on the language of two “sexes” rather than “gender”, marriage existing only between a man and a woman, reproduction being central to and the purpose of sexuality, and “the family” as being the core unit of society.¹⁴

- ▶ **Promotion of “religious liberty” or “religious freedom” legal strategies.** This strategy entails conservatives and religious fundamentalists using legal systems to justify people denying provision of various forms of services or goods when they feel they don't approve either of the “product” or the recipient. So, doctors can try to withhold abortion or other reproductive health care services, pharmacists can try to withhold providing contraception, bakers can try to deny customers cakes for same sex weddings and landlords can deny leases for housing to LGBTI people—all with legal

¹³ Similar efforts were made at the 1994 International Conference on Population and Development in Cairo.

¹⁴ Other agendas include vehement anti-abortion, anti-sexuality education and anti-contraception positions.

protection. This legal strategy positions conservatives as victims being forced to provide against their consciousness. What it really does, however, is legally allow random discrimination by individuals against other people.

- ▶ **Denial of and attacks on science.** Anti-human rights campaigners and religious authorities further entrenched their positions condemning science, fact and evidence-based information. In particular, their efforts focused on condom use, HIV, homosexuality and contraception. These efforts often rely on the promulgation of lies, propaganda and the spreading of what's become known as "fake news" to sway public opinion. Some of their assertions are ludicrous—and, of course, unproven: for instance, they link abortion to incidence of breast cancer, they argue that masturbation causes illness or that homosexuality is linked to paedophilia.

One strategy that has become clear is the limiting of certain terms on websites and official documentation. In one particularly bizarre effort to censor and reshape the discourse of public health, officials in the US Centers For Disease Control (CDC) suggested that the agency stop or limit use of the terms "evidence-based", "science-based", "diversity", "transgender," and "foetus", among a few others, in their budget documents. While this was initially reported as an outright ban, what became clear soon after was that the terms were noted as lightning rods that might trigger denials of funding when those budget documents were reviewed by the Trump administration. So, while this seemed not to be an abject ban, this case does reveal the "chilling effect" on public health officials and open discourse.¹⁵

- ▶ **Fear mongering / moral panic.** This, too, is an old and effective tactic connected to all of the above. Whether about sexuality or other sets of issues, the creation of an "Other" that poses a threat remains a powerful force in denial of rights. It is here that the anti-gay, the anti-trans, the anti-immigrant, the anti-Muslim, the anti-Semitic, the anti-feminist (and other related sentiments) merge. "Access to abortion will cause a national population crisis". "These people are massing at the border ready to bring in drugs, rape and take your jobs." This group of people is a national security threat." "Trans people are sick". "Our children are at risk". All are fabricated ideas fed to people through manipulated media platforms and

manipulative authorities, whether religious or political.

These efforts to create an "other" mark social anxieties among conservatives about liberalism, feminism, progressive ideas, and "political correctness". They also mark fear of loss of power and a concern about threats to the hegemonic and historic hierarchical position of white heteronormative male privilege.

Overall, these mark social anxieties among conservatives about liberalism, feminism, progressive ideas, and "political correctness" (which, at its core, really is a call to be respectful and aware of history, isn't it?).

They also mark fear of loss of power and a concern about threats to the hegemonic and historic hierarchical position of white heteronormative male privilege.

To improve our own advocacy, we must continue to pay close attention to how our detractors have successfully strategised and mobilised support. As much as we decry them as "bigots" or "religious fanatics", they are also engaging in long-term effective strategising. We must respond to their campaigning just as they have responded to ours.

And, finally.

Since the last SSH report was issued, the human rights climate has, for many, taken a turn for the worse. But, paradoxically, the visibility and demands of LGBTI communities and gender non-conforming people have generally increased. Sexual and reproductive rights claims have in many places

¹⁵ Specific language and pages on websites have also been removed, including in relation to climate change.

become further developed in law and been incorporated in evolving human rights standards, including at the UN level.

This is a long game, our work. The outlook in terms of the political landscape remains bleak; social justice advocates, no matter what our main interests, must be bold and strategic and tenacious in these times. And we must be in partnership and solidarity with one another, always. We must also strengthen our capacity to address tensions in global North and South power dynamics, just as we must become better at addressing racism and

sexism within our movements and networks. Our victories may ring hollow if we don't.

The essays and data presented in the rest of this SSH report can be effective tools in our ongoing advocacy and analysis. The ideas and information in this compilation have been rigorously filtered and are presented with care.

It is up to readers to use the details to oppose the conservative strategies and limiting circumstances addressed above. We must forge ahead making our demands and aspiring to our visions of justice. Even in times of crisis.

The Rights of LGBTQ+ People and Referendums: An Irreconcilable Marriage

By Elena Brodeală¹ and Vlad Levente Viski.²

Referendums that subject the rights of LGBTQ+ people to popular vote have proliferated around the world. Most of these referendums concerned the issue of marriage equality, supporting or aiming to ban same-sex unions. For example, over thirty states in the US posed the question of marriage equality to a public vote starting with Alaska and Hawaii in 1998,³ continuing with the famous “Proposition 8” in California in 2008 and ending with North Carolina and Minnesota in 2012.⁴

Referendums on the rights of LGBTQ+ people started being quickly organised in many other countries such as Croatia (2013),⁵ Slovenia (2012/2015),⁶ Slovakia (2015),⁷ Ireland (2015),⁸ Armenia (2016),⁹ Switzerland (2016),¹⁰ Bermuda (2016),¹¹ Australia (2017),¹² and more recently in Romania (2018) and Taiwan (2018).¹³ Two of these referendums were particularly celebrated by human rights activists—namely the ones in Ireland and in Australia—both of which legalised same-sex marriage. However, many observers remain sceptical about putting such an important issue to a popular vote. For example, commenting on the Romanian referendum aimed at defining marriage

as “between a man and a woman” in the country’s constitution. A spokesperson of ILGA-Europe underlined how, although unsuccessful, the popular vote on this question brought to light once again the vulnerability of the LGBTQ+ community.¹⁴ By building on arguments put forward by one of the authors in previous articles,¹⁵ in this short contribution we want to further discuss why referendums on human rights—and in this case in particular, the human rights of LGBTQ+ people—should *always* be a source of concern.

If the referendums in Ireland and Australia were widely celebrated by LGBTQ+ advocates around the world, this was most likely in large part due to their outcome and not because they supported putting marriage equality to a popular vote. In fact, if referendums can at times be successful in bringing equality for all, they might also hurt LGBTQ+ people in more conservative countries by setting a “dangerous precedent”.¹⁶ If similar referendums are replicated in countries where people still harbour animosity towards non-heterosexuals, there are serious chances that such

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³ “Same sex marriage (SSM) and civil unions in Alaska”, *Religious Tolerance*, 18 October 2014: “Same-sex marriage issue has endured a long fight in Hawaii”, *Honolulu Advertiser*, 24 January 2010.

⁴ “California Proposition 8, the ‘Eliminates Right of Same-Sex Couples to Marry’ Initiative (2008)”, *Ballotpedia*: “North Carolina Same-Sex Marriage, Amendment 1 (May 2012)”, *Ballotpedia*: “Minnesota Same-Sex Marriage Amendment, Amendment 1 (2012)”, *Ballotpedia*.

⁵ “Croats back same-sex marriage ban in referendum”, *BBC*, 2 December 2013.

⁶ “Family Law Struck Down”, *The Slovenia Times*, 2 March 2012; “Slovenia says No to gay marriage”, *Politico*, 20 December 2015.

⁷ “Slovakia Referendum on Gay-Adoption Ban Fails”, *The Wall Street Journal*, 8 February 2015.

⁸ “Ireland becomes first country to approve same-sex marriage by popular vote”, *The Irish Times*, 23 May 2015.

⁹ “Referendum in Armenia brings constitutional reforms”, *ILGA Europe*, 16 December 2015.

¹⁰ “Swiss voters reject same-sex marriage ban”, *Pink News*, 29 February 2016.

¹¹ “Voters roundly reject same-sex marriage” *The Royal Gazette*, 24 June 2016.

¹² “Australia says yes to same-sex marriage in historic postal survey”, *The Guardian*, 14 de noviembre de 2017.

¹³ “Romanian Same-Sex-Marriage Referendum Fails Amid Low Turnout”, *Radio Free Europe Radio Liberty*, 7 October 2018: “Taiwan voters reject same-sex marriage in referendums”, *BBC*, 25 November 2018.

¹⁴ “Voters in Romania boycott restrictive referendum on definition of family”, *Euractiv Press Release*, 7 October 2018.

¹⁵ “Human Rights Should not be Subject to a Popular Vote: Lessons from Romania’s Failed Anti-LGBT Referendum”, *Oxford Human Rights Hub*, 30 November 2018: “Why Referendums on Human Rights are a Bad Idea: Reflecting on Romania’s Failed Referendum on the Traditional Family from the Perspective of Comparative Law”, *The Comparative Jurist*, November 2018.

¹⁶ “A referendum is not the way to go when it comes to gay rights or minority issues”, *The Guardian*, 22 May 2015.

referendums will restrict the rights of LGBTQ+ people.

When referendums take place in conservative countries, the LGBTQ+ community is always at risk of dangerous regression. Not only could referendums in these countries most likely lead to restricting the rights of LGBTQ+ people, but they might provide the grounds for conservative groups to grow and continue their anti-rights work. In addition, such referendums might capacitate conservative groups to attack the rights of other social groups such as women or ethnic minorities. This due to the nature of referendums—unlike debates before courts or legislatures— as it necessarily implies a stronger grassroots mobilisation and requires building serious alliances between groups with similar agendas.

The referendums that took place over the last period seem to be quite telling of how they help conservative groups grow. For example, the 2013 referendum in Croatia not only led to the enshrining of the “heterosexual” definition of marriage in the country’s constitution, but it has empowered conservative groups to push their agenda even further. More precisely, after 2013, such groups became more vocal in the Croatian political sphere, opposing, among other things, the ratification of the Istanbul Convention aimed at combating violence against women.¹⁷ This was also the case in Slovakia where shortly after the failed anti-LGBTQ+ referendum (the turnout requirement was not met), the organisation behind it, the Alliance for the Family, managed to bring over 70,000 people to the streets of Bratislava to march against abortion.¹⁸ By the same token, in the United States referendums to forbid same-sex couples’ right to marry emboldened conservative groups to push forward for legislation restricting abortion,¹⁹ limiting the access of transgender youth to the bathrooms of their choice,²⁰ or opposing general anti-discrimination measures meant to protect LGBTQ+ individuals.²¹

Not only can referendums lead to restricting the rights of LGBTQ+ people, but they might provide the grounds for conservative groups to grow and continue their anti-rights work.

Moreover, not only can referendums strengthen anti-rights groups at the local level, but they can also set the base for building transnational anti-LGBTQ+ alliances. This was, for example the case in Eastern Europe, where local groups collaborated in their endeavours to put the question of equality for all to a vote with American conservative organisations such as Alliance Defending Freedom (Croatia, Slovakia, Romania)²², or Liberty Council.²³ With this, discourses tailored in North America were transplanted in the region.²⁴ Among these are the ideas that the question of same-sex marriage should not be decided by “nine justices in black robes”²⁵ or the idea that same-sex marriage “is a serious attack to freedom of religion” and it might put people in jail (as was the case of the former American county clerk Kim Davis who refused to grant marriage licenses to same-sex couples after the US Supreme Court legalised same-sex marriage in the famous *Obergefell v. Hodges* case)²⁶.

Another reason for which referendums should not be organised is that their campaigns often lead to an increase in hate speech, harming LGBTQ+

¹⁷ “Croatia rally: Traditionalists reject European gender treaty”, *BBC*, 24 March 2018.

¹⁸ “Tens of thousands attend Bratislava prolife march”, *The Slovak Spectator*, 25 September 2015.

¹⁹ “Legal Alliance Gains Host of Court Victories for Conservative Christian Movement”, *The New York Times*, 11 May 2014.

²⁰ “This Law Firm Is Linked to Anti-Transgender Bathroom Bills Across the Country”, *NBC News*, 8 April 2017.

²¹ “The 800-Pound Gorilla Of The Christian Right”, *Think Progress*, 1 May 2014.

²² “77 Human Rights organization support constitutional referendum in Croatia”, European Dignity Watch, 22 November 2013; “ADF to Slovak court: Allow citizens to affirm their values at ballot box”, *Alliance Defending Freedom*, 30 September 2014; “Romania’s Coalition for Family and ADF International co-hosted the conference “Referendum for the Family: Analysis and Implications” at the Romanian Parliament in Bucharest”, *Family News*, 26 April 2017.

²³ “Marriage on Romanian Ballot”, *Liberty Counsel*, 12 September 2018.

²⁴ “Anti-gay marriage clerk Kim Davis takes her fight from Kentucky to Romania”, *The Guardian*, 13 October 2017; “Kim Davis, Once Jailed in America, Campaigns Against Gay Marriage in Romania”, *The New York Times*, 12 October 2017.

²⁵ “Raspunsuri Pentru Viață – Interviu Harry Mihet”, *Rodiagnusdei*, 4 October 2016.

²⁶ “*Obergefell et al. v. Hodges*, Director, Ohio Department of Health et al.”, Supreme Court of The United States, October 2014.

individuals. In California,²⁷ Slovenia,²⁸ Slovakia,²⁹ Australia,³⁰ Taiwan,³¹ and Romania,³² the “protection of children” (from the “harms” of “legitimising homosexuality and immorality”) was a major topic during the referendum campaigns. In turn this led to an increase in hate speech towards LGBTQ+ individuals.

Referendum campaigns often lead to an increase in hate speech, harming LGBTQ+ individuals.

For instance, in Romania and Slovakia the proponents of the constitutional ban on same-sex marriage compared LGBTQ+ people to paedophiles.³³ At the same time, the LGBTQ+ legal service in Australia found 220 cases of hate speech during the 2017 plebiscite.³⁴ Moreover, in the age of social media, when hate speech became harder and harder to sanction, the debates sparked by LGBTQ+ referendums can seriously harm non-heterosexuals. For example, in Taiwan, during the referendum campaign regarding the legalisation of same-sex marriage, conservative groups promoted messages on social media which warned that if gay marriage became legal, “HIV-positive people will [...] [go] to Taiwan and flood [...] [its] health system.”³⁵ In the same way, in Romania, during the referendum campaign, hate speech messages accompanied by images depicting “decadent” queer

people in outlandish outfits were posted by public persons on social media and became viral.³⁶

Observers also noted that referendums are generally a poor way of making decisions.³⁷ Many of them show how their outcome often depends on factors other than the question of whether people of all sexual orientations should enjoy equal rights or not. Such an example is Romania, a country often regarded as hostile towards sexual and gender diversity,³⁸ where, surprisingly, the referendum failed due to low turnout.³⁹ Although human rights groups asked people not to go to vote in support of equality for all, most of the people did not go to the polling stations for other reasons than equality concerns.⁴⁰ These include the dislike for the ruling party or the fact that the referendum was seen as “anti-European” in the conditions in which the Court of Justice of the European Union has recently required Romania to recognise same-sex marriages conducted abroad.⁴¹ Further, when Australia held its plebiscite, Prime Minister Tony Abbott talked about the vote as being about “political correctness” and not about the rights of LGBTQ+ individuals *per se*.⁴² Moreover, when put to referendums, the LGBTQ+ question could be easily instrumentalised and used by political forces to gain votes, defame their opponents, or derail the attention from other pressing problems. This was, for example the case in Slovakia where the same-sex referendum was said to have been used in the preceding presidential electoral campaign as a way to discredit opposition.⁴³ In Romania, it was alleged that the ruling party used the referendum to turn

²⁷ “Yes on 8 TV Ad: It’s Already Happened”, *Youtube*, 7 October 2008.

²⁸ “Slovenians vote against same-sex marriage in referendum”, *The Guardian*, 21 December 2015.

²⁹ “Vyjadri svoj názor v referende 7. februára 2015”, *Youtube*, 24 January 2015.

³⁰ “A year after the same-sex marriage postal vote, we’re still wounded from a brutal campaign”, *ABC News*, 14 November 2018.

³¹ “As Taiwan prepares to vote on LGBTQ issues, a homophobic group is running ads before kids videos on YouTube”, *Tech Crunch*, November 2018.

³² “Mesaj pe tema referendumului pe un bloc din Timișoara: ‘Dacă nu vii la vot, doi bărbai vor putea adopta copilul tău’”, *Hot News*, 23 September 2018.

³³ “How is Romania’s LGBTQ+ community preparing for an upcoming referendum on same-sex marriage?”, *SBS*, 24 November 2017: “2015 – An Important Year for Marriage Equality”, *Campaign In Action*, 30 January 2015.

³⁴ “LGBTI lawyers lodge complaint over ‘hate speech’ during same-sex marriage survey”, *The Guardian*, 31 August 2018.

³⁵ “‘A great divide’: Inside the battle to stop same-sex marriage in Taiwan”, *CNN*, 24 November 2018.

³⁶ See example: “Cheloo” *Fanpage Post*, 13 September 2018.

³⁷ “Rule by referendum is not the best way to make decisions”, *The Irish Times*, 2 June 2015.

³⁸ “Country Ranking”, *Rainbow Europe*.

³⁹ “Romania marriage poll: Referendum to ban gay unions fails”, *BBC*, 8 October 2018.

⁴⁰ “Why Referendums on Human Rights are a Bad Idea: Reflecting on Romania’s Failed Referendum on the Traditional Family from the Perspective of Comparative Law”, *Comparative Jurist*, 11 November 2018.

⁴¹ “Same-Sex Marriages Are Backed in E.U. Immigration Ruling”, *The New York Times*, 5 June 2018.

⁴² “Marriage plebiscite: Tony Abbott urges a ‘no’ vote to reject political correctness and protect religious freedom”, *The Sydney Morning Herald*, 9 August 2017.

⁴³ “Bilbordy proti Kiskovi nie sú od OĽaNO, majú patriť Móricaovi”, *Web Noviny*, 25 March 2014.

people's attention away from its attempts to weaken the country's anti-corruption framework.⁴⁴

Another issue that speaks against putting the rights of LGBTQ+ people to popular vote is that many of these referendums aim to entrench changes that would be very difficult to change by future generations. In many countries such as the United States, Croatia,⁴⁵ Georgia,⁴⁶ or Romania,⁴⁷ referendums meant to ban same-sex marriages in their constitutional texts. Enshrining constitutional restrictions seriously prevents progress in this field, keeping fundamental laws stuck in a period when respect for diversity and equality was not among the core values of society. Moreover, putting rights to a popular vote suggests that a constitution or the laws in any given country should in all circumstances reflect the views of the majority of the people at a certain moment in time. Yet, constitutions and laws do not always contain provisions that are descriptive of the beliefs or the values of a society at a certain point in history. Many of them have provisions that are meant to stand as aspirational goals rather than reflections of people's system of beliefs at the moment when these documents were drafted or amended. The provisions on gender equality are a representative example. In one of her studies on gender and constitutions, Catherine A. MacKinnon showed that countries where gender inequality is widespread have much more gender equality protections in their constitutions than countries where gender equality is more likely to lie at the heart of social relations.⁴⁸

The developments taking place over the latest period show that the forums *par excellence* to decide on the legal recognition of the rights of LGBTQ+ people. Not only that, traditionally, the role of the courts was to protect the rights of all social categories, regardless of how popular these categories were. Further, courts are bound to consider arguments on all sides, and must keep the focus of debates on the question that is being examined and ensure that all parties are treated with due respect.

Courts in many parts of the world assumed their role to protect the rights of sexual minorities in a very serious way. In 2015, the US Supreme Court in the famous *Obergefell v. Hodges*⁴⁹ case struck down all the state level constitutional amendments adopted through referendums that aimed to ban same-sex marriage. At the beginning of 2018, the Inter-American Court of Human Rights delivered an opinion explaining how, under the American Convention on Human Rights, States must grant same-sex couples equal rights, including marriage.⁵⁰ Further, in June 2018, the Court of Justice of the European Union delivered its judgement in the *Coman* case in which it obliged Romania and all the other Members States of the European Union to recognise same-sex marriages concluded abroad for the purposes of freedom of movement.⁵¹ Moreover, courts around the world have the ability to strike down legislation through which lawmakers are meant to disregard their previous case law. This is famously the case in Bermuda.⁵² After the Supreme Court of Bermuda legalised same-sex marriage in May 2017, the Parliament passed a bill in December 2017 making same-sex marriage illegal once again. Among the reasons for this decision of the legislature was the result of a non-binding referendum on the matter that—although invalidated due to low turnout—showed that the majority of voters opposed same-sex marriage.⁵³ The Supreme Court of Bermuda, standing by the country's constitution however, declared the new law unconstitutional shortly after it entered into force in June 2018, being backed by the country's Court of Appeal later on in November.

In this context, maybe the time has come to further discuss how courts are better forums to decide sensitive issues such as the rights of LGBTQ+ people.⁵⁴ Perhaps it is a growing consensus that courts are better positioned to decide on this issue that can strengthen courts' legitimacy and their mandate of protecting sexual minorities against "majoritarian" anti-right impulses.

⁴⁴ "Romanian voters ignore referendum on same-sex marriage ban", *Financial Times*, 7 October 2018.

⁴⁵ "Croats vote to ban gay marriage", *The Guardian*, 1 December 2013.

⁴⁶ "Georgian president blocks referendum to ban same-sex marriage", *Democracy & Freedom Watch*, 9 August 2016.

⁴⁷ "Romanian constitutional ban on same sex marriage fails on low vote turnout", *Reuters*, 7 October 2018.

⁴⁸ "Gender in Constitutions" by Catharine A. MacKinnon, in *The Oxford Handbook of Comparative Constitutional Law*, para 401- 402. (Oxford, United Kingdom: Oxford University Press, 2012).

⁴⁹ "OBERGEFELL ET AL. v. HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL.", Supreme Court of The United States, October 2014.

⁵⁰ "A Step Closer to Equality: LGBTQ+ Rights in the Inter-American Court of Human Rights", *Oxford H. Right Hub*, 19 March 2018.

⁵¹ "Free Movement Of Same-Sex Spouses Within The EU: The ECJ's Coman Judgment", *The European Law Blog*, 19 June 2018.

⁵² "Bermuda's government fights against same-sex marriage in Court of Appeal", *CNN*, 8 November 2018.

⁵³ "Bermuda's government fights against same-sex marriage in Court of Appeal", *CNN World*, 8 November 2018.

⁵⁴ "Bermuda top court reverses government's gay marriage ban", *Reuters*, 24 November 2018.

INTERNATIONAL HUMAN RIGHTS LAW

STATE-SPONSORED HOMOPHOBIA 2019



Introduction to the YP+10

By Mauro Cabral Grinspan¹ and Julia Ehart.²

The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (YPs) were elaborated in 2006 and released in 2007. The YPs have played a key role in advancing the rights of LGBTI people worldwide through the application of International Human Rights Law.

The YPs support and promote legal reform, policy change, judicial decision, political activism and social awareness and call upon governments to meet their obligations under International Human Rights Law. Throughout the last ten years the body of International Human Rights Law has considerably evolved in relation to sexual orientation and gender identity and new issues have evolved that have not been adequately addressed or solved within the YPs.

By 2016 it was clearly necessary to come back to the YPs to review them, update them and make them ready to support and guide human rights work in the years to come. People from all around the world contributed to the revision and updating through a participatory process. Key challenges, advances, as well as normative and conceptual tools required to address them were identified and a drafting team was appointed to conceptualise and update the YPs. A group of 28 human rights experts was constituted and met for three days in Geneva to discuss, amend and approve the revision. The new YP+10 were presented in 2017.

The YP+10 supplement the original YPs, not replace them. They add 9 new Principles to the previous 29 and add new obligations for States to the existing YPs Principles.

The notions of *sexual orientation* and *gender identity* have proven to be necessary but insufficient to articulate the complex array of human rights issues faced by LGBTI people.

Hence what the YP+10 have refined is the notion of *gender expression* now defined as 'each person's

presentation of the person's gender through physical appearance—including dress, hairstyles, accessories, cosmetics—and mannerisms, speech, behavioural patterns, names and personal references' and added the notion of *sex characteristics*, which is defined in the YP+10 as 'each person's physical features relating to sex, including genitalia and other sexual and reproductive anatomy, chromosomes, hormones, and secondary physical features emerging from puberty.

The YP+10 supplement the original YPs, not replace them. They add 9 new Principles to the previous 29 and add new obligations for States to the existing YPs Principles.

The YPs and the YPs+10 must be read together and, therefore, all their Principles and State Obligations must be considered to refer to sexual orientation, gender identity, gender expression and sex characteristics.

New Principles and State Obligations in the YP+10

Everyone has the Right to State protection (Principle 30). States have the obligation to ensure that everyone is protected from violence, discrimination and other harm. The principle not only calls states to prevent, investigate, punish and eradicate such human rights violations, but also to

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compile statistics about them, their causes and effects, and to identify the attitudes, beliefs, customs and practices that provoke them, to provide training to all professionals involved in addressing them—including law enforcement officers—, and to provide support and remedies for victims. In the same spirit, Principle 33 on the Right to freedom from criminalisation and sanction, calls States to repeal all the forms in which people around the world are criminalised and sanctioned, as well as subjected to discriminatory laws, due to our SO, GI, GE and SC.

New communicational developments required to expand protections to include the right to the enjoyment of human rights in relation to information and communication technologies (Principle 36), which calls States to ensure all persons' right to "receive and impart information and ideas of all kinds", while protecting privacy and security of digital communications, and holding all sectors accountable for hate speech, harassment and technology related violence.

Principle 34 on the Right to protection from poverty explicitly affirms that "poverty is incompatible with respect for the equal rights and dignity of all persons", calling States not only to reduce and eliminate poverty but also promote socioeconomic inclusion and to ensure access to remedies.

While the Right to freedom of peaceful assembly and association was already included in the YPs (principle 20), developments in the last decade to infringe on those rights called for a refinement of states obligations under that principle in order to ensure the right of marginalised and vulnerable communities to organise, receive and use funding, even if not officially registered. Further adding state obligations to the right to seek asylum (original YPs Principle 23), the YP+10 now holistically reflect provisions in regard to this right and expand on minimal procedural requirements in the treatment of asylum seekers enshrined in international human rights law.

One of the ground-breaking contributions of the original YPs was to demonstrate that the right to recognition before the law implies a State obligation to recognising the gender identity of a person as self-defined. Laws, policies and rulings developed in the last decade in diverse countries across the globe have upheld this obligation, for example by granting access to legal gender recognition without imposing requirements incompatible with human rights standards.

However, the right to legal recognition (Principle 31) goes further as it shall not hinge on "making reference to or requiring assignment or disclosure of sex, gender, sexual orientation, gender identity, gender expression or sex characteristics of a person". Therefore, States are obliged to putting an

end to "the registration of the sex and gender of the person in identity documents such as birth certificates, identification cards, passports and driver licenses".

Acknowledging that it will take time for States to implement this obligation, the same Principle provides for a transitional obligation to "ensure access to a quick, transparent and accessible mechanism to change names, including to gender neutral ones" and "to make available a multiplicity of gender marker options".

The entire Principle reaffirms self-determination as its key normative aspect in International Human Rights Law and explicitly rejects psycho-medical diagnosis and/or interventions, as well as minimum age, among other eligibility criteria. Additional State obligations related to YPs Principle 24 on the right to found a family add the mandate to "issue birth certificates for children upon birth that reflect the self-defined gender identity of the parents".

Bodily issues were not fully included and developed in the original YPs; therefore, the elaboration of the YP+10 is required to address those issues.

Principle 32 on Bodily and Mental Integrity articulates different State obligations referred to the place of our sexed and sexual bodies in the human rights framework. It includes protection "from all forms of forced, coercive or otherwise involuntary modification of their sex characteristics", prohibits "the use of anal and genital examinations" for legal, administrative or prosecutorial reasons, and calls States to provide counselling and support to victims. This Principle as well calls upon States to ensure that "the concept of the best interest of the child is not manipulated to justify practices that conflict with the child's right to bodily integrity".

Bodily issues were not fully included and developed in the original YPs; therefore, the elaboration of the YP+10 was required to address those issues.

Principle 34 on the Right to sanitation comes to address a sad and pervasive reality: those challenges faced by many people when trying to access public sanitation facilities, including school bathrooms, and to make explicit State obligations in this regard.

The YP+10 also added new State obligations related to YPs Principle 17 on the Right to the Highest Attainable Standard of Health to include issue such as the prevention of sexual and reproductive violence, (such as rape, forced marriage and forced pregnancy), as well as access to gender affirming healthcare, and to safe, affordable and effective contraceptives and abortion services. This same Principle calls States to ensure non-discriminatory access to donation of blood, gametes, embryos, organs, cells or other tissues, and ensuring privacy of HIV statuses.

States are also called to prohibit practices such as forced normalising surgeries, involuntary sterilisation and reparative therapies, among others.

A key normative aspect of this Principle from the call for universal access to healthcare care. Additional State obligations related to YPs Principle 20 on the Right to found a family includes access to methods to preserve fertility, and non-discriminatory access to surrogacy where legal.

Acknowledging key developments on intersex issues and human rights, additional State obligations related to Principle 10 on the right to freedom from torture and cruel, inhuman or degrading treatment or punishment establishes

that “the forced, coercive and otherwise involuntary modification of a person’s sex characteristics may amount to torture”.

States are also called to prohibit practices such as forced normalising surgeries, involuntary sterilisation and reparative therapies, among others.

Principle 37, on the Right to Truth, seeks to ensure that both individuals and societies have access to the truth about their past, including past human rights violations based on SO, GI, GE and SO. This Principle is particularly relevant to ensure intersex people’s right to know the truth about medically unnecessary and non-consensual medical procedures to “normalise” their bodies in infancy and childhood, and to access their own medical record, as they are often kept from them even in adulthood.

Finally, the last principle (38) addresses the Right to Practice, Protect, Preserve and Revive Cultural Diversity which states have an obligation to protect and ensure.

Conclusion

The 38 principles of the YPs and the YPs+10 provide an authoritative, expert exposition of international human rights law as it currently applies on the grounds of sexual orientation, gender identity, gender expression and sex characteristic. Their legal and normative weight directly comes from the body of international human rights law, and states should abide to the principles as they should abide to the universal declaration of human rights.

The Role of the Independent Expert in the International Human Rights Framework on Sexual Orientation and Gender Identity

By Rafael Carrano Lelis³ and Zhan Chiam.⁴

June 2016 represented a landmark in the protection of sexual orientation and gender identity (SOGI) rights in the international arena. It was in this month that the United Nations (UN) Human Rights Council (HRC) appointed an Independent Expert (IE) on “protection against violence and discrimination based on sexual orientation and gender identity.”⁵ Despite the several attempts to block such advancement through the proposition of “hostile amendments”,⁶ Resolution 32/2 passed by a close vote of 23 to 18 (and 6 abstentions),⁷ establishing a three-year mandate for the IE.⁸

The IE is part of the UN special procedures (SP) mechanism.⁹ In order to be able to properly fulfil their objective, the SP mandate-holders employ a range of tools, such as communications, country visits and annual reports.¹⁰

This article will cover all the activities of the mandate since its inception, providing a brief overview of its work thus far.

Reports

The IE mandate-holders have so far submitted four reports since the mandate was established, two each to the HRC and the General Assembly (GA) in 2017 and 2018.

In his first report, Vitit Munthabhorn set out “underpinnings” for the mandate.¹¹

The second report, the first to the UN General Assembly, addressed the first two underpinnings: decriminalisation and anti-discrimination.¹² Regarding criminalisation, the IE took a broad approach, covering laws that criminalised not just same-sex relations but also laws that impact on gender identity and expression (such as so-called

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The authors would like to thank Kseniya Kirichenko for her suggestions to this article, especially regarding the analysis of the communications.

⁵ Human Rights Council, *Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/RES/32/2, 30 June 2016.

⁶ ARC International, *Appointing an Independent Expert on Sexual Orientation and Gender identity: An Analysis of Process, Results and Implications* (2016).

⁷ Human Rights Council, *Resolution 32/2. Protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/RES/32/2, 30 June 2016.

⁸ The appointment of the IE also faced fierce opposition in the General Assembly. In this sense, see: OutRight, ISHR, ILGA and ARC, *Defending the Independent Expert on Protection Against Violence and Discrimination Based on SOGIE* (2017).

⁹ Such mechanism was initiated by the Commission on Human Rights and later embraced by the HRC. It consists of either a person (i.e. Special Rapporteur or Independent Expert) or a group of persons (i.e. a Working Group) that conduct *pro bono* work to assess country-specific situations or thematic issues regarding human rights protection. See: Jane Connors and Markus Schmidt, “United Nations” in *International Human Rights Law*, Daniel Moeckli et al. (eds.) (Oxford: Oxford University Press, 2014), 376-70.

¹⁰ Olivier De Schutter, *International Human Rights Law: cases, material, commentary* (Cambridge: Cambridge University Press, 2010), 891-95.

¹¹ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, A/HRC/35/36, 19 April 2017. It described the themes that should be addressed during the mandate. They are: 1) decriminalisation of consensual same-sex relations; 2) effective anti-discrimination measures; 3) legal recognition of gender identity; 4) destigmatisation linked with depathologisation; 5) sociocultural inclusion; and 6) promotion of education and empathy.

¹² *Protection against violence and discrimination based on sexual orientation and gender identity*, A/72/172, 19 July 2017.

“cross-dressing” and vagrancy laws), and the intersections between SO and GI. The report identified regressive and progressive moves in decriminalisation worldwide.¹³ The report also recommended that States should cooperate more with national human rights institutions (NHRIs) to interlink international norms with national settings, and outlined input from the NHRIs of Australia, Malaysia, New Zealand and Cyprus to the IE on criminalisation in their countries. On anti-discrimination measures, whether positive or absent, the report provided input from stakeholders to the mandate in 2017, including where intersectionality enabled protection of SOGI under other laws.¹⁴

In the third report, the new IE, Victor Madrigal-Borloz, iterated his intention to continue the analytical framework developed by Professor Muntabhorn.¹⁵ He referred back to Resolution 32/2 of the HRC, which requests the mandate-holder to address the multiple, intersecting and aggravated forms of violence and discrimination on the basis of SOGI. He also highlighted the importance of an intersectional approach, while remaining aware of all conditions that create the “substantively distinct life experience of an individual”. This approach was then evident in the discussion of hate crimes and the root causes of violence and discrimination; the report emphasised that broader power structures, deeply entrenched gender inequalities and rigid sexual and gender norms should be considered in the analysis. The report also discussed HIV status and the impact of “negation”¹⁶ against “acknowledgement” on data collection and therefore access to justice.

In the fourth and most recent report, presented in 2018 to the GA, the IE explored the next two underpinnings.¹⁷ The fact that this is the first UN report dedicated to gender identity is not insignificant, and it was welcomed by trans

communities. The report welcomes the new category for (adult and adolescent) trans identities in a new chapter created in the revision of the International Classification of Diseases (ICD-11). Given that pathologisation has had a “deep impact on public policy, legislation and jurisprudence, and has been penetrating all realms of State action in all regions of the world”¹⁸, depathologisation becomes a tool to dismantle and abolish harmful legal and policy practices on trans and gender diverse people.¹⁹ Concurrently, the IE takes note and remains seized of the diagnosis of gender incongruence of childhood in ICD-11 because of the potentially significant effects on the enjoyment of human rights by trans and gender diverse children, and that “such classifications have been shown to be obstacles” to such rights.²⁰

The fact that this is the first UN report dedicated to gender identity is not insignificant, and it was welcomed by trans communities.

The report then traverses the global landscape of legal recognition of gender identity, emphasising States’ obligations to do so without prejudice to other rights,²¹ something not available to trans persons in most countries. The IE summarises that this legal vacuum could create a climate that tacitly permits, encourages and rewards with impunity, violence and discrimination leading to a situation of “*de facto* criminalisation”.²²

¹³ For example, while noting that 33 out of 54 African countries criminalised same-sex relations, the IE also discussed a South African Constitutional Court case which declared unconstitutional certain sodomy laws and highlighted advancements in Lesotho, Mozambique and Seychelles to remove such laws from their penal codes since 2012.

¹⁴ E.g. a law of violence against women in Colombia encompassing lesbian and bisexual women.

¹⁵ [Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity](#), A/HRC/38/43, 11 May 2018.

¹⁶ Meaning the refusal that violence and discrimination based on SOGI even exists.

¹⁷ [Protection against violence and discrimination based on sexual orientation and gender identity](#), A/73/152, 12 July 2018. He framed them as (1) the process of abandoning the classification of certain forms of gender as a pathology (“depathologisation”) and (2) the full scope of the State duty to respect and promote respect of gender recognition as a component of identity.

¹⁸ [Protection against violence and discrimination based on sexual orientation and gender identity](#), A/73/152, 12 July 2018, para.14.

¹⁹ Zhan Chiam and Julia Ehrt, “Gender identity and expression in focus: The report of the United Nations Independent Expert on sexual orientation and gender identity, by Victor Madrigal-Borloz” [Journal on Rehabilitation of Torture Victims and Prevention of Torture](#) 23, No. 3 (2018), 133-134.

²⁰ [Protection against violence and discrimination based on sexual orientation and gender identity](#), A/73/152, 12 July 2018, para. 16.

²¹ Such as “the rights to freedom from discrimination, equal protection of the law, privacy, identity and freedom of expression” (para. 21).

²² [Protection against violence and discrimination based on sexual orientation and gender identity](#), A/73/152, 12 July 2018, para. 25.

In two areas, the report presents a forward-thinking interpretation of human rights. First, in data management, where the mandate-holder questions the necessity of the pervasive exhibition of gender markers in official and non-official documentation and asserts that “States must refrain from gathering and exhibiting data without a legitimate, proportionate and necessary purpose”, in many respects echoing Principle 31 of the Yogyakarta Principles Plus 10.²³ The second is the recommendation that States enact hate crimes legislation that establishes transphobia as an aggravating circumstance for criminal convictions, which situates developments in trans rights and their impact on criminal legal thought.²⁴

Communications

Individual complaints or communications²⁵ are, arguably, the most useful tool available to SP and are usually followed by a reply from the corresponded State.²⁶ Research conducted in January 2019²⁷ indicates that the IE has sent 31 communications so far, including 29 joint letters together with other mandate-holders. They were addressed to countries²⁸ from Africa, Asia-Pacific, Eastern Europe, Latin America and the Caribbean and Western Europe and Others, covering all the UN regional groups²⁹. This regional spread shows that the IE was careful in adopting a balanced and cross-regional approach. In addition, one other communication, addressed to “other actors”, was sent to the United Nations High Commissioner for Refugees (UNHCR), regarding the situation of LGBT refugees in Kenya. The only countries that

received more than one communication from the IE were Honduras (4), Russia Federation (3), Republic of Korea (2) and the United States of America (2).

The regional spread of communications shows that the IE was careful in adopting a balanced and cross-regional approach.

It is alarming, however, that only 16 of those communications obtained replies from the concerned entities.³⁰ On the other hand, it must be highlighted that, amidst the States with more than one complaint, the United States was the only one that did not respond.

Although the number of replies may be a good indicator of the engagement and concern of each country regarding SOGI violations, the content of these answers must also be analysed. In that sense, an examination of the available³¹ replies can be divided into four different categories.

The first are replies which showed real concern regarding the protection of SOGI rights, including responses from different actors that, at the same, time provided the requested information and took

²³ For more information on the YP+10, see the article wrote by Julia Ehrt and Mauro Cabral Grinspan in this report. See: *The Yogyakarta Principles plus 10: Additional Principles and State Obligations on the application of international human rights law in relation to sexual orientation, gender identity, gender expression and sex characteristics to complement Yogyakarta Principles*, adopted 10 November 2017, Geneva.

²⁴ *Protection against violence and discrimination based on sexual orientation and gender identity*, A/73/152, 12 July 2018, para. 78(c). Only just becoming a concept in criminal law in a small number of jurisdictions, e.g. Argentina in the sentencing of the murderer of Amancay Diana Sacayán which included the adoption of the term “travesticide”, and in Colombia where the murder of a trans woman was recognised as femicide. See, for example: “Colombia impone la primera condena por feminicidio por crimen de una mujer ‘trans’”, *CNN Español*, 18 December 2018; “Killer of Argentine transgender activist sentenced to life in prison in historic case”, *Daily Kaos*, 19 June 2018.

²⁵ After receiving an individual complaint or sensitive information regarding a current or potential human rights violation, the IE may issue a communication to the relevant government. In this document, that can take form of either a letter of allegation or an urgent appeal, the mandate-holder asks for clarification and/or a call to action to stop the violation.

²⁶ Office of the High Commissioner for Human Rights, *Manual of Operations of the Special Procedures of the Human Rights Council* (2008), 12-15.

²⁷ The data was collected from the “[Communication Report and Search](#)” website of the Office of the High Commissioner for Human Rights.

²⁸ The countries were: Armenia, Azerbaijan, Brazil, Canada, Chile, Egypt, El Salvador, Guatemala, Haiti, Honduras, Indonesia, Kazakhstan, Kenya, Malaysia, Peru, Republic of Korea, Russian Federation, Romania, Singapore, Tunisia, Turkey, United Republic of Tanzania and United States of America.

²⁹ “[United Nations Regional Groups of Member States](#)” *UN Website*.

³⁰ Among them, only Azerbaijan, Brazil, Chile, El Salvador, Indonesia, Kazakhstan, Republic of Korea, Romania, Singapore, Turkey and the UNHCR answered all the delivered communications.

³¹ Although the system indicates that Kazakhstan have indeed replied to the received communication, the content is not available yet, because it is waiting to be translated.

concrete measures to solve the situation that lead to the violation.³²

The second group includes countries that showed moderate concern towards the perpetrated violations, giving responses that acknowledged that some abuse had been committed and indicated some concrete measures. Nonetheless, the same States emphasised some reservations with respect to issues on SOGI.³³

The third category comprises less engaged feedbacks, incorporating responses that completely denied any violations. Those were the replies from Azerbaijan, Turkey, Romania, Singapore, and the first replies from both Brazil and Republic of Korea. Although these countries did reply, they neither recognised the existence of a violation nor showed willingness to improve the protection of rights based on SOGI.

Finally, the last group is composed of only one State, the Russian Federation, with two replies that can only be described as completely hostile, as well as its continued position of not recognising the legitimacy of the mandate. Russia repeatedly refused to answer communications in which the IE is either author or co-author.³⁴

It should be noted that the adoption of this behaviour may take activists to push for the communication to be sent without the IE when Russia is the concerned State, even if it regards sexual orientation and/or gender identity. For instance, a communication to Russia in May 2018 was addressed by three Special Rapporteurs and a Working Group, not including the IE, even though it concerned gender identity rights.³⁵

Moreover, interactions between IE and other mandate-holders may help drawing an analysis of the most recurrent human rights violations suffered by persons based on SOGI. The examination of the communications reveals that the most frequent complaints were issued alongside the mandates regarding freedom of

expression³⁶ and human rights defenders,³⁷ with 17 joint communications each.³⁸

The most frequent complaints were issued alongside the mandates regarding freedom of expression and human rights defenders.

Lastly, an analysis of the topics of the communications issued by the IE shows a wide range of themes: education (1); criminalisation (1); hate speech (1); access to information (1); murder (6); physical violence (10); prohibition of public gathering (1); general discriminatory law (5); and other forms of discrimination (5).

It is apparent how diversified are the threats suffered by persons on the basis of SOGI. Consequently, a variety of actions is also required in order to properly protect those persons.

Country visits

Another important part of any SP work is country visits. They do so to assess the institutional, legal, judicial and administrative framework, and investigate the de facto human rights situation under their respective mandates.

Mandate-holders can meet with different branches of government, NHRIs, UN agencies, NGOs, civil society representatives, victims and others. Since the creation of the mandate, three country visits have taken place: Argentina, Georgia and Mozambique. These countries have a range of SOGI

³² This first group contemplates six different answers, those being: the second one from El Salvador (since the first one merely indicates that there will be a response); both from Honduras; the one from Chile; the one from the UNHCR; and the second reply from Brazil regarding the Marielle Franco case.

³³ Such category would cover the reply from Indonesia, as well as the second reply from the Republic of Korea.

³⁴ Russia's replies to both communications UA/RUS/5/2017 and UA/RUS/7/2017 contained the following statement: "The Russian Federation does not intend to respond to individual or joint submissions from the special procedures of the Human Rights Council when the author or co-author is the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity. We wish to recall that, at the Council's thirty-second session, Russia formally stated that it would not recognise the mandate of or cooperate with this Special Procedures mechanism".

³⁵ See: [Communication AL/RUS/9/2018](#).

³⁶ The Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

³⁷ The Special Rapporteur on the situation of human rights defenders.

³⁸ From a historical perspective, according to a data collection conducted by ISHR and ILGA, those two mandates were also the most engaged ones in SOGI issues even before the appointment of the IE on SOGI. See: "[LGBTI rights | Factsheets on UN Special Procedures](#)" *ISHR Website*.

rights, as well as strong and engaged civil society, providing a rich field for analysis.

Argentina was one of the States which co-sponsored Resolution 32/2, and also was a world first in creating a gender identity law.³⁹ On the other hand, Mozambique is both an Islamic and African country —both blocs that opposed the Resolution in 2016— that only decriminalised same sex relations in 2015.

It is essential that the IE's mandate is renewed in order to maintain the advancement of SOGI rights protection worldwide.

Yet, the function of the IE in his country visits remains the same, which is to assess the country situation, as all three country visits have shown.⁴⁰

For example, in Argentina the IE pointed out the issues with implementation of the transgender

labour quota at the provincial level, as well as the realities of structural violence that still exists, even against prominent trans activists.⁴¹

On the other hand, in Mozambique, the IE noted that flagrant violence against LGBT people was not being reported and recommended that the government should take an awareness-raising role.⁴²

In Georgia, the IE met with a number of civil society organisations, with one reporting that the country visit had attracted positive government's attention to "sensitive issues" (i.e. LGBTI).⁴³

Conclusion

This study illustrates the importance of the IE's mandate and its work conducted thus far.

It is also a timely reminder of what has been achieved, and how much more work needs be done, not the least through providing nuanced analyses of various aspects of SOGI lives and realities, and how these nuances can be translated into suggestions for the progression of international human rights law in this area.

Therefore, it is essential that the IE's mandate is renewed in order to maintain the advancement of SOGI rights protection worldwide.

³⁹ Ley 26.743, *Ley de Identidad de Género* (2012).

⁴⁰ For country visit statements, press releases, and Report on Argentina see: "Country visits of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity" OHCHR Website.

⁴¹ *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity on his mission to Argentina*, A/HRC/38/43/Add.1, 9 April 2018, paras. 46, 51-52.

⁴² "End of mission - Visit to Mozambique" OHCHR Website.

⁴³ Statement from the Women's Initiatives Support Group: "His devoted meeting with us and our beneficiaries was highly appreciated, discussing ongoing challenges towards the LGBTI community like intimate partner violence, domestic violence and hate crimes. Our expectations about his visit have been met, as we had the opportunity to emphasise priorities and challenges, share expert knowledge and attract the government's attention to sensitive issues."

UNITED NATIONS: UNIVERSAL PERIODIC REVIEW

The Third Cycle of the UPR: Organisations Push for More and Better Recommendations on SOGIESC Issues

By Diana Carolina Prado Mosquera.⁴⁴

More than eleven years ago the Universal Periodic Review (UPR) was created.⁴⁵ This has become an innovative mechanism for States, and in practical terms one of the mechanisms that has been most accepted by governments, either because of its constructive nature, or because, as its name suggests, it is a study done between peers. States study other States.

It is universal as it not only applies to the 193 Member States of the United Nations (UN), but also, it analyses any situation on human rights, including issues of sexual orientation, gender identity and expression and sex characteristics (SOGIESC).

It is periodic as it is a mechanism that for each State happens every five years, with regularity and it does not matter the situation that the State is going through. The study must be presented, and it is irrelevant if the previous government had accepted previous recommendations, the current government is obligated to report the level of implementation of those recommendations.

Since its creation, the UPR has evolved in a positive manner. During the first session, the first country which received a recommendation on sexual orientation and gender identity issues was Ecuador. In that moment Egypt opposed this recommendation and the dispute ended when Ecuador said that the proposed recommendation by Slovenia was going to be accepted.⁴⁶ Today, such disputes are no longer observed in the working group sessions, on the contrary, the recommendations on SOGIESC issues are more frequent, and are always present in every session. By the end of 2018, the mechanism counts 2,013 recommendations on SOGIESC issues.

At the end of the second cycle in 2016, the UPR had only one recommendation and a specific advanced question on the topic of intersex persons.⁴⁷

However, the third cycle has seen an increase in these recommendations and today there are 13 that deal with this issue, and the tendency shows that the number will continue to increase in the next working group sessions. In a similar way, the same has happened with the recommendations on gender identity: in 2018 the mechanism counted 49 recommendations on the issue.

By the end of 2018, the UPR counts 2,013 recommendations on SOGIESC issues.

This third cycle has seen the first recommendation on the prohibition of sterilisation as a requisite for the legal recognition of gender,⁴⁸ and also the first recommendation in the issue of prohibition of forced anal examinations as proof of homosexuality. Both recommendations have been the result of the efforts of civil society organisations that every day see more the utility of this mechanism and give more relevance to these processes both at a national and international level.

A lot has been said of the efficacy of the UPR in countries, and distinct comparisons are made against the other existing UN mechanisms such as Treaty Bodies and Special Procedures which issue recommendations that are more technical and concrete. However, the UPR is seen by countries as

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⁴⁵ Human Rights Council, *Resolution 5/1. Institution-building of the United Nations Human Rights Council*, A/HRC/5/1, 18 June 2007.

⁴⁶ *Report of the Working Group on the Universal Periodic Review: Ecuador*, A/HRC/8/20, 13 May 2008, para. 32.

⁴⁷ ILGA World, *26th UPR Working Group Sessions: SOGIESC Recommendations (31 October – 9 November 2016)* (2016), 7; ILGA World, *25th UPR Working Group Sessions: SOGIESC Recommendations (2 – 13 May, 2016)* (2016), 27.

⁴⁸ ILGA World, *27th UPR Working Group Sessions: SOGIESC Recommendations (May 1 – May 12, 2017)* (2017), 21.

one of the more effective mechanisms that exerts international pressure on concrete issues, and in turn deals with issues that are more relevant to the LGBTI populations in different countries.

When the UPR is utilised by civil society organisations as a complementary tool, it can bring positive benefits. By means of amending laws or generating changes in countries regarding awareness issues and even creating a new channel of communication between civil society organisations that work with LGBTI issues and the government.⁴⁹

The UPR is seen by countries as one of the most effective mechanisms that exerts international pressure on concrete issues.

Furthermore, during the third cycle, different countries received their first recommendations in SOGIESC issues, among them are Argentina, Burkina Faso, France, Luxembourg, Morocco, Pakistan, and Serbia. Countries such as Bolivia, Ecuador, the Philippines, Georgia and India formulated their own recommendations, increasing the number of countries that contribute to these issues during interactive dialogues of the UPR working group session.

The third cycle is shaping as an implementation cycle, as during the working group sessions States should report on the level of implementation of the recommendations received during the second cycle. It is precisely here where the mechanism meets its match as midterm reports are voluntary, and to date, of the 193 states examined, only 39 have presented a midterm report for the second cycle. The level of implementation and the way to follow up continues being a challenge.

Working group sessions present new advances. For example, in the case of Luxembourg, during the second cycle (2013), it received a recommendation from the Netherlands, where it was asked to adopt a law on same-sex marriage,⁵⁰ and the State, in its third UPR, reported that in 2014 such law was approved.

At the same time, it shows advances in other countries like Ghana, where in 2013 it created a system for cases of discrimination, which received complaints online, via SMS messages or in person. Then they are investigated with the intention of resolving them. This system was created for persons who had been victims of discrimination due to their sexual orientation or gender identity among others.⁵¹ And it responds to two recommendations that were accepted by Ghana in its second cycle and the advances were reported during the review of the third cycle.

Some countries have showed advances in the implementation of recommendations. Meanwhile, in others the reaction in the face of questions of sexual orientation and gender identity has resulted in the failure to comply with recommendations that were issued and accepted in the second cycle. For example, even though in the second cycle, Cameroon accepted the recommendation to investigate police violence motivated by sexual orientation, real or perceived,⁵² there have been 137 documented arrests in the last 5 years. Further still, a law recently sanctioned the criminalisation of certain forms of expression between persons of the same sex.⁵³

Whilst States have their own challenges, civil society organisations continue to strive to follow-up on recommendations. Therefore, the end of the second cycle and the beginning of the third has seen the creation of different follow-up mechanisms on the part of civil society, the organising of periodic meetings with governments, the combined work with national offices of the UN

⁴⁹ In this vein, and understanding the power and value that the UPR can represent when combined with other advocacy strategies, ILGA, together with 14 other organisations and its regional offices, created the toolkit for the UPR in OSIEGCS topics (a practical guide for advocates working on issues of sexual orientation, identity and gender expression and sex characteristics). This material was produced in order to help organisations become familiar with the mechanism and include it as an additional advocacy tool. See: Diana Carolina Prado Mosquera, *SOGIESC UPR: Advocacy Toolkit. A Guide for Defenders Working on Sexual Orientation, Gender Identity and Expression and Sex Characteristics* (2017).

⁵⁰ ILGA World, *29th UPR Working Group Sessions. SOGIESC Recommendations (15 January – 26 January 2018)* (2018), 36.

⁵¹ Solace Brothers Foundation, *Factsheet. UPR 2017, GHANA. 3rd Cycle of the Universal Periodic Review Sexual Orientation and Gender Identity* (2017).

⁵² ILGA World, *30th UPR Working Group Sessions. SOGIESC Recommendations (7 May – 18 May 2018)* (2018), 14.

⁵³ Para más información al respecto, véase la entrada sobre Camerún en la sección “Criminalización” de este informe.

to advance the implementation of the recommendations, etc.⁵⁴

The third cycle is shaping up as a cycle in which the recommendations on SOGIESC issues will continue to increase.

At the same time, 2018 ended with a pilot project that ILGA together with other two international non-governmental organisations held in Jamaica.⁵⁵ This project was firstly focused on the implementation and follow-up of recommendations by the UN and included recommendations from the UPR and the Human Rights Committee.

The project concluded with a national consultation that included women's organisations, organisations

that work with SOGIESC issues and organisations on health issues. For 2019, ILGA hopes to continue with this project in other countries, contributing to the following-up process of recommendations.

The third cycle is shaping up as a cycle in which the recommendations on SOGIESC issues will continue to increase, as well as advanced questions proposed on these issues.

The language will be very specific and the continued presence of recommendations and forward-thinking questions in the topic of SOGIESC will oblige states under review to decide on issues, which in some cases will be the first time that civil society hears its governments decide on issues in this regard.

The third cycle will continue giving value to reports sent by organisations that work on these issues and also observe techniques, each time more elaborate. Without a doubt, one hopes that the third cycle contributes to generate a positive impact on the legislative processes, for example through laws and public policies.

⁵⁴ In an effort to compile these practices, in 2019 ILGA will prepare a report on best practices for implementation and follow-up on recommendations of the UPR, which will seek to compile information from different civil society organisations, with the objective that other organisations may replicate these best practices and adapt them to their own context.

⁵⁵ "UPR: First Joint Consultation on Implementation of UN Recommendations Held in Jamaica", *ILGA World Website*, 12 January 2019.

SOGIESC in the UN Treaty Bodies' Individual Cases: Analysis of Four Decades of Jurisprudence

By Kseniya Kirichenko.⁵⁶

Strategic litigation represents one of the main advocacy methods used by LGBTI human rights defenders across the globe. However, United Nations Treaty Bodies' individual communications, an important opportunity for international strategic litigation, has seemingly been overlooked by advocates.

United Nations Treaty Bodies' mechanisms of individual communications⁵⁷ provide defenders from different countries, in different regions, a chance to obtain justice after the exhaustion of domestic remedies. Using this mechanism, defenders can benefit from positive developments achieved in the field by colleagues from other countries and can contribute to the global process of SOGIESC human rights' evolution.

Applying to Treaty Bodies with individual cases allows advocates to overcome impediments they faced on the national level and to obtain more in-depth analysis of the problem, as well as concrete and comprehensive recommendations for national authorities.⁵⁸ Treaty Bodies usually review cases quicker than regional human rights courts. Treaty Bodies' individual communications mechanism also provides opportunities for a case to be analysed by international human rights experts, specialising in distinct fields, such as gender, racial discrimination or disability.

However, out of more than 1,500 cases reviewed by Treaty Bodies,⁵⁹ only 25 addressed issues of sexual orientation and/or gender identity. This statistic clearly shows that the individual complaints mechanism under Treaty Bodies has not been widely used by LGBTI advocates.

Additionally, there is no comprehensive database of Treaty Bodies' jurisprudence and there is no other available collection of up-to-date decisions made by the Committees. This makes it more difficult for advocates and researchers to access information about SOGIESC developments under Treaty Bodies' individual complaints mechanism.

Out of more than 1,500 cases reviewed by UN Treaty Bodies, only 25 addressed issues of SOGI.

For this reason, ILGA decided to organise a specific research and to produce a toolkit for LGBTI defenders. The toolkit will be published in 2019 and will provide information and instruments to aid defenders with the consideration, planning and implementation of strategic litigation on SOGIESC issues before Treaty Bodies; thus, bringing positive change to their communities. The present article is based on the above-mentioned research.

General overview

Overall, the Committees have published 25 views and decisions addressing sexual orientation or gender identity since 1982. More than a half of them (14 cases) were made during 2013–2018. All the views and decisions were produced by two

⁵⁶ Senior Officer, Women and UN Advocacy, ILGA World.

⁵⁷ The terms "complaint," "communication" and "petition" are used interchangeably here.

⁵⁸ Currently, there are eight Treaty Bodies that can receive individual complaints: Human Rights Committee, Committee on Economic, Social and Cultural Rights (CESCR), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Rights of Persons with Disabilities (CRPD), and Committee on Enforced Disappearances (CED).

⁵⁹ The estimate according to the "Statistical Survey on individual complaints" at the Committees' webpages. Available [here](#).

Committees: HRCtee (19 cases) and the Committee against Torture (six cases).

In 18 cases, the Committees concluded that State parties violated the rights enshrined in the relevant treaties, in one case the claims were considered inadmissible, and in the rest of the cases (six views) violations were not found.

The cases reviewed by the Committees can be divided into six categories, according to the issues they address (see figure 1).

Cases reviewed by the Committees so far were brought against 12 countries, with Australia and Sweden having the highest number of complaints (five complaints against each of them) (see figure 2).

Topics

Criminalisation of same-sex relations⁶⁰

Toonen v. Australia (Human Rights Committee, 1994), the first Treaty Bodies' case on sexual orientation where a violation was disclosed, was the truly ground-breaking decision influencing multiple national and regional developments around the globe. In this decision, the Human Rights Committee declared that adult consensual sexual activity in private is protected under the concept of "privacy", and that references to "sex" in ICCPR articles 2 and 26 cover sexual orientation.

Asylum seekers

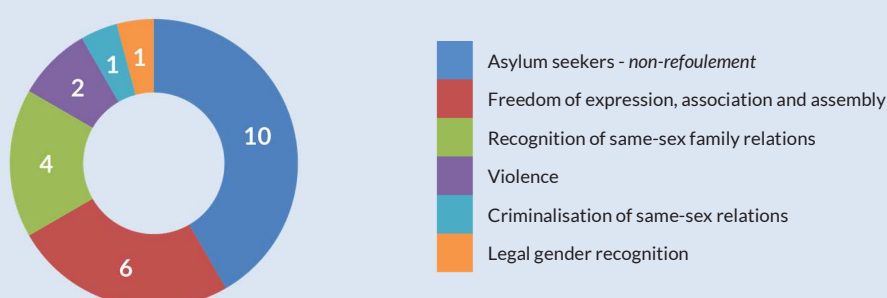
LGBT asylum seekers' situation has been addressed by Treaty Bodies' jurisprudence with regard to only one aspect, namely, the *non-refoulement* rule. This rule prohibits States from returning individuals to countries where they face a risk of torture and other forms of ill-treatment.

The very fact of criminalisation of same-sex activities (or, presumably, GIESC) in a country, does not mean that any LGB(TI) individual's deportation to this country would *per se* constitute a violation of their rights.

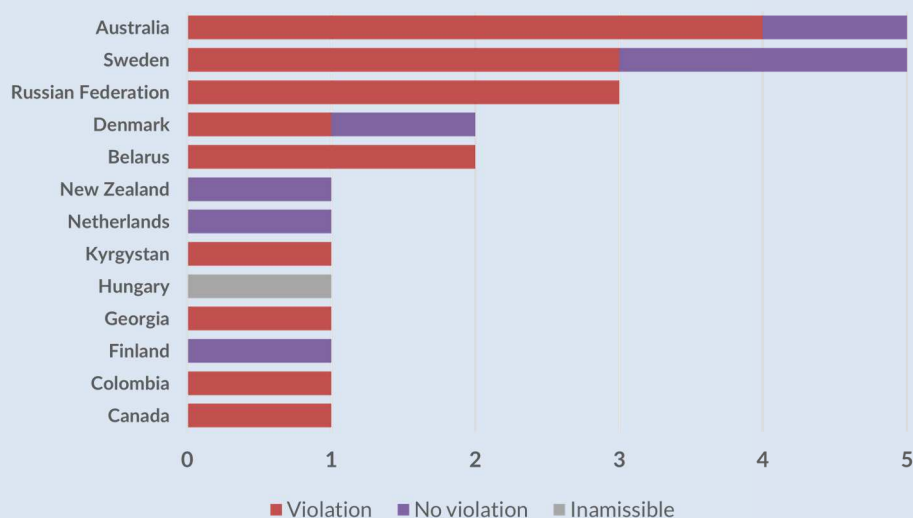
However, it is difficult to identify particular factors related to LGBTI persons' risk in their country of origin that would necessarily lead a Committee to recognise the violation. Instead, each case is analysed individually, and many factors are taken into account.

Such factors included the criminalisation of same-sex relations, religious beliefs of the author and/or their political or social activities, the author's previous experience of violence based on their sexual orientation, and sources of information confirming that the current situation in the country is that LGBTI people face enormous level of violence, harassment and intimidation, and police or other officials do not protect victims/survivors.

Figure 1: Issues addressed by UN Treaty Bodies in their jurisprudence.



⁶⁰ There was a case *Dean v. Australia* (HRCtee, 2009) that we do not consider under the criminalisation section as it concerned sexual relations with minors, and therefore there is a crucial difference between this case and cases related to criminalisation of consensual same-sex relations. While the author in *Dean* case claimed that he was discriminated against because of his sexual orientation, as he has been treated more harshly than "non-homosexuals" in respect of sentencing, the Committee found this part of his claims inadmissible.

Figure 2: SOGIESC cases by country and outcome.

Violence, hate speech and hate crimes

The two cases on violence in the context of sexual orientation reviewed by Treaty Bodies so far addressed the topic indirectly. In both cases, namely *Ernazarov v. Kyrgyzstan* (Human Rights Committee, 2015) and *D.C. and D.E. v. Georgia* (CAT, 2017), the issue raised by the authors was of particularly cruel treatment towards male detainees suspected of having committed sexual acts with other men. Surprisingly, no cases on hate crimes and hate speech against LGBTI persons have been reviewed by Treaty Bodies so far. Some cases against Russia pending before CEDAW and the Human Rights Committee could potentially fill in this gap.

Freedom of expression, assembly and association

Six SOGIESC cases on freedom of expression and freedom of assembly have been reviewed by Treaty Bodies, all by the Human Rights Committee. In all but one case, the Committee found a violation. One case (*Hertzberg et al. v. Finland*, 1982) was concerned with censoring radio and TV programmes on sexual orientation, two other cases (2012 case of *Fedotova* and 2018 case of *Nepomnyaschiy*, both against Russia) were on administrative sanctions for “propaganda of homosexuality,” and three cases (*Alekseev v. Russian Federation*, 2013; *Praded v. Belarus*, 2014; and *Androsenko v. Belarus*, 2016) concerned freedom of assembly.

LGBTI families

Four cases on LGBTI families have been reviewed by Treaty Bodies so far. All four cases involved same-sex couples only; an additional case, *G. v. Australia*, involved the divorce requirement for legal gender recognition, and will be referred to in the next section. All the cases were reviewed by the Human Rights Committee.

Of the four cases on same-sex relations, two were about marriage (*Joslin et al. v. New Zealand*, 2002 and *C. v. Australia*, 2017), and two concerned the petitioners’ benefits and rights after the death of their same-sex partner (*Young v. Australia*, 2003 and *X. v. Colombia*, 2007).

Only in the first case, *Joslin et al. v. New Zealand*, did the Committee find no violation. In the three later cases, the Committee decided that State parties violated the authors’ rights enshrined in the ICCPR.

Legal gender recognition

Until recently, Committees did not have any jurisprudence on cases brought by trans persons. However, in March 2017, the Human Rights Committee found a violation in *G. v. Australia*, the case brought by a trans woman who underwent hormonal treatment and gender reassignment surgery, and obtained a new passport, but was not able to get her gender marker changed on her birth certificate.

Conclusions and identified gaps

For the past three decades, Treaty Bodies have accumulated a portfolio of jurisprudence on LGBT cases. However, gaps and opportunities still remain.

Firstly, so far, only the Human Rights Committee and CAT have reviewed cases on SOGI issues. Advocates are encouraged to consider other Committees, such as CEDAW, CERD, CESC, CRC or CRPD, as they could explore new interpretations of issues, or tackle issues covered by their particular mandates.

Only the Human Rights Committee and the Committee against Torture have reviewed cases on SOGI issues.

Secondly, defenders could think about bringing cases on issues that fall within the six existing areas, but could also touch on new areas or aspects not analysed by the Committees so far.

For *criminalisation*, it could be on the criminalisation of same-sex female relations, relations between adolescents, the criminalisation of certain forms of gender expression, the criminalisation of same-sex relations in particular conditions, such as in the military, or certain degrading practices used by authorities when investigating cases on same-sex relations. Defenders could also bring cases challenging specific consequences of criminalisation for economic, social and cultural rights, or implications related to disability or race, ethnicity, indigenous or migrant status.

For LGBTI *asylum seekers'* cases, advocates can bring complaints on behalf of intersex and trans persons, LBQ women or LGBTI persons with children, as well as cases related to mistreatment and inadequate conditions in asylum centres.

On *violence*, new cases could be brought on hate crimes and hate speech and lack of effective investigation into such incidents; on violence and bullying in educational settings; on specific forms and consequences of violence experienced by LBQ women and trans and intersex persons; on the so-called "conversion therapies"; on violence in detention; and, on intersex genital mutilation and other coercive medical treatment.

Regarding *freedom of expression, assembly and association*, advocates are encouraged to consider cases on freedom of association, including restrictions on registration or operation of LGBTI organisations and problems related to funding; on impediments for dissemination of information on SOGIESC, including website blocking, media censorship, access to information for adolescents or on HIV; on impediments to LGBTI demonstrations created by private actors, such as anti-LGBTI groups, and an ineffective response to it by authorities; and, on gender expression as part of freedom of expression.

On *LGBTI families*, further cases could be brought regarding the lack of access to institutions, such as marriage, for same-sex couples or particular rights and benefits they are denied because of it; access to assisted reproductive technologies, filiation and adoption, as well as parental rights; and, families of intersex children, when it comes to information provided to them and consent for medical treatment.

Regarding *legal gender recognition*, the *G. v. Australia* case seems to open new opportunities for individual complaints related to legal gender recognition procedures. This includes, where they are not adopted in a country at all, or where they are abusive. Cases revealing particular consequences or intersectional aspects of the LGR procedures' shortcomings could be reviewed by the Human Rights Committee, but also by other Treaty Bodies.

While no cases on *discrimination* on grounds of SOGIESC in employment, education, health care, housing and other areas have been reviewed by Treaty Bodies so far, this area could be developed in future petitions.

Thirdly, most of the LGBT cases reviewed by Treaty Bodies, were brought from a limited number of countries; this situation reveals a significant regional imbalance. Of the 25 views and decisions adopted by the Committees since 1982, 16 cases came from countries in Europe and Central Asia, 6 cases from Oceania (Australia and New Zealand), one case from LAC region (Colombia), and another from North America (Canada). No cases against Asian (except for Central Asia, namely, Kyrgyzstan) or African countries have been reviewed by Treaty Bodies so far. This situation could be partly explained by objective factors, such as the number of ratifications in different regions or access to regional mechanisms. At the same time, defenders coming from underrepresented regions or sub-regions are encouraged to consider strategic litigation before Treaty Bodies and to inform partners about their needs and possible support required for such work.

Annex: Treaty Bodies' Jurisprudence on SOGIESC⁶¹

BODY	CASE TITLE	COM. NUMBER	DATE	SUBJECT MATTER	RESULT
CRIMINALISATION OF SAME-SEX RELATIONS					
HRCtee	Toonen v. Australia	488/1992	31 Mar 1994	Criminalisation of consensual same-sex relations between adults.	Violation
ASYLUM SEEKERS					
CAT	K.S.Y. v. Netherlands	190/2001	15 May 2003	Deportation of a gay man to Iran	No violation
CAT	E.J.V.M. v. Sweden	213/2002	14 Nov 2003	Deportation of a bisexual man to Costa Rica	No violation
CAT	Uttam Mondal v. Sweden	338/2008	23 May 2011	Deportation of a gay man to Bangladesh	Violation
HRCtee	X. v. Sweden	1833/2008	1 Nov 2011	Deportation of a bisexual man to Afghanistan	Violation
HRCtee	M.I. v. Sweden	2149/2012	25 Jul 2013	Deportation of a lesbian woman to Bangladesh	Violation
CAT	J.K. v. Canada	562/2013	23 Nov 2015	Deportation of a gay man and LGBT activist to Uganda	Violation
HRCtee	M.K.H. v. Denmark	2462/2014	12 Jul 2016	Deportation of a gay man to Bangladesh	Violation
HRCtee	M.Z.B.M. v. Denmark	2593/2015	20 Mar 2017	Deportation of a trans woman to Malaysia	No violation
CAT	E.A. v. Sweden	690/2015	11 Aug 2017	Deportation of a gay man to Lebanon	No violation
HRCtee	Z.B. v. Hungary	2768/2016	19 Jul 2018	Deportation of a woman, who allegedly suffered from violence based on her sister's sexual orientation in Cameroon, to Serbia, where she had been raped and captured	Inadmissible
VIOLENCE / HATE CRIMES / HATE SPEECH					
HRCtee	Ernazarov v. Kyrgyzstan	2054/2011	25 Mar 2015	Death of a person convicted of "forced sodomy" in a police station as a result of inter-prisoner violence against gay men and sex-offenders	Violation
CAT	D.C. and D.E. v. Georgia	573/2013	12 May 2017	Vulnerability of a detained person subjected to torture, including attempted rape, by police	Violation
FREEDOM OF EXPRESSION / FREEDOM OF ASSEMBLY AND ASSOCIATION					
HRCtee	Hertzberg et al. v. Finland	061/1979	2 Apr 1982	Censuring radio and TV programmes dealing with sexual orientation	No violation

⁶¹ So far Treaty Bodies have reviewed cases related to LGBT persons only. Cases are grouped in the table by topics and in chronological order within each topic.

HRCtee	Fedotova v. Russian Federation	1932/2010	31 Oct 2012	Administrative fine for “gay propaganda among minors” for displaying LGBT posters	Violation
HRCtee	Alekseev v. Russian Federation	1873/2009	25 Oct 2013	Refusal to authorise a picket against execution of gay people in Iran	Violation
HRCtee	Praded v. Belarus	2092/2011	10 Oct 2014	Arrest and imposition of a fine for holding of a peaceful assembly against killings of gay people in Iran without prior authorisation	Violation
HRCtee	Androsenko v. Belarus	2092/2011	30 Mar 2016		Violation
HRCtee	Nepomnyaschiy v. Russian Federation	2318/2013	17 Jul 2018	Administrative fine for “gay propaganda among minors” for displaying LGBT posters	Violation
FAMILY RIGHTS					
HRCtee	Joslin et al. v. New Zealand	902/1999	17 Jul 2002	No access to marriage for two lesbian couples	No violation
HRCtee	Young v. Australia	941/2000	6 Aug 2003	Refusal to grant a pension to a same-sex partner of a deceased man	Violation
HRCtee	X. v. Colombia	1361/2005	30 Mar 2007	Refusal to grant a pension to a same-sex partner of a deceased man	Violation
HRCtee	C. v. Australia	2216/2012	28 Mar 2017	Denial of access to divorce proceedings for a lesbian couple married abroad	Violation
LEGAL GENDER RECOGNITION					
HRCtee	G. v. Australia	2172/2012	17 Mar 2017	Divorce requirement for legal gender recognition	Violation

Progress Towards Ending Discrimination Based on SOGI in the World of Work⁶²

By Gurchaten Sandhu.⁶³

Standard setting

Celebrating its centenary in 2019, the International Labour Organisation (ILO) is one of the oldest United Nations' specialised agencies. Mandated to promote social justice and decent work for all, the ILO's founding mission is that social justice is essential to universal and lasting peace.

Through its unique tripartite structure, the ILO brings together governments, employers and workers to define international labour standards, and to develop policies and programme for decent work for all.

Two ILO recommendations explicitly include references to sexual orientation.

International labour standards in the form of conventions and recommendations are drawn up by governments, employers and workers that are adopted at the ILO's Annual International Labour Conference. *Conventions* are legally binding international treaties that Member States may ratify, whilst *recommendations* serve as guidelines for Member States for integration into national legislation and policy frameworks.

To date there are two ILO recommendations that explicitly include references to sexual orientation: the [Private Employment Agencies Recommendation, 1997](#) (No. 188) and the [HIV and AIDS Recommendation, 2010](#) (No. 200).

The ILO supervisory system

The ILO's has a unique supervisory system to ensure that member states implement the conventions they have ratified. Through this system, the ILO monitors the application of the conventions by Members States and identifies areas for improvement.

Member States submit reports on application in law and practice of the conventions, which are examined by two ILO Bodies: the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the International Labour Conference's Tripartite Committee on the Application of Conventions and Recommendations.

Composed of 20 eminent jurists for three year terms, the CEACR makes two kinds of comments when examining the reports from States: *observations* and *direct requests*.

In the 2017 session, the CEACR made direct requests specifically on the grounds of sexual orientation and/or gender identity to Australia,⁶⁴

⁶² The views expressed herein are those of the author(s) and do not necessarily reflect the views of the International Labour Organisation.

⁶³ Gurchaten Sandhu works as a Programme Support Officer at the United Nation's International Labour Organisation (ILO) has him working for the promotion of equality and non-discrimination in the Fundamental Principles and Rights at Work Branch. He also finds the time to volunteer for UN GLOBE, the staff group representing LGBTI staff in the UN and its peacekeeping operations. As its Vice-President, he works to ensure the voice and rights of LGBTI staff are represented in UN policies and procedures. He has raised the group's visibility, has trained colleagues at the highest level of the UN agencies, organised and built a community of UN LGBTI staff, as well as a network with local and national LGBTI organisations in Switzerland. Gurchaten has also helped to reform the staff regulations on personal status in the ILO and more recently helped to introduce gender inclusive/neutral toilets on every floor of the ILO building, making it the first UN agency in Geneva to do so. He serves as a steering committee member of the International Family Equality Day NGO, advising on non-discrimination based on family status in the world of work, and finally, last year, he was listed in the Financial Times Top 30 OUTstanding Role Model in the Public Sector.

⁶⁴ [Direct Request \(CEACR\) - Discrimination \(Employment and Occupation\) Convention, 1958 \(No. 111\) - Australia.](#)

Brazil,⁶⁵ Haiti,⁶⁶ Italy,⁶⁷ Jamaica,⁶⁸ Netherlands,⁶⁹ Papua New Guinea,⁷⁰ and Vanuatu.⁷¹

Awareness raising and advocacy

Since 2013, the ILO's Director-General, Guy Ryder, has observed the International Day against Homophobia, Transphobia and Biphobia (IDAHOTB) by issuing a statement promoting tolerance and condemning workplace discrimination against LGBTI+ workers.⁷²

The Director General's message in the statement focus on the IDAHOTB theme for that particular year in relation to the world of work. The statements also coincide with events held at HQ in Geneva to celebrate the day and giving visibility to the ILO's work on LGBTI+ issues as well as the Office's efforts to promote diversity and inclusion in the workplace.

For IDAHOTB 2017, in response to the results of an internal LGBT staff survey where 32% of LGBT respondents indicated that they were not out to colleagues at work, ILO Officials at HQ were invited to "come out" as LGBT allies by wearing rainbow coloured lanyards/badge holder showing their commitment to making the ILO an inclusive workplace for all. Owing to the IDAHOTB theme of "alliances for solidarity" the LGBTallies@ILO initiative was repeated in 2018, along with a panel discussion on the theme of "LGBT Voices: our experiences in the workplace & beyond". In addition, a three-step guidance piece on how to fight discrimination in the workplace and become an LGBTI ally was launched.⁷³

Working with LGBTI people, the ILO piloted a specific project to promote decent and productive work. Sixteen trans women participated in the 2nd edition of the kitchen assistant course organised in April 2018 by the project "Employability of Trans People – Kitchen & Voice".⁷⁴

The "Kitchen & Voice" project educated the first group at the end of 2017 and managed to bring about 70 per cent of participants into jobs offered by a network of partner companies. "Kitchen & Voice" is part of a National Employability Project for the LGBTI population and is expected to expand its geographic scope to other Brazilian states, including Bahia, Rio de Janeiro, Goiás and Pará.

As a follow up to the "Promoting rights, diversity and equality in the world of work (PRIDE)" Project,⁷⁵ the ILO is developing a gender-sensitive comprehensive toolbox for the promotion of inclusion of LGBTI+ people in the world of work. The Toolbox will promote the use of social dialogue and collective bargaining in addressing LGBTI+ concerns; adopt a differentiated approach to addressing the needs of LGBTI+ persons; cover a broad scope from fair recruitment to termination of work; focus on legal and policy issues at both the national and enterprise levels; include modules on HIV to be used in countries where there is a significant link between LGBTI and HIV; and promote non-violence, access to justice and social inclusion of LGBTI+ in the world of work. It will present an easy-to-use reference with step-by-step and practical guidance on how to develop inclusive working environments for use by Governments, i.e. Ministries of Labour, Employers' organisations, Workers' organisations as well as business and public sector institutions.

⁶⁵ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Brazil.

⁶⁶ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Haiti.

⁶⁷ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Italy.

⁶⁸ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Jamaica.

⁶⁹ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Netherlands.

⁷⁰ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Papua New Guinea.

⁷¹ Direct Request (CEACR) - Discrimination (Employment and Occupation) Convention, 1958 (No. 111) - Vanuatu.

⁷² Statements by the ILO Director-General Guy Ryder on the occasion of the International Day against Homophobia and Transphobia can be accessed here: [2013](#); [2014](#); [2015](#); [2016](#); [2017](#); [2018](#).

⁷³ "Three steps to fight discrimination in the workplace and become an LGBTI ally", Work in Progress (ILO-Blog), 17 May 2018.

⁷⁴ "ILO helps open doors to the labour market for LGBTI people in Brazil", ILO Website, 16 August 2018.

⁷⁵ In 2012, with the support of the Government of Norway, the ILO initiated the "Gender Identity and Sexual Orientation: Promoting Rights, Diversity and Equality in the World of Work (PRIDE)" project. The project conducts research on discrimination against Lesbian, Gay, Bisexual and Transgender (LGBT) workers across the world and highlights good practices that promote meaningful inclusion. The first phase of the project, which is now complete, focused on Argentina, Hungary and Thailand, and work is on-going in Costa Rica, France, India, Indonesia, Montenegro and South Africa. See: ILO (International Labour Office Gender, Equality and Diversity Branch), *ORGULLO (PRIDE) en el trabajo: Un estudio sobre la discriminación en el trabajo por motivos de orientación sexual e identidad de género en Argentina* (2015); —, *PRIDE at work A study on discrimination at work on the basis of sexual orientation and gender identity in Thailand* (2015).

UNESCO and the 2030 Agenda for Education Inclusive of Young LGBTI People

By the UNESCO Team.⁷⁶

Supporting effective education sector responses to violence and bullying based on SOGIE

School violence and bullying is an obstacle to quality education. Evidence shows that LGBTI learners are particularly vulnerable to school violence and bullying, as well as those learners who are perceived as gender-non conforming. Preventing and addressing homophobic and transphobic violence in educational institutions is essential to ensure that education is more inclusive of LGBTI and gender non-conforming learners.

UNESCO is supporting its Member States to combat school violence and bullying based on sexual orientation and gender identity or expression, in line with its mandate on ensuring the right to quality education for all in learning environments that are safe, non-violent and inclusive (SDG4 – Target 2.a). UNESCO uses a culturally sensitive approach that is adapted to a range of socio-cultural contexts and legal environments.

UNESCO's work aims at improving the evidence base, documenting and sharing best practice for action, raising awareness and build coalitions, and supporting interventions at country level to prevent and address homophobic and transphobic violence.

UNESCO started to work in this area in 2011 by convening the first-ever UN international

consultation to address homophobic bullying in educational institutions.

In 2016, it organised the first international ministerial meeting on education sector responses to homophobic and transphobic violence to catalyse responses by its Member States. A group of countries affirmed a *Call for Action* by Ministers to express their political commitment to ensuring inclusive and equitable education for all learners in an environment free from discrimination and violence, including discrimination and violence based on sexual orientation and gender identity/expression.⁷⁷ This Call for Action has been supported by 56 countries.⁷⁸

56 countries affirmed a Call for Action to ensuring inclusive and equitable education for all, free from discrimination and violence based on SOGIE.

During the meeting, UNESCO also launched the first global report providing an up-to-date analysis of the scope and impact of homophobic and transphobic violence in schools worldwide, as well as examples of

⁷⁶ Special thanks to Christophe Cornu, Team Leader of the Section of Health and Education (Division for Peace and Sustainable Development), Education Sector UNESCO.

⁷⁷ *Call for Action by Ministers: Inclusive and equitable Education for All learners in an environment free from discrimination and violence*, ED/IPS/HAE/2016/02 REV (2016).

⁷⁸ These countries include: Albania, Andorra, Argentina, Australia, Austria, Belgium, Bolivia, Brazil, Cabo Verde, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Ecuador, El Salvador, Estonia, Fiji, Finland, France, Germany, Greece, Guatemala, Honduras, Iceland, Israel, Italy, Japan, Liechtenstein, Luxembourg, Madagascar, Malta, Mauritius, Mexico, Moldova, Montenegro, Mozambique, The Netherlands, Nicaragua, Norway, Panama, Peru, The Philippines, Portugal, Romania, Serbia, Slovenia, South Africa, Spain, Sweden, Switzerland, United States of America and Uruguay.

successful responses in a number of regions and countries.⁷⁹

Early evidence and the conceptual framework from the UNESCO report were used by the Council of Europe to develop, in collaboration with UNESCO, a report to enrich the evidence base for education sector responses to violence based on SOGIE in the European region, published in 2018.⁸⁰

UNESCO has supported concrete follow-up to the ministerial meeting and *Call for Action* in Ministers in various regions and selected countries.

In Asia-Pacific, in 2017, the regional UNESCO Office organised a consultation with representatives from nine countries from the region to highlight gaps and good practices at country-level and identify strategic opportunities for multi-stakeholder advocacy and action to address school-related SOGIE-based violence.

As a follow-up to the consultation, UNESCO has partnered with Education International (EI), which is the world's largest teachers' union, to build capacity of their teachers on the rights of LGBTI people and the role of the education sector to address discrimination on the basis of SOGIE in Asia Pacific.

As part of this partnership, EI has also conducted a survey on the perception of the rights of LGBTI people among teachers who are members of unions from across the region. In Thailand, a teacher training and curriculum development workshop was organised with the goal of providing national education authorities with a deeper understanding of SOGIE and the impact of bullying and discrimination based on SOGIE, and of identifying entry-points and strategies for the Thai context. A School Climate Assessment tool was piloted in North Thailand to assess aspects that are essential for a whole school approach to creating a safe and inclusive learning environment for LGBTI students.

In Europe, with support of UNESCO, the International Lesbian, Gay, Bisexual, Transgender, Queer & Intersex Youth and Student Organisation (IGLYO) organised a follow-up meeting to the Call for Action for European countries. Participating countries reviewed progress in the implementation of their commitments and planned for further actions.

In Latin America, UNESCO worked with Cenesex (*Centro Nacional de Educación Sexual*) in Cuba to generate data through two studies: a situation analysis on the response of the education sector to homophobic and transphobic bullying, and a study conducted amongst young LGBT adults about their experiences of violence when they were in school.

Promoting education and health that are fully inclusive of LGBTI learners

Beyond its activities to prevent and address homophobic and transphobic violence in educational institutions, UNESCO is working to ensure that education and health are fully inclusive of LGBTI learners.

In 2018, UNESCO published the International Technical Guidance on Sexuality Education.

In 2017, at the invitation of UNDP and the World Bank, UNESCO chaired the expert working group on education for the development of an international LGBTI Inclusion Index.

Furthermore, in 2018, UNESCO published the International technical guidance on sexuality

⁷⁹ UNESCO, '*Out in the open: Education sector responses to violence based on sexual orientation and gender identity/expression*' (Paris: UNESCO, 2016). Summaries available in English and French.

⁸⁰ Council of Europe, '*Safe at school: Education sector responses to violence based on sexual orientation, gender identity/expression or sex characteristics in Europe*' (2018).

education.⁸¹ The guidance is developed to assist education, health and other relevant authorities in the development and implementation of school-based and out-of-school comprehensive sexuality education programmes and materials. The needs of LGBTI students are extensively referenced.

Last but not least, in 2018, UNESCO also supported a global web-based consultation conducted by the youth organisation MAG

Jeunes LGBT on how to make the 2030 Sustainable Development Agenda for education and health more inclusive of young LGBTI people. The inputs of more than 20.000 LGBTI youth were presented during the second conference of the Equal Rights Coalition (ERC) in Canada, giving a voice to young LGBTI people who are often underrepresented in forums where the rights of LGBTI people are discussed.⁸²

More UNESCO SOGIESC Resources

- ▶ [Out in the open: education sector responses to violence based on sexual orientation and gender identity/expression](#), UNESCO, 2016. Summary report available in [English](#), [French](#) and [Spanish](#).
 - ▶ [From Insult to Inclusion: Asia-Pacific report on Bullying, Violence and Discrimination on the Basis of Sexual Orientation and Gender Identity](#), UNESCO, 2015.
 - ▶ [La violencia homofóbica y transfóbica en el ámbito escolar en Latinoamérica: hacia centros educativos inclusivos y seguros](#), UNESCO, 2015. *In Spanish only*.
 - ▶ [El bullying homofóbico y transfóbico en centros educativos: taller de sensibilización para su prevención \(Guía de facilitación\)](#), UNESCO, 2015. *In Spanish only*.
 - ▶ [Bullying targeting secondary school students who are or are perceived to be transgender or same sex attracted: Types, prevalence, impact, motivation and preventive measures in 5 provinces of Thailand](#), UNESCO Bangkok, 2014.
 - ▶ [Good Policy and Practice Series, Booklet 8: Education Sector Responses to Homophobic Bullying](#), UNESCO, 2012. Also available in [Chinese](#), [French](#), [Italian](#), [Korean](#), [Polish](#), [Portuguese](#), [Russian](#), [Spanish](#).
 - ▶ [International Day against Homophobia and Transphobia Lesson Plan](#), UNESCO, IDAHOT, 2012. Also available in [French](#), [German](#). Locally adapted for Thailand in "[Lesson Plans for teaching about sexual and gender diversity](#)".
 - ▶ [Reaching Out – Volume 2: Preventing and Addressing SOGIE-related School Violence in Viet Nam](#), UNESCO, 2016.
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⁸¹ UNESCO, UNAIDS, UNFPA, WHO, UN Women, [International technical guidance on sexuality education: an evidence-informed approach](#) (2018).

⁸² Findings are summarised in a report available on the website of MAG Jeunes LGBT: <https://www.mag-jeunes.com/wp-content/uploads/2018/12/Global-Summary-Report-LGBTI-Youth-ENG.pdf>

INTERNATIONAL HUMAN RIGHTS LAW

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INTER-AMERICAN COURT OF HUMAN RIGHTS

Advisory Opinion No. 24: A Milestone in the Quest for Equality in the Americas

By *Lucía Belén Araque*.⁸³

The Inter-American Court of Human Rights (IACtHR or “the Court”) is one of the two bodies in charge of protecting human rights within the system built around the Organisation of American States (OAS). The Court interprets and applies — among other legal instruments— the American Convention on Human Rights (ACHR, “The Convention”), the main human rights treaty of the system. It does this basically in two ways. The first —and most prominent— is by hearing and ruling on specific cases concerning alleged violations of its provisions perpetrated by States that ratified or acceded to the treaty. The Court can also express its views on concrete legal matters brought to its attention by organs and Member States of the OAS. These views—formally referred to as “advisory opinions”—have proved to be a valuable tool for further advancing human rights in the region.

In November 2017, the IACtHR issued a remarkably bold and far-reaching advisory opinion on sexual and gender diversity. Not only did the Court recognise that LGBT persons have historically been victims of stigmatisation and violence, but also set clear standards with respect to the enjoyment of their human rights in a regional context of emerging anti-rights groups and governments.

Unlike what the European Court of Human Rights (ECHR) argued in cases like *Schalk and Kopf v. Austria*, the IACtHR categorically stated that the lack of consensus among American States over alleged controversial topics such as those involving sexual and gender minorities cannot be considered a valid argument for denying or restricting their human rights and perpetuating and reproducing structural and historical discrimination against them, leaving no local margin of appreciation in this regard.⁸⁴ The fact that the Court distanced itself from nuanced approaches proves its potential as a

driving force of change in the Americas while, at the same time, poses a challenge in terms of effectiveness of its decisions.

The Court’s reliance on the progress made by OAS Member States (notably Argentina, Colombia, Mexico and Uruguay) in issues of sexual and gender diversity—and the work carried out by human rights advocates that underlies it— is undoubtedly one of the main features of this advisory opinion, together with the opportunity it offers LGBT activists to assess priorities.

The Court set clear standards with respect to the enjoyment of human rights by LGBT people in a regional context of emerging anti-rights groups and governments.

Despite being a massive win for trans identities, media coverage of the opinion—and to some extent the work of academics—appear to have intensively focused on the sections of the decision on same-sex marriage, reflecting once again the uneven attention that trans-related topics receive in comparison to LGB ones, a phenomenon that has historically been a source of tension within the LGBT movement.

⁸³ Lucía Belén Araque is an Argentinean lawyer specialised in Public International Law with a focus on International Human Rights Law (University of Buenos Aires, 2018). Exchange student at The University of Texas at Austin School of Law (full-ride merit-based scholarship granted by UBA Law School, Fall 2017). LLM in International Human Rights Law Candidate, researcher and Assistant Lecturer at UBA Law School.

⁸⁴ Inter-American Court of Human Rights. Gender identity, and equality and non-discrimination with regard to same-sex couples. State obligations in relation to change of name, gender identity, and rights deriving from a relationship between same-sex couples (interpretation and scope of Articles 1(1), 3, 7, 11(2), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights). *Advisory Opinion OC-24/17*. Series A No. 24 (in Spanish), para. 83.

Costa Rica's questions

Observing that the protection of the human rights of LGBT persons varies significantly among OAS Member States, Costa Rica submitted a request to the IACtHR for clarification of the content and scope of the prohibition of discrimination on grounds of sexual orientation and gender identity under the ACHR.⁸⁵ The Court was specifically asked to address whether States have an obligation to allow for name changes of individuals in accordance with gender identity and to recognise all patrimonial rights stemming from same-sex relationships.⁸⁶

On equality and non-discrimination

The IACtHR described the principle of equality and non-discrimination as the basis of national and international human rights systems, strongly linking it to human dignity.⁸⁷

Recalling its well-established case law, the Court stressed that States must refrain from carrying out any action that discriminates (directly or indirectly) against a person or group of people and that they must guarantee the full realisation of human rights without discrimination.⁸⁸ This also includes protecting people from third party practices that create, maintain or favour discriminatory situations.⁸⁹ Interestingly, the Court stressed that sexual orientation, gender identity and gender expression (SOGIE) are protected categories under this principle⁹⁰ and even referred to the notion of intersectionality (i.e., a theory on how overlapping dimensions of oppression operate on different identities), although it did not go into too much detail in this regard.⁹¹

On SOGIE and personality

The IACtHR delivered a robust construction of SOGIE as essential aspects of the “right to identity”.⁹² Noting that no particular mention of such human right is made in the ACHR, the Court explained that the protection of attributes and characteristics that allow the individualisation of a

person within society derives from the protection that the Convention affords to the principles and rights that make up its core: personal autonomy, equality and non-discrimination, name, private and family life and freedom of expression.

In other words, the development of personality and aspirations, the determination and expression of individuality and the building and definition of social relationships belong within the domain of the choices that an individual makes in accordance with self-perception and personal convictions and that States must therefore respect and safeguard.

The Court stressed that sexual orientation, gender identity and gender expression are protected categories under the principle of equality and non-discrimination.

The Court also identified the nature of the right to an identity —of which SOGIE is a fundamental component— as instrumental to the full realisation of other human rights that depend on its recognition.⁹³

On legal recognition of gender identity

The IACtHR explored its connection with the right to “legal recognition as a person before the law”.⁹⁴

Put this way, this right may sound odd to those who are not familiar with the I/A system or with civil (continental) law. Basically, it determines the existence of the individual as a human being with distinct needs, interests and opinions and the possibility of accessing and exercising rights. The Court also referred to the right to a name, a defining attribute of personality without which the

⁸⁵ *Ibid.*, para. 2.

⁸⁶ *Ibid.*, paras. 1, 3.

⁸⁷ *Ibid.*, para. 61.

⁸⁸ *Ibid.*, para. 63.

⁸⁹ *Ibid.*, para. 65.

⁹⁰ *Ibid.*, para. 78.

⁹¹ *Ibid.*, para. 41.

⁹² *Ibid.*, paras. 85-101.

⁹³ *Ibid.*, paras. 98, 99.

⁹⁴ *Ibid.*, paras. 102-104.

person cannot be recognised by society or registered by the State.⁹⁵

In this regard, the Court affirmed that the ACHR establishes the right to have one's name changed and one's image and sex or gender markers rectified to match self-perceived gender identity in public records and identification documents.⁹⁶

Furthermore, the Court declared that States are free to choose which type of procedure aimed at realising such right to implement —judiciary or administrative (though it recommended the latter)—, provided it meets certain minimum standards.⁹⁷

Firstly, it must be of a “declaratory nature”. Under no circumstances can it be turned into a form of external validation of the applicant's gender identity.⁹⁸ Secondly, it must be based solely on the free and informed consent of the applicant, without involving unreasonable or pathologising requirements such as medical, psychological or other certifications (of good conduct, “not married” marital status, criminal records, etc.),⁹⁹ forced hormonal therapy, gender reassignment surgery, sterilisation or any sort of body modification.¹⁰⁰ And last but not least, it must be confidential (documents cannot reflect the changes and/or rectifications either),¹⁰¹ prompt and, insofar as possible, centralised and cost-free.¹⁰²

Most notably, the Court added that these regulations apply likewise to procedures involving children.¹⁰³ The right to legal recognition of gender identity in these cases must be protected taking into account the principles of best interests of the child, progressive autonomy, participation and equality and non-discrimination.¹⁰⁴

On protection of same-sex couples

The IACtHR expressed that the conventional protection of family and private and family life

applies also to relations between persons of the same sex with respect to all kinds of issues.¹⁰⁵

The Court outlined the different legislative, judicial and administrative measures that had been taken in the region to ensure equal rights for same-sex couples and, based on the principle of equality and non-discrimination, determined that no argument could justify not extending such institutions to same-sex couples.¹⁰⁶

Particularly, it stated that establishing two types of formal unions with different names —but that grant the same rights and produce the same effects— is inadmissible under the ACHR, as it means creating a stigmatising distinction based on sexual orientation.¹⁰⁷

Moving towards effective implementation

Advisory Opinion No. 24 constitutes a landmark in the advancement of human rights of LGBT persons in the Americas. The IACtHR's approach to sexual and gender diversity —undoubtedly the most progressive one ever adopted by a human rights regional court— called a halt to the discussion aimed at excluding SOGIE legal safeguards from the ACHR.

The question within the I/A System then is no longer whether legal recognition of gender identity and protection of same-sex relationships are actually required, but rather how these rights are going to be fulfilled in practice.

The effective implementation of these rights in the precise way that they were construed by the Court is still uncertain considering the high risk of political backlash in a region that shows growing anti-rights tendencies. Nevertheless, several States— responding to pressure from LGBT activists— have already started to act on the Advisory Opinion, raising hope that effective implementation will ultimately follow the Court's guidelines.

⁹⁵ *Ibid.*, para. 106.

⁹⁶ *Ibid.*, para. 115.

⁹⁷ *Ibid.*, paras. 117, 159.

⁹⁸ *Ibid.*, para. 158.

⁹⁹ *Ibid.*, paras. 127-133.

¹⁰⁰ *Ibid.*, paras. 145-148.

¹⁰¹ *Ibid.*, paras. 134-140.

¹⁰² *Ibid.*, paras. 124, 125, 141-144.

¹⁰³ *Ibid.*, para. 154.

¹⁰⁴ *Ibid.*, paras. 149-156.

¹⁰⁵ *Ibid.*, paras. 191, 198.

¹⁰⁶ *Ibid.*, paras. 200-228.

¹⁰⁷ *Ibid.*, para. 224.

The Protection of the Rights of LGBTI People by the Inter-American Commission on Human Rights

Luiza Drummond Veadó.¹⁰⁸

The Inter-American Commission on Human Rights (IACHR) is one of the main bodies of the Organisation of American States (OAS) that promotes and protects human rights in the 35 States of the region and, together with the Inter-American Court of Human Rights (I/A Court), forms the Inter-American System.

Since 2011, the Commission has a Thematic Unit on the rights of LGBTI persons, which later became one of its Rapporteurships. Through this Rapporteurship, the IACHR monitors the situation of this population in the Americas, working with States and civil society, as well as other regional and international actors. It also processes individual petitions and cases related to SOGIESC.

Public hearings

In 2018, the IACHR heard diverse concerns from civil society organisations and received information from the States in several thematic hearings. In particular, the Commission received information on gender and sexual diversity policies in Paraguay,¹⁰⁹ the human rights situation of trans people in Argentina,¹¹⁰ the situation of LGBT people deprived of liberty in the Americas,¹¹¹ violations of economic, social, cultural and environmental rights of LGBTI people in the region,¹¹² the political crisis in Venezuela and its effects on the LGBTI community¹¹³ and equal marriage in the Americas,¹¹⁴ as well as various intersectional issues that affect the lives of LGBTI people in the continent.

Through the Rapporteurship on the rights of LGBTI persons, the IACHR monitors the situation of this population in the Americas.

System of petitions and cases

In 2018, the Commission published reports on individual cases on issues of sexual orientation and gender identity.

The IACHR took the case of Azul Rojas Marín against Peru before the Inter-American Court of Human Rights.¹¹⁵ This is the first case of violence against LGBTI persons before that court and refers to the illegal, arbitrary and discriminatory arrest of Azul Rojas Marín, who then identified as a gay man (she currently identifies as a trans woman). Azul suffered serious acts of physical and psychological violence perpetrated by state agents, including various forms of sexual violence and rape. The IACHR found that the acts of violence against the victim were carried out with special cruelty because the state agents had identified Azul Rojas Marín as a gay man. The Commission also found that the facts of the case constitute violence based

¹⁰⁸ Luiza Drummond Veadó, LL.M. from the University of Essex, is a human rights lawyer and consultant on issues of sexual orientation, gender identity and sexual characteristics.

¹⁰⁹ "Paraguay Género y Diversidad Sexual", IACHR YouTube Channel, 27 February 2017.

¹¹⁰ "Argentina DDHH Población Trans", IACHR YouTube Channel, 1 March 2018.

¹¹¹ "Personas LGBTI privadas de libertad", IACHR YouTube Channel, 8 May 2018.

¹¹² "DESCA de personas LGBTI en América", IACHR YouTube Channel, 2 October 2018.

¹¹³ "Venezuela: Personas mayores y LGBTI", IACHR YouTube Channel, 4 October 2018.

¹¹⁴ "Regional: Matrimonio Igualitario", IACHR YouTube Channel, 5 December 2018.

¹¹⁵ IACHR, *Report No. 24/18*, Case 12.982. Merits. *Azul Rojas Marín et al.* Peru. 24 February 2018; *Press Release No. 189/18*: "IACHR Takes Case Involving Peru to the Inter-American Court of Human Rights", 27 August 2018.

on prejudice and considered that the constitutive elements of torture are also present. In addition, throughout the investigation, the victim was humiliated, and her credibility questioned by judicial authorities, from the initial report until the final decision. Thus, the IACHR considered that the State of Peru violated the State obligations to respect and fulfil the rights of a victim who denounces sexual violence, with the aggravating prejudice against LGBT people. This is a great opportunity for the Inter-American Court to issue a paradigmatic decision with clear standards on the protection of LGBTI persons against violence.

Additionally, the IACHR published the admissibility report in the case of *Gareth Henry, Simone Carline Edwards and families*¹¹⁶ on acts of discrimination and violence in Jamaica based on the sexual orientation of the victims. Such acts of violence forced both alleged victims to leave the country and apply for asylum abroad. The alleged victims place great emphasis on the existence of sodomy laws in Jamaica, alleging that it legitimises structural discrimination against LGBT people.

Precautionary measures

In 2018, the IACHR issued two precautionary measures in favour of human rights defenders of LGBTI persons in Brazil.

The first was awarded to Mônica Tereza Azeredo Benício,¹¹⁷ partner of Marielle Franco, a well-known defender of afro-bisexual human rights murdered in Rio de Janeiro. The Commission understood that the alleged threats, harassment and persecution, among other acts of intimidation, could be related to the complaints that the beneficiary has been filing in recent months in relation to the murder of her partner, as well as her willingness to assume her legacy and continue her important work.

The second precautionary measure granted in 2018 was granted to Jean Wyllys de Matos Santos,¹¹⁸ the first openly gay Brazilian legislator and to his family, in relation to possible threats against his life and personal integrity. According to available information, the threats are directly related to his work as a human rights defender and as a gay man. It is important to underline that Jean Wyllys subsequently left Brazil due to the threats

suffered and did not take up his seat in the congress, even after the issuance of the precautionary measure granted by the Inter-American Commission.

Other lines of work

In addition to all these decisions, the IACHR conducted a public consultation related to the protection of economic, social and cultural rights (ESCR) of trans people in the Americas and collected numerous responses through a public questionnaire.¹¹⁹ It also issued several press releases highlighting the advances and setbacks in the region on the rights of LGBTI people¹²⁰ and held a joint event with the United Nations High Commissioner and the African Commission on Human and Peoples' Rights. Finally, the IACHR also launched a campaign composed of six videos about serious human rights violations against LGBTI people that continue to exist in the Americas and the Caribbean.¹²¹

Over the past decade, the Inter-American Commission has made broad strides and has developed an innovative and coherent case law for the comprehensive protection of LGBTI people at the regional level. In addition, these developments grow through cases and reports published by the IACHR. At the same time, Member States make progress by enacting new laws, issuing judicial decisions and implementing public policies on issues of sexual orientation, gender identity and expression, and sexual characteristics.

The protection of the human rights of LGBTI persons is a complex, dynamic and multifaceted process. Certainly, there are still many barriers and shadows down the road. Violence and discrimination still govern the daily lives of many LGBTI people in the hemisphere. However, victories and advances continue to be achieved. The Americas have proven to be a region that—not without difficulties—has developed numerous laws, policies and programs that are among the most advanced on the planet to recognise, protect and empower LGBTI people. Those victories are only possible thanks to the work of LGBTI activists, defenders and agents of the State that join the struggle, so that we can all be free and equal in rights and dignity.

¹¹⁶ IACHR, *Report No. 80/18*. Petition 1850-11. Admissibility. *Gareth Henry, Simone Carline Edwards and families*. Jamaica. 2 July 2018.

¹¹⁷ IACHR, *Precautionary Measure No. 767-18*, *Mônica Tereza Azeredo Benício*, Brazil, 1 August 2018.

¹¹⁸ IACHR, *Precautionary Measure No. 1262-18*, *Jean Wyllys de Matos Santos and family*, Brazil, 20 November 2018.

¹¹⁹ "Questionnaire for the Report on trans persons and economic, social and cultural rights", IACHR Website.

¹²⁰ "Press Releases", IACHR Website.

¹²¹ "Campaña de videos en Youtube/Agosto 2018", IACHR Website.

ORGANISATION OF AMERICAN STATES (OAS) – POLITICAL ORGANS

The Impact of the LGBTTTI Coalition of Latin America and the Caribbean at the OAS

By *Marcelo Ernesto Ferreyra*.¹²²

The Organisation of American States (OAS) is the intergovernmental organisation that unites the 35 independent States of the Western Hemisphere. In the last decade, it has become a forum that has seen great advances in equality issues. However, these advances have not gone without great resistance and challenges.

The General Assembly of 2017

In June 2017, the OAS celebrated its 47th General Assembly (GA) in Cancun, Mexico.¹²³ The level of anti-LGBT incidents, attacks and hate speech was lower than in previous years thanks to the efforts of the OAS to minimise conflicts through changes in the methodology of civil society participation.

Of 394 civil society organisations registered—among them were the organisations integral to the LGBTTTI Coalition of Latin America and the Caribbean that work in the OAS—around 100 organisations were in opposition.¹²⁴

In this context, the anti-trans bus “Citizen-Go” arrived in Cancun with the intention of parking in front of the OAS GA building. However, by order of the Mexican government, the bus had to park some kilometres from the access, and it passed practically unnoticed.

At the same time, the National Council for Preventing Discrimination (CONAPRED), installed a space for receiving complaints in the GA area.

In the last decade, the OAS has become a forum that has seen great advances in equality issues.

Of 24 registered coalitions to speak at the event, 10 included anti-rights speeches that dealt with, among other issues, abortion, anti-LGBT incidents and the defence of “natural” marriage between a man and a woman.

The biggest efforts for the anti-rights organisations supported by the Paraguayan and Jamaican delegations was to eliminate the entire section on the rights of LGBT people proposed by the “Core LGBTI Group” in the resolution on human rights in the region. Through a long and complicated discussion, it was finally agreed to preserve the language of the resolution from the previous year, with the anti-rights groups failing to achieve their principle objective.¹²⁵

¹²² Marcelo Ernesto Ferreyra is an architect by profession and feminist activist defender of Sexual Rights and Reproductive Rights since 1987, first integrating the Comunidad Homosexual Argentina and later Gays DC (organisation with which he was one of the promoters of the First Pride March in Buenos Aires), and later in Latin America and the Caribbean, being in that context a Founder member at the Coalition of LGBTTTI Organisations with work at the OAS. He has collaborated in several international organisations such as Interpride, of which he was vice president and director for the Latin America and the Caribbean area. During 2006 - 2012 he was the Coordinator of the Program for Latin America and the Caribbean in the International Commission on Human Rights for Gays and Lesbians (IGLHRC) and from 2010 to 2012 he was Coordinator Member of the Collegiate Coordination of the Campaign for an Inter-American Convention on Human Rights. Sexual and Reproductive Rights. Currently a member of the Synergia Initiative for Human Rights, he is also a member of the Sex and Revolution Advisory Collective, Feminist and Gender-Generative Policy Memories Program of CeDInCI / UNSAM; and officiates as an advisor to the Mama Cash women's fund.

¹²³ “47^{mo} Período Ordinario de Sesiones de la Asamblea General de la OEA – 2017”, OAS Website.

¹²⁴ The Coalition of Lesbians, Gays, Bisexuals, Transgenders, Transsexuals, Travestis, Intersex (LGBTTTI) of Latin America and the Caribbean that advocates before the OAS is a regional network composed of 53 organisations from 26 countries in the region. Since its foundation in 2006, its strategic objective has been visibility, promotion and mobilisation to guarantee the overall and systematic commitment of the OAS and its regional system for the protection of human rights to protect and promote LGBTI human rights in the American hemisphere.

¹²⁵ The “Core Group” was founded on June 15, 2016 in Santo Domingo under the “[Joint Declaration of the founding members of the LGBTI Support Group](#)”, and was signed by Argentina, Brazil, Canada, Colombia, United States, Chile, Mexico and Uruguay. The resolutions on “Human Rights, Sexual Orientation and Gender Identity” were approved annually since the 38th General Assembly

The Summit of the Americas of 2018

In April 2018, the eighth Summit of the Americas took place in Lima, Peru.¹²⁶ The opposition groups also participated in the Civil Society space of the event, but its level of influence diminished in comparison with the previous Summit.

The organisations formed the LGBTTTI coalition which participated as one of the 28 civil society coalitions that were admitted in the Summit to read their own document before the Governmental Representatives of the Highest Level.

During the presentation of the work methodology, the General Secretary of the OAS included a reminder that there will be a zero tolerance of harassment against participants and organisers of the event and adopted the appropriate measures to defend the principles of pluralism and respect, including appropriate accreditation and bathrooms for trans participants. Although these measures caused protests from opposition groups on social networks, they were respected during the whole event.

As an event without precedent in the history of the Summit of the Americas, the Secretary of the Summit took the opportunity for a person from civil society to be a spokesperson for a “dialogue between social actors and representatives of the highest levels of government”, presenting a document summarising the key points for the intervention of the 28 coalitions of civil society. The one-page document clearly showed contradictions as two of the coalitions were composed of opposition groups.

The General Assembly 2018

In June 2018, the OAS celebrated its 48th General Assembly in Washington D.C.¹²⁷ Of the total 307 civil society organisations approximately 90 were opposition organisations, a few more than the organisation for sexual, reproductive and LGBTTTB rights.

A novelty was the attendance *en masse* of churches –Catholics and Evangelicals– with a pre-eminence of the latter. This is the first time that in the civil society space of the OAS, some coalitions identified openly as religious. This signalled that also, for the first time, there was a progressive religious coalition, the “Coalition for the Religions, Beliefs and Spirituality in Dialogue with Civil Society”.

Of the 31 registered coalitions, 9 included an opposition discourse (less than the previous year). The issues included, among others, abortion, “gender ideology”, opposition to the rights of LGBTI people and the defence of “natural” marriage between a man and a woman.

Also, they were looking to delegitimise the Inter-American Commission on Women (ICM), the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACHR), denouncing them as “overreaching” in their functions to include recommendations and jurisprudence on sexual orientation and gender identity.

This time, the efforts of the opposition—under the leaderships of Paraguay—focused on the sections regarding the rights of LGBTI people in the resolution on human rights.¹²⁸

The situation of international treaties that expressly include sexual orientation and gender identity and/or expression

The Inter-American System is the first system of human rights in the world with two binding instruments that protect sexual orientation and gender identity and/or expression. These are the [Inter-American Convention Against All Forms of Discrimination and Intolerance \(A-69\)](#) approved in 2013 and the [Inter-American Convention on the Protection of Human Rights of Older Persons \(A-70\)](#) approved in 2015. Both enter into force 30 days after the document is ratified by only two countries.

The Convention (A-70) entered into force on the 11th of January 2017; but is still missing 4 countries’ signatures and ratification in order to activate the supervisory mechanism. On the 11th of May 2018, Uruguay became the first country to ratify Convention (A-69). It is still missing one of the other 10 countries that have already signed, to ratify the convention so it can come into force.

of the OAS of 2008. In subsequent years, resolutions on the same subject were approved in each of the OAS GA, ten to date, which increased in depth and scope. A complete list of all the resolutions can be seen on this page of the IACHR [website](#).

¹²⁶ Unlike the General Assembly, which is the main organ of the organisation, the Summit of the Americas is a high-level meeting in which the first mandataries of the OAS Member States participate to discuss diplomatic and commercial issues at the continental level. The first meeting of this kind took place in 1994 and since then they have been held periodically every 3 or 4 years.

¹²⁷ “48^{vo} Período Ordinario de Sesiones de la Asamblea General de la OEA – 2018”, OAS Website.

¹²⁸ OAS GA, [Draft Resolution: Promotion and Protection of Human Rights](#), AG/Doc.5632/18, 1 June 2018.

The efforts of the opposition focused on the sections regarding the rights of LGBTI people in the resolution.

Although instead of opposing the text completely as they had in the previous year, they opposed the advances proposed on two issues. Firstly, the language on “sexual characteristics” which includes intersex persons, and secondly, to eliminate reference to Consultative Opinion 24/17.

This was pure spectacle on its part, as the Consultative Opinion didn’t need support from States by being a judicial document. Both paragraphs were eliminated.

In the frame of this General Assembly, the Inter-American Commission on Women (CIM) convened a meeting with international and regional bodies and civil society organisations that are dedicated to working for the advancement of gender equality and the empowerment of women and girls.

For this, the CIM created, by request from the Titled Delegates, the “Inter-American Guidelines on gender equality for the good for humanity”,¹²⁹ with the object to emphasise the concrete benefits of gender equality for women and men in the social, political, and economic spheres, as a way to identify positive messages from responses before the anti-human rights movements and speeches and anti-gender equality. Hillary Anderson, Gender Specialist for the ICM, expressed her worry for the threat that these movements represented in the region.

The next GA of the OAS will be held in June 2019 in Medellin, Colombia.

¹²⁹ *Inter-American Guidelines on Gender Equality for the Good of Humanity*, OEA/Ser.L/II.5.33, 28 August 2017.

COUNCIL OF EUROPE

SOGIESC in the Council of Europe

By Sarah Burton.¹³⁰

The Council of Europe promotes and defends human rights, democracy and the rule of law across its 47 Member States, which are home to 830 million people.¹³¹ Chiefly famous as the home of the European Convention on Human Rights and the European Court of Human Rights, it conducts much of its work through intergovernmental cooperation, via its Committee of Ministers and intergovernmental steering committees, and through the human rights monitoring bodies set up under many of its more than 200 conventions.

In addition to the European Court of Human Rights, key bodies as far as SOGIESC-related matters are concerned include the Commissioner for Human Rights,¹³² the Parliamentary Assembly of the Council of Europe and its General Rapporteur on the rights of LGBTI people,¹³³ the European Commission against Racism and Intolerance (ECRI) and the intergovernmental sector's SOGI Unit. In 2017, the Committee for the Prevention of Torture (CPT) was also active in this field.

Overall context

The Council of Europe's work from March 2017 to December 2018 reflected conflicting trends that can be observed across its member states as regards SOGIESC-related issues – from increasing recognition at one end of the spectrum, to the most egregious human rights violations, including torture and extrajudicial killings, at the other.¹³⁴

These developments have occurred against a background of vocal opposition emanating from some religious and ultra-conservative groups to notions of gender and so-called “gender ideology”.

Developments have occurred against a background of vocal opposition emanating from some religious and ultra-conservative groups to notions of gender and so-called “gender ideology”.

The reticence displayed in some member states towards ratifying the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) led the Council of Europe to publish in 2018 a leaflet specifically aimed at countering misrepresentations of the Istanbul Convention, including its definition of “gender” and how it relates to issues of sexual orientation and gender identity.¹³⁵

Persecution on the basis of actual or perceived sexual orientation or gender identity

Chechen Republic (Russian Federation)

First reported by Russian newspaper *Novaya Gazeta* in early April 2017, the alleged large-scale abduction, detention and torture—and, in some cases, killing—of LGBTI people in Chechnya led to

¹³⁰ Sarah Burton is secretary to the Committee on Equality and Non-Discrimination of the Parliamentary Assembly of the Council of Europe. The views expressed in this chapter are solely those of the author and do not necessarily reflect the official policies of the Council of Europe or its member states.

¹³¹ Background information on the Council of Europe, [here](#). List of member states, [here](#).

¹³² The [Commissioner](#) is elected by the Assembly for a six-year term of office. In the period covered by this report, this post was held by [Nils Muižnieks](#) and then (as from 1 April 2018), by [Dunja Mijatović](#).

¹³³ The General Rapporteur on the rights of LGBTI people is appointed by the Assembly's Committee on Equality and Non-Discrimination. In the period covered by this report, the post was held by [Jonas Gunnarsson](#) (Sweden, SOC), then, as from 27 June 2017, [Piet De Bruyn](#) (Belgium, NI).

¹³⁴ ECRI, *Annual Report on ECRI's Activities covering the period from 1 January to 31 December 2017*, CRI(2018)26 (2018), para. 19.

¹³⁵ Council of Europe, *The Council of Europe Convention on Preventing Combating Violence against Women and Domestic Violence (Istanbul Convention): Questions and answers* (2018).

both rapid and longer-term responses from the Council of Europe.

On 5 April 2017, the Assembly's General Rapporteur on the rights of LGBTI people and its rapporteur on Human rights in the North Caucasus issued a joint statement expressing alarm at the reports and calling for an immediate, effective investigation.¹³⁶

The same day, the Commissioner for Human Rights sent a letter to the Head of the Russian Federal Investigative Committee, requesting information about steps taken to investigate both the alleged crimes and the statements made by Chechen public figures that may have constituted incitement to hatred, as well as to protect victims.¹³⁷

Adopting a resolution on human rights in the North Caucasus soon afterwards, on 25 April 2017, the Parliamentary Assembly expressed grave concern over the reports, condemned the "denial, trivialisation and condoning" by the Chechen authorities of the attacks, and "urge[d] the Russian Federation to carry out an immediate and transparent investigation" in order to bring those responsible to justice and ensure the safety of the LGBTI community, human rights defenders and journalists reporting on such violations.¹³⁸

From 28 November to 4 December 2017, the Committee for the Prevention of Torture (CPT) conducted a visit to the Chechen Republic, during which it looked, *inter alia*, into the investigation of certain specific complaints/reports of unlawful detention and ill-treatment by law enforcement officials in the Chechen Republic.¹³⁹ Its report, adopted in March 2018,¹⁴⁰ has not yet been made public¹⁴¹.

On 27 June 2018, the Assembly adopted *Resolution 2230 (2018)*¹⁴² and *Recommendation 2138 (2018)*¹⁴³ on Persecution of LGBTI people in the Chechen Republic (Russian Federation), on the

basis of a detailed report prepared by the General Rapporteur on the rights of LGBTI people, Piet De Bruyn (Belgium, NI).¹⁴⁴

Persecution on the basis of actual or perceived sexual orientation or gender identity led to a series of responses from the Council of Europe.

The Assembly noted that a "campaign of persecution [had] unfolded against the backdrop of serious, systematic and widespread discrimination and harassment against LGBTI people in the Chechen Republic", and that its effects continued.

Emphasising that the Russian Federation has responsibilities as a Council of Europe member state, it called on the authorities, *inter alia*, to conduct an impartial and effective investigation into the facts, or to allow an independent international investigation; to protect victims, their families and witnesses, as well as human rights defenders; and to authorise the publication of the CPT's report.

It further called on other Council of Europe member states to grant protection to victims, witnesses and their families; to support NGOs and human rights defenders providing assistance to victims and witnesses; and, should the Russian Federation fail to conduct an investigation within a

¹³⁶ "Attacks against LGBT people in Chechnya: claims must be investigated and victims protected", Council of Europe Parliamentary Assembly Website, 5 April 2017.

¹³⁷ Commissioner for Human Rights, *Annual Activity Report 2017, CommDH (2018) 1, Chapter 2.6: Human Rights of LGBTI People*, 19 January 2018.

¹³⁸ Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), *Resolution 2157 (2017): Human rights in the North Caucasus: what follow-up to Resolution 1738 (2010)?*, 25 April 2017.

¹³⁹ CPT, "Council of Europe anti-torture Committee visits the Chechen Republic of the Russian Federation", Strasbourg, 7 December 2017. <http://www.coe.int/en/web/cpt/-/council-of-europe-anti-torture-committee-visits-the-chechen-republic-of-the-russian-federation>.

¹⁴⁰ CPT, "CPT holds its March 2018 plenary meeting", Council of Europe Website, 12 March 2018.

¹⁴¹ Under Article 11 of the [European Convention for the Prevention of Torture and Inhuman or Degrading Treating or Punishment](#), the report relating to a visit remains confidential until the authorities of the state concerned request its publication.

¹⁴² Parliamentary Assembly of the Council of Europe, *Resolution 2230 (2018): Persecution of LGBTI people in the Chechen Republic (Russian Federation)*, 27 June 2018.

¹⁴³ Parliamentary Assembly of the Council of Europe, *Recommendation 2138 (2018): Persecution of LGBTI people in the Chechen Republic (Russian Federation)*, 27 June 2018.

¹⁴⁴ Committee on Equality and Non-Discrimination, *Report: Doc. 14572. Persecution of LGBTI people in the Chechen Republic* (Russian Federation), 8 June 2018.

reasonable time, to consider conducting a Council of Europe investigation into these events.¹⁴⁵

Azerbaijan

Reports of the arrest, detention, physical ill-treatment of LGBT persons, and other serious violations of their human rights, including forced medical examinations, in Baku in autumn 2017 also prompted a series of rapid responses. The Commissioner wrote to the Minister of Internal Affairs of Azerbaijan, calling for a thorough investigation into these allegations and underscoring that arrests based wholly or in part on sexual orientation or gender identity constitute discrimination and run counter to the ECHR. However, “the Minister’s response only heightened my concerns,” the Commissioner subsequently reported.¹⁴⁶ Adopting a resolution on the functioning of democratic institutions in Azerbaijan on 11 October 2017, the Assembly also expressed concern about the reports and called for independent, effective investigations to be conducted into the actions of the police.¹⁴⁷

Hate Crime

As the European Commission against Racism and Intolerance (ECRI) noted in its 2017 annual report, homophobic and transphobic hatred is still present in Europe, and its presence on the Internet and in social media has helped fuel a rise in hostility towards LGBTI people.¹⁴⁸

In June 2017, the SOGI Unit published a manual designed to help train police to provide a professional response in cases of hate crimes based on real or perceived sexual orientation or gender identity.¹⁴⁹

In a Human Rights Comment published in August 2017, the Commissioner emphasised that effective laws and justice systems are essential but not enough and called on member states to work proactively to bring about broader changes in societal attitudes to LGBTI persons.¹⁵⁰

Freedoms of association, assembly and expression

In June 2017, the European Court of Human Rights issued its judgment in the case of *Bayev and Others v. Russia*, finding violations of Article 10 ECHR (freedom of expression) and of Article 14 ECHR (prohibition of discrimination) in conjunction with Article 10 concerning the applicants’ conviction and fining for administrative offences, following their demonstrations against so-called “gay propaganda laws”.¹⁵¹

The Committee of Ministers is currently examining the measures taken by the Russian Federation to execute this judgment together with those taken to execute the Court’s much earlier 2010 judgment in the case of *Alekseyev v. Russia*.¹⁵² Meanwhile, a new judgment finding similar violations was delivered in November 2018,¹⁵³ and a number of cases concerning the registration of associations, the organisation of public events and the impact of the Russian *Foreign Agents Act*, linked to sexual orientation and/or gender identity, are currently pending before the Court.¹⁵⁴

In statements issued on 26 June and 20 November 2017 respectively, the Commissioner for Human Rights regretted the decision of the governor of Istanbul to ban the 2017 Pride and that of the governor of Ankara to ban all LGBTI activities in the city.¹⁵⁵ On 14 December 2017, the Assembly’s General Rapporteur on the rights of LGBTI people

¹⁴⁵ See Resolution 2230 (2018) and Recommendation 2138 (2018) on Persecution of LGBTI people in the Chechen Republic (Russian Federation) cited above.

¹⁴⁶ Commissioner for Human Rights, *Annual Activity Report 2017, CommDH (2018) 1, Chapter 2.6: Human Rights of LGBTI People*, 19 January 2018. Note: Both the letter and the Minister’s response were published on 16 October 2017 and can be found [here](#).

¹⁴⁷ Parliamentary Assembly of the Council of Europe, *Resolution 2184 (2017) on The functioning of democratic institutions in Azerbaijan*, 11 October 2017.

¹⁴⁸ ECRI, *Annual Report on ECRI’s Activities covering the period from 1 January to 31 December 2017*, CRI(2018)26, June 2018, para. 19.

¹⁴⁹ Joanna Perry and Paul Franey, *Policing Hate Crime against LGBTI persons: Training for a Professional Police Response* (Strasbourg: Council of Europe, 2017).

¹⁵⁰ Commissioner for Human Rights, “*The long march against homophobia and transphobia*”, *Commissioner for Human Rights Webpage*, 31 August 2017.

¹⁵¹ European Court of Human Rights, *Bayev and Others v. Russia*, applications nos. 67667/09, 44092/12 and 56717/12, judgment of 20 June 2017.

¹⁵² European Court of Human Rights, *Alekseyev v. Russia*, application no. 4916/07, judgment of 21 October 2010.

¹⁵³ European Court of Human Rights, *Alekseyev and Others v. Russia*, application no. 14988/09, judgment of 27 November 2018 (not yet final at the time of writing).

¹⁵⁴ For an up-to-date (not necessarily exhaustive) list, see Press Unit, European Court of Human Rights, [Factsheet – Sexual orientation issues](#).

¹⁵⁵ “*Commissioner Muižnieks criticises ban of Istanbul Pride*”, Strasbourg, 26 June 2017. For the statement of 20 November 2017, see the Commissioner’s [Facebook page](#).

expressed similar concerns and called on the Turkish authorities to ensure that human rights were respected throughout the country.¹⁵⁶ Dozens of members of the Assembly signed written declarations denouncing the ban on the Istanbul Pride and calling for an end to the Ankara ban.¹⁵⁷

The Committee of Ministers pursued its examination of the execution of several judgments delivered between 2012 and 2016 and finding violations by Georgia, Moldova and Turkey of the freedoms of expression, association and/or assembly, and/or of the right to an effective remedy, and/or of the prohibition of discrimination, in relation to the organisation of Pride marches or other demonstrations or publications in favour of equal rights regardless of sexual orientation or gender identity.¹⁵⁸

Rights of intersex people

Prompted in part by the previous work of the Commissioner in this field,¹⁵⁹ in October 2017 the Assembly adopted *Resolution 2191 (2017) on Promoting the human rights of and eliminating discrimination against intersex people*.

It called on states to ban unnecessary sex “normalising” surgeries, sterilisation and other treatments practised on intersex children without their informed consent, and for the deferral of treatments until such time as the child is able to participate in the decision, based on the right to self-determination and on the principle of free and informed consent.

It also urged states, inter alia, to put in place simple and accessible legal gender recognition procedures, in line with those already called for in its *Resolution 2048 (2015) on Discrimination against transgender people in Europe*; to ensure, wherever gender classifications were in use by public authorities, that a range of options were available for all people,

including those intersex people who do not identify as either male or female; to ensure that the law did not perpetuate barriers to equality for intersex people; to provide adequate psychosocial support mechanisms for intersex people and their families, and to work with civil society organisations to break the silence around the situation of intersex people.¹⁶⁰

In 2017, the Assembly adopted Resolution 2191 on promoting the human rights of and eliminating discrimination against intersex people.

Private and family life

The Court continued building on its already considerable case-law with respect to rainbow families in 2017 and 2018, notably through its judgment in the case of *Orlandi and Others v. Italy* (legal recognition of couples married abroad).¹⁶¹ An application concerning access to medically-assisted procreation for same-sex couples was however declared inadmissible due to non-exhaustion of domestic remedies.¹⁶²

During the reporting period, the SOGI Unit launched two publications relevant to LGBT families: one on values-based campaigning¹⁶³ and the second on trends in Europe regarding the rights and responsibilities of same-sex families.¹⁶⁴

In a Human Rights Comment published in February 2017, the Commissioner emphasised that access to registered same-sex partnerships is a question of

¹⁵⁶ “Stifling LGBTI organisations’ free expression is harmful and a breach of fundamental rights”, Strasbourg, 14 December 2017.

¹⁵⁷ Written declaration no. 636, “Turkish violations against the Istanbul Pride”, 20 October 2017, Doc. 14374, and Written declaration no. 650, “Turkey must restore the right to freedom of expression and assembly to LGBTI persons”, 9 May 2018, Doc. 14488. Written declarations by Assembly members only commit those who sign them.

¹⁵⁸ European Court of Human Rights, *Genderdoc-M v. Moldova*, application no. 9106/06, judgment of 12 June 2012; *Identoba and Others v. Georgia*, application no. 73235/12, judgment of 12 May 2015; *Kaos GL v. Turkey*, application no. 4982/07, judgment of 22 November 2016.

¹⁵⁹ Commissioner for Human Rights, *Human rights and intersex people: Issue paper* (2015).

¹⁶⁰ Parliamentary Assembly of the Council of Europe, *Resolution 2191 (2017) on Promoting the human rights of and eliminating discrimination against intersex people*, 12 October 2017,

¹⁶¹ European Court of Human Rights, *Orlandi and Others v. Italy*, applications nos. 26431/12; 26742/12; 44057/12 and 60088/12, judgment of 14 December 2017.

¹⁶² European Court of Human Rights, *Charron and Merle-Montet v. France*, application no. 22612/15, decision of 16 January 2018.

¹⁶³ Gráinne Healy, *Good Practice Guide on Values-Based Campaigning for Legal Recognition of Same-Sex Partnerships*, Council of Europe, November 2017.

¹⁶⁴ Kees Waaldijk, “Extending rights, responsibilities and status to same-sex families: Trends across Europe”, Ministry of Foreign Affairs of Denmark, March 2018.

equality, and observed that “genuine commitment to full equality would at least require states to seriously consider opening up civil marriage to same-sex couples”.¹⁶⁵

The Assembly had already made important recommendations regarding the rights of transgender and intersex people in the field of private and family life in its *Resolution 2191* (2017) and *Resolution 2148* (2015), referred to above.

In 2018, it took up for the first time specifically questions concerning sexual orientation and equality in private and family life. In October 2018, it adopted *Resolution 2239* (2018) on “Private and family life: achieving equality regardless of sexual orientation”. It called on states that were not already doing so to implement the standards already set out in the Court’s case-law, in particular by ensuring that a specific legal framework provided for the recognition and protection of same-sex couples, and that they had the same rights as regards succession to a tenancy and health insurance cover.

It further called on states to refrain from adopting changes to their constitutions that would prevent the recognition of same-sex marriage or of other forms of LGBT families, and to ensure access without discrimination to rights concerning residence, citizenship, family reunification, medical care, property, inheritance, parental authority, adoption, recognition of children and medically assisted procreation. It emphasised that intolerance that may exist in society towards people’s sexual orientation or gender identity could never be used as a justification for perpetuating discriminatory treatment and urged states to work vigorously to combat the prejudice that enables such discrimination to persist, and to promote acceptance of and respect for LGBT families.¹⁶⁶

Asylum

Throughout the reporting period, the Court continued to receive applications from individuals at risk of expulsion from a Council of Europe Member State, concerning a risk of ill-treatment in breach of Article 3 ECHR should they be returned to their country of origin, due to their sexual orientation or gender identity. Some applications were struck out because the applicant was no longer at risk of expulsion; others were declared inadmissible, due notably to the non-exhaustion of domestic remedies; others were still pending at the time of writing.¹⁶⁷

In October 2018, the Commissioner published a Human Rights Comment entitled “Open minds are needed to improve the protection of LGBTI asylum seekers in Europe”. The comment noted that persons claiming asylum because they are at risk of persecution based on their sexual orientation and gender identity are particularly at risk of the rolling back of protection, and set out key steps that member states should take to ensure adequate protection is granted to persons who seek international protection because they face persecution on the grounds of their sexual orientation or gender identity.¹⁶⁸

Review of the implementation of recommendation CM/Rec(2010)5

In March 2018, the Steering Committee for Human Rights (CDDH) launched a new review process of the implementation of recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity. Both governments and NGOs were invited to contribute to this review process. The CDDH is due to adopt its report on the review in June 2019.¹⁶⁹

¹⁶⁵ Commissioner for Human Rights, “[Access to registered same-sex partnerships: it’s a question of equality](#)”, *Commissioner for Human Rights Webpage*, 21 February 2017.

¹⁶⁶ Parliamentary Assembly of the Council of Europe, *Resolution 2239* (2018) on *Private and family life: achieving equality regardless of sexual orientation*, 10 October 2018,

¹⁶⁷ See European Court of Human Rights, *I.K. v. Switzerland* (no. 21417/17); *A.T. v. Sweden* (no. 78701/14); *E.S. v. Spain* (no. 13273/16); *Nurmatov v. Russia* (no. 56368/17); *O.S. v. Switzerland* (no. 43987/16); *A.R.B. v. The Netherlands* (no. 8108/18).

¹⁶⁸ Commissioner for Human Rights, “[Open minds are needed to improve the protection of LGBTI asylum seekers in Europe](#)”, *Commissioner for Human Rights Webpage*, 11 October 2018.

¹⁶⁹ “[Launching of the new review cycle of the implementation of the Recommendation \(2010\)5 of the CM](#)”, *Council of Europe Website*, 23 March 2018.

EUROPEAN UNION

A Brief Overview of the Latest Decisions by the Court of Justice of the European Union on SOGI issues

By Constantin Cojocariu.¹⁷⁰

During the period covered by the present report, the Court of Justice of the European Union (CJUE) ruled in favour of LGBT applicants in three cases.

The first case, *F. v. Bevándorlási és Állampolgársági Hivatal*, concerned the type of evidence that may be required as proof of the applicants' sexual orientation during asylum proceedings.¹⁷¹

The second case, *MB v Secretary of State for Work and Pensions* concerned the validity of the forced divorce requirement as pre-condition to legal gender recognition where that was linked to the applicant, a trans woman, becoming eligible for a State retirement pension.¹⁷²

The third case, *Coman and Others v. Inspectoratul General pentru Imigrări and Others*, concerned the residence rights of a same-sex couple in a Member State that does not recognise same-sex marriage.¹⁷³

Evidence in asylum claims based on sexual orientation

The case *F. v. Bevándorlási és Állampolgársági Hivatal*, decided on 25 January 2018, involved a Nigerian man who claimed international protection in Hungary based on the fear of persecution in his home country on grounds of his sexual orientation. The Hungarian authorities denied his application in consideration of a psychological report concluding that it was impossible to corroborate his sexual orientation. In this context, the CJEU was asked to

decide if the relevant EU norms in the area of asylum and human rights precluded the use of such expert opinions in asylum proceedings related to LGBT claimants. Should that option be precluded, the CJEU was also asked whether national authorities were prevented from examining by expert methods the truthfulness of such international protection claims.

From the outset, the Court stated that the applicants' claims constituted only the starting point in asylum assessments and that a well-founded fear of persecution could also be linked to the characteristic in question being *attributed* to the applicant by the perpetrator, making any assessment of the credibility of his sexual orientation superfluous.

The CJEU ruled that it was permissible to use expert reports for the assessment of the relevant facts and circumstances, including for example country of origin information (COI), in a manner consistent with the applicant's fundamental rights. At the same time, the asylum authorities had to make a determination on a case-by-case basis, instead of deferring to experts. The Court also noted that, since the type of expert reports used in national proceedings focused on an essential element of the applicant's identity, they constituted a "severe interference with his right to respect for private life". In doing so, the Court specifically mentioned the *Yogyakarta Principles* as supportive authority.¹⁷⁴ Besides being scientifically questionable and inconclusive, such tests were

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¹⁷¹ Court of Justice of the European Union, Case C-473/16, *F. v. Bevándorlási és Állampolgársági Hivatal* (2018); Press Release: [Press Release No. 8/18](#): "An asylum seeker may not be subjected to a psychological test in order to determine his sexual orientation", 25 January 2018.

¹⁷² CJEU, Case C-451/16, *MB v Secretary of State for Work and Pensions* (2018).

¹⁷³ CJEU, Case C-673/16, *Relu Adrian Coman, Robert Clabourn Hamilton, Asociația Accept v Inspectoratul General pentru Imigrări, Ministerul Afacerilor Interne* (2018).

¹⁷⁴ For more information on the Yogyakarta Principles and the process by which they were updated in 2017, see the article written by Julia Ehrt and Mauro Cabral Grinspan in this report.

unnecessary, with Member States having to ensure that the personnel interviewing applicants for international protection were adequately trained to assess all necessary circumstances, including with respect to sexual orientation. Furthermore, where the applicants' statements on their sexual orientation were consistent and plausible, additional confirmation was not needed. Consequently, EU law precluded the use of such expert reports.

Forced divorce as a requirement for legal gender recognition (LGR)

The question referred by the British Supreme Court in the case *MB v Secretary of State for Work and Pensions*, decided on 26 June 2018, involved a trans woman who transitioned after getting married and who was denied access to a state retirement pension from the statutory pensionable age available to women. This was due to her refusing to get a divorce, a necessary pre-condition to legal gender recognition in the United Kingdom at the time. Without being able to legally change her gender markers, she did not qualify as a “woman” for the purposes of accessing a retirement pension from the age of 60. The Supreme Court asked if the legislation preventing married trans people from accessing a State retirement pension based on their gender identity constituted discrimination based on sex prohibited under EU legislation.

The CJEU narrowly circumscribed the scope of the case before it, emphasising that it was concerned solely with the eligibility conditions for a State retirement pension, a subject matter that was covered by EU law, as opposed to legal gender recognition more broadly, which remained within the purview of Member States. Although Member States were competent in matters of civil status, they had to comply with EU law in exercising that competence.

The CJEU noted that the situation of a person who changed gender after marrying was comparable to the situation of a person who had retained their birth gender and is married. The British Government argued that the distinction served the purpose of avoiding the existence of a same-sex marriage in the event the trans spouse was allowed to change their gender markers without getting a divorce.

However, since that justification was not available under applicable EU legislation, there was discrimination based on sex.

The term “spouse” under EU law

The *Coman* case, decided on 5 June 2018, involved a same-sex couple formed of Adrian Coman — a Romanian (i.e. EU citizen)— and Robert Claibourn Hamilton, an American citizen, who got married while living in Belgium and who sought to obtain permission to reside in Romania. The Romanian authorities informed them that Hamilton was not entitled to reside in Romania for longer than three months on grounds of family reunion, since national law did not recognise same-sex marriage. The case ended up before the Constitutional Court, which referred several questions to the CJEU regarding Mr. Hamilton’s right to reside in Romania under EU law and the extent to which the notion of “spouse” employed under EU law encompassed the partner in a same-sex marriage.

The CJEU noted that the applicants created a family life in Belgium, which they had a right to continue upon their return to Romania. In these circumstances, EU law required the Romanian authorities to grant Mr. Hamilton a derived residence right, based on his status as a family member of a EU national. The Court further remarked that the term “spouse” in the applicable provision was gender-neutral and referred to “a person joined to another person by the bonds of marriage.” Although the definition of marriage remained a State prerogative, in exercising that competence Member States had to comply with EU law, including with respect to the freedom of movement.

Under established principle, a restriction to the freedom of movement could be justified if it was based on objective public-interest considerations, interpreted narrowly, if it was proportionate to a legitimate objective pursued by national law and if it was consistent with fundamental rights. The Governments involved in the procedure before the CJEU invoked the fundamental nature of marriage defined as “a union between a man and a woman”. The Court dismissed that argument, reasoning that recognising a same-sex marriage conducted in another Member State for the sole purpose of residence rights did not undermine the institution of marriage or challenge national definitions of marriage. Furthermore, the impugned measure impinged on the right to respect for private and family life, which, under the jurisprudence of the European Court of Human Rights, also covered same-sex couples.

The CJEU therefore held that, in the particular circumstances of the case, a third country national same-sex spouse of an EU citizen had a right to reside in the Member State of which that citizen was a national.

European Law Developments on SOGIE

Complementing rulings of the European Court of Human Rights, the European Committee on Social Rights, and the European Court of Justice.

By Arpi Avetisyan.¹⁷⁵

Rise of populism and nationalism, vocal anti-gender movements are increasingly more noticeable across Europe. This inevitably affects SOGIE communities and human rights activists working in this area. Judging from the extensive flow of cases on SOGIE issues to regional courts, it is evident that litigation plays ever bigger role in upholding human rights and holding states accountable.

This essay looks into the legal developments in the area of SOGIE rights at the European level, focusing on the complementing rulings of the European Court of Human Rights (ECtHR),¹⁷⁶ the European Committee on Social Rights (ECSR)¹⁷⁷ and the European Court of Justice (CJEU).¹⁷⁸

It is evident that litigation plays ever bigger role in upholding human rights and holding states accountable.

Despite some setbacks, the 2017-2018 have witnessed important legal developments at the European level, especially in the areas of recognition of same-sex couples and freedom of movement, freedom of expression, prohibition of sterilisation of trans people, asylum, and *non-refoulment*.¹⁷⁹

Many of the cases touch upon morality issues and the notion of “traditional family” weaves though and combines with other areas of SOGIE rights being brought to the Courts’ attention.

Family rights

Within context of the right to freedom of movement, the landmark judgment of *Coman and Others*¹⁸⁰ brought a big celebration for confirming equality for same-sex spouses exercising their freedom of movement across the EU. In this case, Adrian Coman, a Romanian citizen, had married his husband (a US citizen) in Belgium while residing there. Although EU law provides protection against discrimination based on sexual orientation (SO),¹⁸¹ and freedom of movement is one of the essential pillars of the EU,¹⁸² Romania did not recognise

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¹⁷⁶ The [European Court of Human Rights](#) is a Council of Europe body, which rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

¹⁷⁷ The [European Committee of Social Rights](#) monitors compliance with the Charter under two complementary mechanisms: through collective complaints lodged by the social partners and other non-governmental organisations ([Collective Complaints Procedure](#)), and through national reports drawn up by Contracting Parties ([Reporting System](#)),

¹⁷⁸ The [Court of Justice of the European Union](#) is the judicial institution of the European Union and of the European Atomic Energy Community (Euratom). Its primary task is to examine the legality of EU measures and ensure the uniform interpretation and application of EU law.

¹⁷⁹ This is not a comprehensive survey, but provides highlights on developments that have had or will have a significant impact in further developments in respective areas.

¹⁸⁰ CJEU, *Case C-673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Others*, 5 June 2018.

¹⁸¹ Article 21 of the EU Charter on the Fundamental Rights.

¹⁸² [Citizens’ Rights Directive](#) (Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation - EEC).

their marriage¹⁸³ and authorities denied a residence permit to the American spouse based on the Citizens Directive.

This judgment is of great significance in many ways. The CJEU confirmed that “spouse” is “a person joined to another person by the bonds of marriage”,¹⁸⁴ and clarified that the term “is gender-neutral and may therefore cover the same-sex spouse of the Union citizen concerned”.¹⁸⁵ This was a huge shift in Court’s approach from an earlier one, where it had defined marriage as “generally accepted by the Member States”, to mean “a union between two persons of the opposite sex”.¹⁸⁶

However, as an EU body, the CJEU lacks competence to rule on marriage laws of member states. Therefore, this ruling is confined to recognition for the purposes of freedom of movement only.¹⁸⁷ This was also to address the concerns raised by a few Member States around public policy or “national identity” if they allowed same-sex couples to use the Citizen’s Directive.¹⁸⁸ In this regard, the CJEU made it clear that as “such recognition does not require that a Member State [...] provide, in its national law, for the institution of marriage between persons of the same sex”. Having said that, the *Coman* case is a huge way forward as it cleared up the legal uncertainty that many LGBT families have been facing for years and it may be considered a first step in recognition of same-sex couples beyond residence rights, especially in those States that have no legal framework in place.¹⁸⁹

In considerations on the family life of same-sex couples, in the *Coman* CJEU took on ECtHR’s approach. Among others, it looked at *Orlandi and*

Others v Italy,¹⁹⁰ where ECHR confirmed that States ought to provide *some form* of legal recognition to marriages of same-sex couples contracted abroad. While refusing to consider the claims under Article 12 on the right to marriage and referring to the notion of “margin of appreciation”,¹⁹¹ the ECtHR relied on its earlier judgment of *Oliari and Others*¹⁹² where it had established the need of legal recognition and protection of relationships of same sex couples.¹⁹³ Importantly, both CJEU Advocate General in *Coman*, and the ECtHR in *Orlandi* indicated the shift in interpretation of the concept “spouse” and “marriage”, rapid developments in recognition of same-sex unions in Europe, with majority legislation in favour of such recognitions.¹⁹⁴

“Propaganda laws” and freedom of expression

In summer 2017 the ECtHR’s delivered a strong worded judgment in *Bayev and Other v Russia*¹⁹⁵ concerning Russia’s infamous “gay propaganda laws”.¹⁹⁶ This case concerned three activists who argued that application of the laws for using slogans such as “Homosexuality is natural and normal”, “Children have a right to know”, “Great people are also sometimes gay” among others, during protests held outside schools or children’s libraries in Russia was in violation of their right to freedom of expression. The applicants were found guilty by domestic courts of an administrative offence (“public activities aimed at the promotion of homosexuality among minors”).

This judgment was a leap forward from a similar decision by UN HRC in *Fedotova* in 2012.¹⁹⁷ The

¹⁸³ Article 277(2) of the Romanian Civil Code states: “Same-sex marriage contracted abroad, whether between Romanian citizens or by foreign citizens, is not recognised in Romania”.

¹⁸⁴ *Coman and Others*, para 34.

¹⁸⁵ *Ibid*, para 35.

¹⁸⁶ CJEU, C-122/99 P and C-125/99, *P D and Kingdom of Sweden v Council of the European Union*, 31 May 2001m, para 34.

¹⁸⁷ N.B. The judgment is applicable in certain conditions: a) in freedom of movement cases only; b) the marriages must be those concluded in an EU MS with genuine residence of at least 3 months; c) the judgment concerns residence rights only, and any additional rights are under the discretion of the hosting MS.

¹⁸⁸ Hungary, Latvia, Poland intervened on these points before the CJEU.

¹⁸⁹ Romania, Bulgaria, Poland, Slovakia, Lithuania and Latvia.

¹⁹⁰ *Orlandi and Others v Italy* (Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12), ECtHR, 14 December 2017.

¹⁹¹ Margin of appreciation doctrine is developed by the ECtHR. It means that a member state is permitted a degree of discretion, subject to ECtHR’s supervision, when it takes legislative, administrative or judicial action in the area of a Convention right. For further details see [OSJI Factsheet](#).

¹⁹² *Oliari and Others v Italy* (Applications nos. 18766/11 and 36030/11), ECtHR, 21 July 2015.

¹⁹³ *Orlandi*, para 192.

¹⁹⁴ *Advocate General Opinion in Coman and Others*, 11 January 2018, para 56; *Orlandi*, paras 204-206.

¹⁹⁵ *Bayev and Others v Russia* (Appl. Nos 67667/09, 44092/12 and 56717/12), ECtHR, 20 June 2017.

¹⁹⁶ Series of legislative acts (most recently in 2013) “promoting non-traditional sexual relationships” among minors was made an offence punishable by a fine. For details, see *Bayev and Others*, paras 26-34, relevant domestic laws.

¹⁹⁷ Human Rights Committee, *Fedotova v. Russian Federation*, Merits, Communication No 1932/2010, UN Doc CCPR/C/106/D/1932/2010, 31 October 2012.

ECtHR found that these laws were not only in violation of applicants' right to freedom of expression, but also had reinforced stigma and prejudice, and encouraged homophobia, which was incompatible with the values of a democratic society and the European Convention.

Interestingly, while considering how far interference in the right to freedom of expression could be justified based on the protection of morals (as argued by the Russian government), the ECtHR acknowledged the commitment to family values by LGBTI community members and in so doing reinforced the notion that the right to "family life" equally applies to them. It referred to the steady flow of cases coming to its attention on various aspects of family life (access to marriage, parenthood and adoption), in effect rejecting the Government's argument that exercising freedom of expression on this question could devalue or otherwise adversely affect the existence of "traditional families" or compromise their future.¹⁹⁸

Importantly, the ECtHR reiterated that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority".¹⁹⁹

The ECtHR reiterated that "it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority".

Lastly, in relation to the argument of the protection of the rights of others, the risk of minors being

"converted" to homosexuality, the Court found that the Government had been unable to provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity was susceptible to change under external influence. In addition to significant jurisprudential development, this judgment is also important means in pre-empting similar initiatives of introducing propaganda laws occurring regularly in various European countries.²⁰⁰

Sterilisation and bodily integrity

The ECtHR had already ruled in a number of cases concerning rights of trans people seeking legal gender recognition (LGR), but it was not until the case of the *A.P., Garçon and Nicot v. France* that the Court established that the sterilisation requirement as part of LGR violates human rights.²⁰¹ The applicants in this case complained that they needed to prove infertility and genital surgery, as well as undergoing excessive and lengthy discriminatory examinations in order to satisfy the condition. The ECtHR held that requiring that individuals undergo sterilisation against their will for the purpose of achieving LGR puts those individuals in a situation of an insoluble dilemma: that of choosing full exercise of the right to private life (for LGR) at the expense of their right to physical integrity, also guaranteed by the same right.²⁰²

This line of reasoning resonated in the decision of *Transgender Europe and ILGA-Europe v. the Czech Republic*,²⁰³ by the European Committee on Social Rights (ECSR).²⁰⁴ So far this is the first discrimination case relating to GI decided under this procedure. The ECSR found that the legal requirement for transgender persons in the Czech Republic to undergo medical sterilisation in order to have their gender identity recognised seriously impacts a person's health, physical and psychological integrity, and dignity, therefore is in violation of the right to health under the Charter. The Committee reiterated that gender recognition in itself is a right recognised under international human rights law.

¹⁹⁸ *Bayev and Others*, para 67.

¹⁹⁹ *Ibid*, para 70.

²⁰⁰ See e.g. ILGA-Europe, *Annual Review 2018*, 26 (Moldova), 72 (Hungary).

²⁰¹ *A.P., Garçon and Nicot v France* (Appl nos. 79885/12, 52471/13 and 52596/13), ECtHR, 6 April 2017.

²⁰² Although not systematically, but ECHR cases are also directly applied in domestic courts, e.g. in the *case of two trans persons in Lithuania*.

²⁰³ *Transgender Europe and ILGA-Europe v Czech Republic*, Complaint No. 117/2015, ECSR, made public 1 October 2018.

²⁰⁴ This case was brought under the *Collective Complaints Procedure*.

This case will serve as a basis for reinforced advocacy efforts before this Council of Europe body, and will allow the Committee to find violations of the right to health under its national reporting system against the many other Council of Europe Member States which still require sterilisation as part of the LGR process.²⁰⁵

Regrettably, these rulings did not go far enough to address ending forced medical examinations ordered by the national courts or a mental health diagnosis as a violation of the European Convention or the Charter. Another drawback is the reluctance by these two bodies to consider discriminatory aspect of sterilisation requirement. It is much hoped however, that in light of World Health Organisation's recent removal of trans identities from the mental health disorders chapter²⁰⁶, both European and national courts will adopt the same approach.

Asylum and non-refoulement

In the area of asylum and migration, there has been different dynamics between various European Courts. To date, CJEU has ruled in three judgments,²⁰⁷ the latest being *F. v Bevándorlási és Állampolgársági Hivatal*.²⁰⁸ The latter concerned subjecting "F" —a Nigerian man claiming international protection in Hungary due to persecution based on his sexual orientation— to psychological tests in order to "determine his homosexuality". The CJEU established that the use of psychological tests to determine the sexual orientation of an asylum seeker "amounts to a disproportionate interference"²⁰⁹ in their private life. While the CJEU upheld that national governments can use experts' reports as part of an asylum seekers' credibility assessment, they cannot do so in a way that violates the fundamental rights guaranteed by the Charter of Fundamental Rights of the EU and they cannot base a decision solely on

the conclusions of such a report or be considered bound by it. What is remarkable, is that in addition to applicable EU law in this case CJEU relied on the *Yogyakarta Principles*,²¹⁰ in particular "that no person may be forced to undergo any form of psychological test on account of his sexual orientation or gender identity".²¹¹ This is especially significant in the context of CJEU's repeatedly claimed role of adjudicator of EU law, and not being a human rights court. In comparison, the ECtHR has not yet decided in any *non-refoulement* related cases based on applicants' SOGIE. These cases have either been declared inadmissible or struck out as a result of friendly settlement. Such cases are regularly submitted to ECtHR's scrutiny, and hopefully this Court will also provide further guidance with a positive judgment in this area.²¹²

These developments cannot be taken for granted, especially in light of several strong dissenting opinions voiced in these judgments.

The cases discussed above are a huge milestone in development of SOGIE issues, and important foundation to continue building on further. The notion of majority versus minority comes up in most of them, especially concerning SO. Although these developments cannot be taken for granted especially in light of several strong dissenting opinions voiced in these judgments, it is encouraging to see litigation as a means for protections of LGBTI people, followed with positive rulings from European Courts.

²⁰⁵ For further details, see "[Reporting system of the European Social Charter](#)".

²⁰⁶ "[World Health Organisation moves to end classifying trans identities as mental illness](#)", TGEU; WHO, [International Classification of Diseases](#).

²⁰⁷ CJEU, Joint cases C-199/12 to C-201/12, *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel*, 7 November 2013 (concerning concealment of one's SO); Joint Cases C-148/13 to C-150/13, A, B, C v *Staatssecretaris van Veiligheid en Justitie*, 2 December 2014 (on credibility assessments).

²⁰⁸ CJEU, C-473/16, *F. v Bevándorlási és Állampolgársági Hivatal*, 25 January 2018.

²⁰⁹ *Ibid.*, para 60.

²¹⁰ [Yogyakarta principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity](#) (2007).

²¹¹ *F v Bevándorlási és Állampolgársági Hivatal*, para. 62.

²¹² It is noteworthy, that in a recent case, *S.A.C. v UK*, currently communicated to the UK Government for response, for the first time ECtHR has asked about concealment of one's SO upon returning to their home country where they are at risk of persecution.

GLOBAL PERSPECTIVES

STATE-SPONSORED HOMOPHOBIA 2019



GLOBAL PERSPECTIVES

AFRICA

STATE-SPONSORED HOMOPHOBIA 2019



AFRICA

Courage and Resilience amidst Oppression

Various authors.

Mechanisms of Adaptation and Resistance to Repression in North Africa

By Naoufal Bouzid¹ and Khadija Rouggany.

The situation of LGBTQI+ people in North Africa is characterized by a context in which 4 countries still criminalize sexual acts between adults of the same sex: Mauritania, Morocco, Algeria and Tunisia.² Additionally, Egypt does not formally have norms that explicitly criminalize this type of acts, but in practice they are criminalized under other legal provisions (*de facto* criminalization).³ This criminalization carries penalties ranging from imprisonment and the fine to death, in Mauritania.

In addition, the regional context is marked by a repression that goes beyond limiting the sexual and emotional life of LGBTQI+ people. The laws restrict the right to freedom of assembly and association in all the countries of the region,⁴ except in Tunisia, where civil society has managed to found and officially register several LGBTQI+ organizations. Similarly, freedom of expression is often severely limited, notwithstanding initiatives that seek to empower local communities, often running the risk of being persecuted.⁵

Therefore, despite a difficult context, queer groups are emerging under their own dynamics - groups whose objective is to improve the lives of those who are affected.

In contexts where repressive laws continue to oppress LGBTQI+ people and create barriers to the formation of human rights organisations, local activists in the region opt to organize around informal groups/collectives. Under that scheme, they carry out their work to the extent they can. Although for the moment it is mostly discrete activities, they are progressively achieving a certain level of visibility.

Arts and festivals committed to diversity

When words, slogans and harangues are no longer enough to achieve mobilization, art committed to diversity stands out as an effective alternative voice. The objective is to raise awareness about the human rights of LGBTQI+ people and democracy, through an interactive dynamic: that of cinema, music, and theater that reflect the difficult lives of LGBTQI+ people in Northern Africa. Among these initiatives are the *Chof-tohonna* festival and the Tunisian International Festival of Feminist Art LBT Chouf Minorities Association, which had its 4th edition in 2018.⁶

Social networks

In addition, the *sotto voce* dynamic has not prevented activists from participating in training activities and further developing their capacities at the national, regional or international level. The expansion of social networks also provides greater visibility to groups and organisations and helps to maintain a sense of closeness within the

¹ Nao Bouzid is a gay African feminist and an LGBTQI+ activist from Morocco. He is the co-founder and the Executive Director of Equality Morocco, an LGBTQI+ organization in Morocco. Nao has over 10 years of experience working with local and international LGBTQI+ and Human Rights NGOs. During these years of activism, he got involved in different national and international campaigns calling for the decriminalization of same-sex consensual relationships and in social awareness campaigns about LGBTQI+ issues in Morocco.

² The human rights situation in each of these countries and the main events between 2017 and 2018 are developed in the entries for each country in the "Criminalization" section of this report.

³ For more information on *de facto* criminalization and the situation of persecution in Egypt, see the entry for that country in the "Criminalisation" section of this report.

⁴ For more information on these types of restrictions, see the section on legal barriers to registration and operation of SOR NGOs in the "Global Overview" section of this report.

⁵ For more information on restrictions on freedom of expression, see the corresponding section in the "Global Overview" section of this report.

⁶ "International Feminist Art Festival of Tunis", Facebook Webpage.

community, through the interaction and publication of activities on social networks.

These communication channels have been used to carry out awareness and promotion campaigns, such as the viral campaign #HomophobiasACrime and #StopArt489 of the MALI group (Alternative Movement for Individual Freedoms), which is launched annually on the occasion of the IDAHOT (Day International against homo, lesbo, bi and transphobia), or the #TenTen virtual campaign that celebrates the national day of LGBTIQ+ people in Algeria. Initiated by three activists, this day is celebrated each year on October 10 since 2007. Activists and allies light candles and share photos of these candles with that hashtag as an act of solidarity in social networks.

Web magazines and radio broadcasts

On the other hand, in order to better frame and develop theoretical content, some groups in the region publish quarterly (or every semester) articles in attractive journals, with content on sexual diversity issues. Other groups manage to broadcast on web radios on issues related to the rights of LGBTIQ+ people, sometimes with the presence of experts and offering the possibility of asking questions live through Facebook.

Dynamics of regional coalitions

The dynamics of networks, meetings, exchanges and regional trainings have allowed the emergence of several initiatives. Among them is Transat, a platform of trans activists, non-binaries and gender dissidents from North Africa and the Middle East, which capitalizes on a queer regional solidarity as a form of virtual resistance.⁷

Regional and international incidence

Several groups in the region are part of a strategic vision to reform the laws that affect LGBTIQ+ people and are working on the issue through two main strategies. The first is to prepare reports to monitor violations of the rights of LGBTIQ+ people. The second aims to occupy advocacy spaces, to encourage and channel pressure from the international community on national governments, including the Human Rights Council, Universal

Periodic Review and the African System of Human and People's Rights. In effect, the region knows of a real dynamic that overcomes the many existent restrictions. The best example is how the Egyptian queer community survived the repression of 2017, the effects of which are still palpable.

Activist groups carry out their activities despite very limited resources: only 0.001% of global LGBTIQ+ funding goes to North Africa,⁸ while the region needs much more help to implement the changes desired by the community.

A Brief Overview of East Africa

By Eric Guitari.⁹

In East Africa, the continued criminalization of private consensual sexual acts between adults of the same sex, as well as the outlawing of diverse gender expressions are indicators of States' interest to entrench discrimination and violence based on real or perceived sexual orientation and gender identity/ expression.

Although Rwanda does not criminalize same sex relations, social stigma against LGBTIQ persons is prevalent, including family exclusion and discrimination on the basis of sexual orientation and gender identity is rife in the employment sector.

None of the East Africa countries have anti-discrimination statutes and hate crimes laws to protect persons from bias or discrimination on grounds of their sexual orientation and gender identity. The legal social status of LGBTIQ persons and communities in East and central Africa is nothing but vague, hostile and criminal.

According to reports by social movements and activists, violence and discrimination remain the most concerning legal social issues facing LGBTIQ person and communities in the East Africa region.

For example, Tanzania has banned provision of condoms and lubricants to LGBTIQ health clinics and has since 2018, upscaled the use of forced anal examination against suspected LGBTIQ persons including cramping down on organizations that support their rights.¹⁰

⁷ "Transat", Website.

⁸ Global Philanthropy Project (GPP), *The 2015-2016 Global Resources Report: Philanthropic & Government Support for Lesbian, Gay, Bisexual, Transgender, and Intersex Communities* (2018).

⁹ Eric Guitari is a PhD Candidate (SJD) at Harvard Law School and the former Executive Director of the National Gay and Lesbian Human Rights Commission-Kenya (NGLHRC).

¹⁰ For more information, see the entry on Tanzania in the "Criminalisation" section of this report.

In Burundi, a protracted election violence led by an incumbent state that refuses to obey presidential constitutional term limits continues to subject LGBTIQ persons to structural violence on account of their political opinions and sexual orientations.¹¹

In Uganda, reports of an imminent parliamentary bill to further criminalize same sex relations continue to heighten anguish and insecurities within LGBTIQ community members. Political and religious elites in Uganda continue to perpetuate paternalistic public discourses that cast same sex orientation and trans identities as existential threats to the future of the nation. Anxieties over reproduction and fear of recruitment of children into homosexuality are the common social trojans used against LGBTIQ persons in public discourse.

In Kenya, NGLHRC's Because Womxn has reported increased vulnerabilities and discrimination against LBQ women on account of multiple biases of gender and sexual orientation. This has resulted in marginalization, violence and exclusion of LBQ women not only by the general society but also within the LGBTIQ community. These intersections and multiplicity of discrimination grounds become more relevant and subtler in asylum cases for LGBTIQ persons who face rights violations and protection challenges during asylum processing.

Geo-conflicts in Somalia, DR Congo, Sudan and South Sudan have continued to drive out LGBTIQ refugees towards Kenya, Tanzania and Uganda. The asylum flights pose a legal paradox where countries that criminalize same sex relations continue to abide by their international obligations to protect LGBTIQ refugees and asylum seekers within their borders but at the same time continue to prosecute and persecute their LGBTIQ citizens.

Activists and groups have been documenting and fighting discriminations based on sexual orientation including ongoing litigation challenging criminalization of same sex relations in Kenya, denial of registration of SMUG in Uganda, refusal of registration of NGLHRC in Kenya and the recently (2018) successful challenge against forced anal examination in Kenya.

It can thus be said that criminalizing East States have no demonstrable legislative and political interests to reduce violence and suffering on LGBTIQ persons. LGBTIQ persons within these countries need therefore embrace their civic duty

to stay vigilant on their rights and engage in public education towards equality and social justice.

The Situation of the LGBT Community in West Africa

By Ababacar Sadikh Ndoeye¹² and Emma Onekekou.¹³

The context of West Africa is peculiar as a "false calm" exists when speaking of the rights of LGBTI persons. This silence is deceptive as it could suggest that the situation of lesbians, gays, trans and intersex persons is positive. However, nothing could be further from the truth. One of the problems in West Africa is that there is no political will to support and respect the rights of LGBT persons. There is a certain level of political will when it comes to health issues and HIV/AIDS, related to the taking care of men who have sex with men (MSM). However, it is exclusively focused on this group to the detriment of women who have sex with women and trans persons.

The socio-legal diversity in the region

The region is characterised by its socio-cultural and legislative diversity, which makes LGBT communities face distinct legal differences. These go from the explicit criminalisation (in countries such as Gambia, Guinea, Liberia, Mauritania, Nigeria, Senegal, Sierra Leon, and Togo) to countries with a certain level of antidiscrimination protection (such as Cape Verde).¹⁴ In a more ambiguous situation are some countries that do not explicitly criminalise same-sex sexual acts. However, in practice there have been recorded cases of detention and prosecution for such acts (such as Ivory Coast).

Religion has a big influence in judicial rulings of some West African countries, such as Mauritania, Niger, Senegal and Northern Nigeria, where Islam has a strong presence in both the social notions of sexuality and its application in the law. In effect, Islamic Sharia law is one more source of law among others, in which same-sex sexual acts are

¹¹ For more information, see the entry on Burundi in the "Criminalisation" section of this report.

¹² Ababacar Ndoeye is a blogger (@Tous_pour_1) and human rights activist in Senegal.

¹³ Emma Onekekou is a blogger (@EmmalInfos) and human rights activist in Ivory Coast and Burkina Faso.

¹⁴ Since 2008, article 45(2) of the New Labour Code of Cape Verde prohibits an employer soliciting information of the "sex life" of their employees. Article 406(3) imposes sanctions on employers who fire employees on the basis of their sexual orientation.

criminalised, in some cases the death penalty applies.¹⁵

Generally speaking, it can be said that the HIV/AIDS epidemic has opened some space for LGBT activism. The focus of the issue regarding men who have sex with men (MSM) has shaped the emergence of the LGBT community and given certain access to funding. Therefore, the rights of LGBT people in the region are mostly addressed through the issues of public health. This approach has however, brought some consequences for lesbians, bisexual women and trans persons whose own issues remain marginalised.

Even so, in recent years, a broader approach for LGBTI organisations has progressively emerged. For example, in the Ivory Coast a federation of LGBTI organisations called Couple Akwaba was created, which brought together 15 of the 23 organisations in the country.¹⁶ This organisation faces multiple challenges, such as obtaining information on time and from reliable sources in the face of violations of LGBT persons' rights in the country and the resources to document them, give psychological support to victims of attack and/or arbitrary detention due to the sexual orientation or the gender identity, or even to provide support for temporary relocation in grave situations.¹⁷

In the Ivory Coast, despite the fact that no law exists which criminalises consensual same-sex sexual relations, at the end of 2016 a judge in the city of Sassandra used article 360 of the Penal Code to condemn 2 men to 18 month imprisonment.¹⁸ They were caught by the uncle of one of the men, and after having been reported, they admitted before the judge to having been in a loving relationship.¹⁹

In Burkina Faso, in the period between March 2017 and December 2018, there were 10 LGBTI persons detained in Ouagadougou (the capital city) and 38 more in the municipality of Bobo-Dioulasso (the second biggest city in the country and predominantly Islamic).²⁰ Despite this, the

Burkinabe penal code does not actually prohibit consensual same-sex sexual acts. In October 2017, two gay men reported to the authorities that their phones had been stolen. On being summoned by the authorities after the criminal had been apprehended and phones recovered, the claimants were detained as the phones had contained same-sex pornographic content. The two men were eventually freed thanks to the intervention of a community leader in Ouagadougou and having paid a fine of 40,000 francs.

In countries where same-sex sexual relations are criminalised, there are few cases where the persons arrested have been found "in flagrante delicto". In the majority of cases, the arrests and prosecutions take place based on third party accusations (sometimes anonymous) that report people for having had allegedly performed same-sex sexual acts. Such was the case where a group of 2 men and 2 women were detained on 15 September 2018 in the city of Dakar, Senegal. The authorities of Godpeul arrested them as they were reported for committing "unnatural acts" and having gone against the moral order.²¹

Violence and social prejudice

Same-sex sexual acts continues to be a taboo subject in almost all West African countries, particularly in countries such as Ivory Coast, Burkina Faso, Senegal and Benin, where the existence of LGBTI people is often completely denied. Public opinion and the media usually consider **sexual orientation** as a "choice" that reflects a "sexual perversion" or even motivated by "economic incentive".²² The growth in widespread general homophobia has justified multiple forms of violence against LGBTI people: from arbitrary detention by the police, school exclusion, denial of medical attention, expulsion from the home, arbitrary dismissal from employment to lynching

¹⁵ Countries where there is a possibility of imposing the death penalty for consensual same-sex sexual relations are: Mauritania and Nigeria (in the provinces where Islamic sharia law applies).

¹⁶ "La Coupole Akwaba", Facebook Page.

¹⁷ Ababacar Sadikh Ndoye, *Rapport de terrain : Documentation des cas de violence sur les LGBTQI du Mali*, 4, 2018.

¹⁸ Penal Code (Ivory Coast), article 360: "Whoever commits acts which constitute an affront to public modesty will be sentenced to imprisonment of between three months and two years, and with a fine of between 50,000 and 500,000 francs. If the affront to public modesty is considered an indecent act or against nature with a person of the same sex, the sentence will be imprisonment of between six months and two years, and a fine of 50,000 to 300,000 francs".

¹⁹ See the following: "Justice : première condamnation pour pratique homosexuelle en Côte d'Ivoire", Abidjan Net, 14 November 2016; "Pour la première fois, la Côte d'Ivoire condamne deux hommes pour homosexualité", 18 November 2016; "Côte d'Ivoire : des homosexuels condamnés à 18 mois de prison", *Afrique sur 7*, 16 November 2016; "Ivory Coast officials refuse to explain why two gay men were jailed", *The Guardian*, 26 January 2017.

²⁰ This information was obtained by the Courage and Plural Vision Organisation (individual interview).

²¹ "Sicap: Une bande d'homo arrêtée pour vidéos obscènes", *Seneweb.com*, 17 September 2018.

²² "Poverty responsible for rise in homosexuality", *Graphic Online*, 3 November 2018.

and murder.²³ In many cases the attacks are recorded on phones and go viral being shared on social media. On 15 January 2019, two young men were discovered in the district of Wolofobougou-Bolibana, Bamako, Mali, kissing in the street. Neighbours and some police officers dressed as civilians attacked and beat them in a type of lynching.²⁴ In some areas of Ghana, homophobic gangs lynch LGBT persons, later terrorising their partners and families.²⁵ LGBT people live in an increasingly hostile environment, suffering increasingly violent attacks and arbitrary detention. This happens with the acquiescence of the States of the region who give no response to these violations.²⁶ Even in Benin where consensual same-sex sexual relations are not criminalised, LGBT persons are forced to live in hiding.²⁷

New forms of organised violence and the media

The growth of homophobia has found new ways of operating by harassing, exposing and humiliating LGBT persons through false social network profiles.²⁸ In 2017, the movement "Fight against homosexuality in Mali" (LCHM) was created, made up of numerous Malian residents, although its main leaders live abroad (chiefly in France, Italy, Canada and the United States). In Mali social networks, the news group of the movement is achieving high levels of participation in what they call "hunting homosexuals".²⁹

In all of West Africa, we are seeing a stronger media focus on sexual orientation issues, with the media tending to publish incendiary articles and reports on the issue. It is common to read extremely pejorative content regarding same-sex sexual acts, denigrating references of LGBT people, equating it with paedophilia and prostitution, as well as negative descriptions of human rights defenders.³⁰

In the face of such levels of aggressions, many LGBT people in West Africa have no other choice but to leave their countries in search of asylum. In general, the majority of victims of arbitrary attacks and detention due to their sexual orientation or gender identity go to neighbouring countries or Europe and other western countries.

Access to economic support

On the economic front, LGBTI organisations in West Africa are responsible for the plurality of self-employed activity which generates income. This highlights the vulnerability of LGBTI people in this regard. In fact, gender identity expression can be a barrier to employment. This problem is still more worrying in the case of trans people, who in most countries are unable to change their gender marker on their identity cards, diplomas and other necessary documents.³¹ Some trans people have been forced to completely abandon their sources of income, and on occasion are arrested for the crime of "identity theft", as was the case of Lyly.³²

²³ "Scandale: Un homosexuel a été battu puis déshabillé en pleine rue à Abidjan", *Net Afrique*, 25 April 2018; "Bamako (Mali): lynchage sordide d'un homosexuel dans la rue", *Fdesouche*, 20 February 2018; "Vidéo - Déchaînement de violence contre une personne transsexuelle à Bamako", *Net Afrique*, 11 October 2018.

²⁴ "Mali : des homosexuels tabassés par une foule à Bamako", *Infowakat*, 17 January 2019.

²⁵ "Family of lynched gay man's partner demand maximum security", *Ghana Web*, 31 March 2018; "Police save suspected lesbians from lynching", 13 February 2018; "Angry Youth In Kyebi Zongo Lynched Gay Man, Still Hunting His Partner", *Daily Guide Network*, 3 August 2015.

²⁶ See, for example: "In Sierra Leone, human rights defenders stay silent on LGBTQ+ discrimination", *Politico SL*, 16 January 2018.

²⁷ "Être adolescent et gay au Bénin, c'est vivre caché dans un monde libre", *Le Monde*, 25 December 2018.

²⁸ "Gays in Mali are hunted and humiliated online", *The Observers*, 18 September 2017.

²⁹ For more information see: Ababacar Sadikh Ndoeye, *Rapport de terrain : Documentation des cas de violence sur les LGBTQI du Mali*, 4, 2018; "Chasse aux homosexuels au Mali : les accusations s'organisent sur Internet", *Les Observateurs*, 15 September 2017.

³⁰ See, for example: "Côte d'Ivoire : des homosexuels condamnés à 18 mois de prison", *Afrique sur 7*, 16 November 2016; "Homosexualité : Un haut cadre d'une entreprise privée chassait sur Facebook les...", *Seneweb*, 30 May 2018; "Homosexualité : Sur les pas de la communauté LGBT de Bobo-Dioulasso", *Le Faso*, 30 May 2016.

³¹ For more information on the legislation in the modification of personal documentation in Africa, see: Zhan Chiam et al., *Trans Legal Mapping Report 2017: Recognition before the law* (Geneva: ILGA, November 2017).

³² "Les femmes transgenres africaines discriminées au travail", *Blog : Tous Pour Un Monde Meilleur*, 21 August 2018.

An Overview of Some Central African countries

By Julie Makuala Di Baku³³ and Jean Paul Enama.³⁴

In the last two years, issues related to sexual orientation and gender identity have not seen much progress in Central Africa. These issues continue to be perceived as taboo and “contrary to African values”. In addition, many people still believe that these are issues “imported from Europe”. It is only necessary to walk the streets of several of these countries to understand how difficult it is to be seen as a couple with a person of the same sex. In the region, while in some countries there are explicit laws that criminalize same-sex sexual acts, in others there is a legal vacuum on the matter.

Although Cameroon revised its criminal code in 2016, the provisions that penalizes same-sex relationships were unfortunately kept intact.³⁵ In the international arena, Cameroon has rejected all recommendations on issues of sexual orientation and gender identity.³⁶ Even so, there is some political will to eradicate HIV from key population groups and the National Health Plan 2018-2022 identifies men who have sex with men (MSM) and trans women as a vulnerable population.

In the Central African Republic, although same-sex sexual relations between consenting adults are not explicitly criminalized, article 85 of the criminal code criminalizes “acts against nature committed in public”, defining them as “attacks on public morals” and imposing harsher penalties compared to other attacks on morals. Alternatives Centrafrique, a local LGBT organization, has documented cases of arbitrary arrests based on (false) allegations of same-sex sexual intercourse.³⁷ In this line, in its

3rd cycle of the UPR, the Central African Republic received two recommendations (prohibit discrimination based on sexual orientation and gender identity and improve the situation of sexual minorities).³⁸ The National HIV Plan 2016-2020 identifies MSM as key populations, so the actions of the Global Fund project focus on them.

While there is no law in Gabon criminalizing consensual same-sex relations between consenting adults, the human rights situation of LGBT people remains extremely worrying,³⁹ with arrests for “moral attacks” based only on the form of dressing “translating sexual orientation”.⁴⁰ Gabon had its first recommendation on SOGIEC in the third cycle of the UPR in 2017, which focused on access to medical care for LGBT people.⁴¹ In fact, the National Health Plan does not recognize gay and bisexual men as a key population.

Before 2017, the legal situation was not particularly clear in Chad: Article 272 of the Criminal Code condemned those who committed “acts against nature” with persons under 21 years of age. A bill to criminalize same-sex relations with up to 20 years in prison was debated in Parliament in 2016 but failed to pass. However, the revision of the Criminal Code that entered into force in 2017 incorporated the criminalization of “same-sex sexual relations”,⁴² making Chad the latest State to criminalize same-sex consensual relationships and, therefore, a worrying example of legal regression in the region. Furthermore, the National Health and HIV Plan does not identify key populations and there is no record on any LGBT organization operating in the country.

Of particular gravity is the situation in the Democratic Republic of the Congo, where LGBT people continue to be victims of human rights violations and face increasing discrimination and

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³⁴ Jean Paul Enama is the Executive Director of Humanity First Cameroon.

³⁵ This article has simply changed its nomenclature (from 347bis to 347-1 and has maintained its text.

³⁶ For more details on the participation of Cameroon in the framework of the Universal Periodic Review, see the entry on Cameroon in the “Criminalization” section of this report.

³⁷ For more information, see: Alternatives Centrafrique, *Rapport sur la situation des minorités sexuelles et de genre en Centrafrique* (2018).

³⁸ El Estado contestará esta pregunta durante la 40a sesión del Consejo de Derechos Humanos.

³⁹ “Gabon: malgré sa légalité, l’homosexualité reste très mal tolérée dans le pays”, *RFI Afrique*, 17 de mayo de 2017;

⁴⁰ “Un jeune homosexuel gabonais arrêté pour attentat à la pudeur à Moanda”, *Info 241*, 18 de noviembre de 2018.

⁴¹ See: *Report of the Working Group on the Universal Periodic Review: Gabon*, A/HRC/37/6, 29 December 2017, para. 118.118: Strengthen public policies aimed at addressing the high number of people living with HIV/AIDS and not receiving treatment, particularly women, in order to reduce the rates of HIV transmission from mothers to children during childbirth; as well as for lesbian, gay, bisexual, transgender and intersex people, guaranteeing medical care without discrimination based on sexual orientation and gender identity (Mexico).

⁴² *Penal Code* of Chad (enacted by Law No. 001/PR/2017, 8 May 2017, article 354).

stigmatization. While same-sex sexual relations between consenting adults are not expressly criminalized,⁴³ Article 176 of the Criminal Code—which criminalizes activities against public decency—is used in practice as the legal basis to criminalize LGBT persons.⁴⁴

There are numerous documented instances of arbitrary arrests and blackmail perpetrated by the police in which this provision is used to persecute and repress public displays of affection, non-normative gender expressions, among others.⁴⁵

In this regard, the Human Rights Committee expressed its concern and recommended that the State ensure that no person is prosecuted under Article 176 of the Penal Code because of their sexual orientation or gender identity, as well as enact anti-discrimination legislation that expressly includes sexual orientation and gender identity.⁴⁶

Among the few positive aspects, it should be mentioned that the Democratic Republic of the Congo has a law to protect people living with HIV/AIDS.⁴⁷ Articles 3 and 4 of this law prohibit acts of stigmatization and discrimination against any person living with the virus.

In addition, article 2 contains a definition of “vulnerable groups”, which includes sex workers and “homosexuals”. This law is today the only legal text in force that can be used to offer protection to LGBT people, although mainly with respect to men who have sex with men. Unfortunately, this means that lesbians and trans people must use the label of one of the groups identified as “vulnerable groups” to have access to care.

Small Victories Add Up in Southern Africa

The author wishes to remain anonymous.

It could be argued that in a few countries in Southern Africa some advancements in legislative protections and guarantees of equality often outpace changes in public sentiment. Even South Africa, the first country with a constitutional protection from discrimination based on sexual orientation, has and continues to struggle with a lack of societal acceptance of sexual and gender minorities, and reports of anti-LGBT violence seem to regularly cycle through the news.

Yet the past two years have seen a number of legislative and court victories for LGBTI people across the sub-region, proving that progress is possible in the face of resistance. Importantly, the governments of non-criminalizing countries have signalled support for SOGI issues in a number of areas, including ending discrimination in education and supporting LGBTI asylum-seekers.

Homophobia, discrimination, and hate incidents

In terms of marriage equality, constitutional rights, and legal protections from discrimination for LGBTI people, South Africa is undoubtedly a regional leader. At the same, South Africa’s high rates of rape and homophobic crime, perpetrated disproportionately against lesbians of colour in poorer townships,⁴⁸ demonstrate that robust legislation does not necessarily translate to societal acceptance. A 2017 report on violence faced by the LGBT community in South Africa found that a shocking four out of ten LGBT South Africans know of someone who has been murdered for their sexual orientation or gender identity; that number rises to 49% for black LGBT people in the country.⁴⁹

⁴³ Over the past five years, several members of Parliament have made efforts to explicitly criminalize same-sex relationships. See: Canada: Immigration and Refugee Board of Canada, *Democratic Republic of Congo: Situation of sexual minorities, including legislation and treatment by society and the authorities; state protection and support services* (2014).

⁴⁴ *Penal Code* of the DRC, article 176: “A person who engages in activities against public decency will be liable to a term of imprisonment of eight days to three years and/or fined twenty-five to one thousand zaires”.

⁴⁵ The East African Sexual Health and Rights Initiative, *Landscape Analysis of the Human Rights Situation of Lesbians, Gay, Bisexual, Transgender, Intersex People and Sex Workers in the Democratic Republic of Congo* (2017), 12; Mouvement pour la promotion du respect et égalité des droits et santé (MOPREDS) et al., *Human Rights Violations Against Lesbian, Gay, Bisexual and Transgender (LGBT) People in the Democratic Republic of the Congo (DRC): Submitted for consideration at the 121st Session of the Human Rights Committee* (2017), 4.

⁴⁶ Human Rights Committee, *Concluding observations on the fourth periodic report of the Democratic Republic of the Congo*, CCPR/C/COD/CO/4, 30 November 2017, para. 14.

⁴⁷ *Loi n° 08/011 du 14 juillet 2008* portant protection des droits des personnes vivant avec le VIH/SIDA et des personnes affectées.

⁴⁸ James Fletcher, “Born free, killed by hate - the price of being gay in South Africa” *BBC News*. 7 April 2016.

⁴⁹ Michael Morris, “LGBT community still faces high levels of violence - report” *News24*. 4 December 2017.

The high rates of violence perpetrated against LGBTI people continue to be a major focus of activism from human rights groups in the country. In May 2017, dozens of human rights defenders lobbied the authorities to take immediate action on the bias murders of five LGBT persons that had been denied justice for years.⁵⁰ Soon after, activists took to the streets of several South African cities to protest ongoing deadly attacks against members of the LGBTI community.⁵¹

Protection from discrimination

In March of 2018, in a huge step towards addressing the country's persistent problems with homophobic and transphobic violence, South Africa's cabinet approved a bill criminalizing hate crimes and hate speech and submitted it to Parliament. Aside from providing justice to victims of bias crimes, the bill would greatly improve data collection on the incidence of and nature of hate crimes in the country. However, critics feared the broad language used in the bill may pose a threat to free speech, and pushed back by arguing that the bill "makes a 'common' insult punishable by three years in prison."⁵² In December 2018, the South Africa Parliament invited public input on the bill from stakeholders and interested persons, and announced it would hold public hearings on the bill.⁵³

That same month, the South African National Assembly passed a bill to remove a provision from the Civil Union Act that allowed civil servants to refuse to marry same-sex couples on the basis of their "conscience, religion, or belief."⁵⁴ The prior year, the Minister of Home Affairs revealed that only 111 of its 412 branches had officers willing to marry same-sex couples, and that 37% of its officers were exempt from providing the services. Nonetheless, the Minister refused to back an amendment repealing the provision.⁵⁵

Civil society organizations in South Africa have been developing innovative approaches to combating discrimination and hate crimes. A nationwide initiative addressing violence against LGBTI communities has launched a website to help victims anonymously report hate crimes in South Africa.⁵⁶ A 2016 survey of LGBT people found that 88% of respondents did not report hate crimes or discrimination, as they often fear having to come out to friends and family, or facing victimization from the authorities or community.⁵⁷

In September 2018, an umbrella organization for LGBT+ employee network groups launched an index to measure how companies in South Africa are faring when it comes to the inclusion of sexual and gender minorities in the workplace. Of the 17 companies—representing six different sectors and employing over 30,000 people—that participated in the analysis, very few had provisions protecting employees from discrimination on the grounds of gender identity and expression.⁵⁸

The UN Independent Expert on the protection against violence and discrimination based on sexual orientation and gender identity paid a visit to Mozambique at the end of 2018 to assess how the government was upholding the rights of its LGBT citizens.⁵⁹ In his assessment, he commented that the absence of systematic, large-scale rights violations against the LGBT community made Mozambique an "inspiring example" in the region, but that the government urgently needed to end its policy of marginalization and "guarantee the full social inclusion of lesbian, gay, bisexual and transgender people."⁶⁰

Education

Several countries in the sub-region participated in the first international ministerial meeting on education sector responses to homophobic and transphobic violence organised by UNESCO.

⁵⁰ Luiz de Barros, "The Five - Justice denied" *Love Not Hate*. 9 May 2017.

⁵¹ Roberto Igual, "Burnt body feared to be that of young lesbian woman" *Mamba Online*. 5 April 2017; Lou-Anne Daniels, "We remember Lerato Molo" *IOL*. 20 August 2018; Roberto Igual, "Free State gay man killed and dumped in hole: Stephen Nketsi" *Mamba Online*. 19 May 2017; Love Not Hate, "Pretoria LGBTI Hate Crimes Protest" Facebook (web page), accessed 1 March 2019.

⁵² Queenin Masuabi, "Controversial Hate Speech Bill On Its Way To Parliament" *Huffington Post*. 17 March 2018.

⁵³ "Parliament calls for public input on bill preventing and combating hate crimes and speech" South African Government. 7 December 2018.

⁵⁴ Jan Gerber, "Home Affairs officials can't refuse to solemnise same-sex marriages after Bill is adopted" *News24*. 6 December 2018.

⁵⁵ Luiz de Barros, "Home Affairs minister rejects call to amend discriminatory Civil Union Act" *Mamba Online*. 12 July 2017.

⁵⁶ "New LGBTI hate crime reporting platform launched" *OUT*. 13 March 2018.

⁵⁷ *Hate Crimes against Lesbian, Gay, Bisexual and Transgender (LGBT) people in South Africa, 2016* Love Not Hate Campaign; OUT LGBT Well-being. (2016).

⁵⁸ *The South African Workplace Equality Index 2018*. LGBT+ Forum. (2018).

⁵⁹ For more information on the visit and the role of the UN IE SOGI, see the article written by Rafael Carrano Lelis and Zhan Chiam in the International Human Rights Law of this report.

⁶⁰ "Comunidade LGBT em Moçambique é discriminada?" *Deutsche Welle*. 12 December 2018.

Mauritius, South Africa and Mozambique, joined the countries signing the *Call for Action* sponsored by UNESCO to express their political commitment to ensuring inclusive and equitable education for all learners in an environment free from discrimination and violence, including discrimination and violence based on sexual orientation and gender identity/expression.⁶¹

In March 2017, the Limpopo Department of Education in South Africa was ordered to pay compensation to a student who had suffered discrimination for her gender identity from her school principal.⁶² The same week she won her case, 38 girls at a school in Mdantsane, South Africa were forced them to disclose their sexual orientation in front of parents, guardians and teachers, after the principal had seen two of them kissing.⁶³ Though the education department of the province investigated the issue, they took no disciplinary action against the principal who outed the students.⁶⁴

Intersex issues

In early 2017, activists from South Africa and Kenya gathered to Pretoria to take part in a consultative meeting on the Model Law on the rights of intersex persons in Africa, which the Centre for Human Rights was drafting for eventual tabling at the African Commission on Human and Peoples' Rights. The Draft Model Law sought to, "prevent unfair discrimination and to protect and promote of the rights of intersex persons in African countries."⁶⁵

At the end of the year, intersex and human rights activists hosted a National Engagement on the Promotion and Protection of the Human Rights of Intersex Persons with the Department of Justice and Constitutional Development, the first large-scale engagement with the government of South Africa. They discussed a number of issues of importance to the intersex community, including infant genital mutilation and healthcare

procedures, and strengthening legal mechanisms to protect from discrimination.⁶⁶

Issues on gender identity

South Africa has similarly seen progress in legal gender recognition and accommodations for trans individuals. After a lawsuit from three trans people and their spouses, the Western Cape High Court ruled that a law barring married individuals from changing their gender without first divorcing was unconstitutional.⁶⁷

More recently, a trans woman in South Africa, currently serving a 15-year sentence in a prison for men, sued the Correctional Services Department to seek recognition for her right to gender expression while in custody. The case has the potential to change the way transgender individuals are treated in the criminal justice system.⁶⁸

In December 2017, a trans plaintiff in Botswana won the right to change his gender from female to male on identity documents.⁶⁹

Immigration and asylum

Given the high number of criminalizing states in the sub-region, and in Sub-Saharan Africa more generally, nearby countries like South Africa where consensual same-sex acts are legal become a destination for LGBT asylum-seekers. Despite having laws guaranteeing refugee status to LGBT persons fleeing persecution, many gay, lesbian, and trans refugees are turned away at the border.⁷⁰ Queer human rights activists lobbied the government to address the situation, as many LGBT refugees being discriminated against were remaining in country undocumented. In September 2018, the Department of Home Affairs agreed to have its officials undergo sensitisation training.⁷¹

A Mozambican LGBT organization attended the 32nd Assembly of the African Union in February 2019 to draw attention to the fact they have been receiving requests for support from

⁶¹ *Call for Action by Ministers: Inclusive and equitable Education for All learners in an environment free from discrimination and violence*, ED/IPS/HAE/2016/02 REV (2016).

⁶² Kellyn Botha, "Victory for transgender learner in Limpopo a long time coming?" *Daily Maverick*. 24 March 2017.

⁶³ Tammy Petersen, "Alleged 'homophobic abuse' at Eastern Cape school to be investigated" *News24*. 9 March 2017.

⁶⁴ Roberto Igual, "No action taken against principal who outed 'lesbian' pupils" *Mamba Online*. 13 April 2017.

⁶⁵ "Centre for Human Rights hosts first consultative meeting to discuss Draft Model Law on the rights of intersex persons in Africa" *Centre for Human Rights, University of Pretoria*. 26 April 2017.

⁶⁶ Andrea Hayes, "11 December 2017 National Intersex Meeting Announcement" *Iranti*. 11 December 2017.

⁶⁷ Safura Abdool Karim, "Married transgender people can change their official sex, court finds" *Ground Up*. 8 September 2017.

⁶⁸ Norman Cloete, "Transgender prisoner looks to Constitutional Court" *IOL*. 9 December 2018.

⁶⁹ For more information, please see the entry for Botswana in the Criminalisation section of this report.

⁷⁰ "A Double Challenge: LGBTI Refugees and Asylum Seekers in South Africa" *Heinrich Böll Foundation*. 11 October 2018.

⁷¹ Carl Collison, "Gigaba rights queer affairs" *Mail & Guardian*. 28 September 2018.

LGBT refugees fleeing other African nations, and to partner with UNHCR to establish a, “structured response to the needs of these people.” They also pledged to do more for LGBT refugees in the Nampula camp in Mozambique, including offering psychological support, counselling, and healthcare.⁷²

HIV & health

A national HIV plan to address the specific needs of the LGBTI community, the first of its kind, was launched during the 8th South African AIDS Conference in Durban. The plan aims to reduce HIV rates by 63 percent, tuberculosis by 30 percent, and boost STI detection by 70 percent over five years. The plan also acknowledged the effects of societal stigma and discrimination on LGBTI people seeking healthcare, and called for services designed for their needs.⁷³

As part of its commitment made under the HIV plan, South Africa’s Human Sciences Research Council announced the country’s first national survey on HIV in transgender women in January 2018. The study aimed to fill a gap in data on HIV prevalence among transgender women and their specific vulnerabilities in order to be able to better serve their community.⁷⁴ Just two months later, the South African government began distributing PrEP⁷⁵ to sex workers for free in hopes of reducing the spread of HIV.⁷⁶

In neighbouring Mozambique, health NGOs announced in February 2018 they received grants from The Global Fund for programming aimed at reducing new HIV infections and HIV-related deaths by 40 percent and tuberculosis deaths by 50 percent by 2020.⁷⁷

Activism in the sub-region

Given its size, regional power status, and active civil society, South Africa tends to dominate the

discussion of LGBTI issues in Southern Africa. Yet, over the past two years, grassroots activism in neighbouring countries is increasing domestic and international visibility of their LGBT people.

At the end of 2016, representatives of LGBTI organizations from Madagascar, Mauritius, Seychelles, and Réunion gathered in Antananarivo, Madagascar for the 15th symposium on HIV, where they formed the Indian Ocean region’s first LGBTI network.⁷⁸

A few months later, a Malagasy LGBTI group belonging to the network hosted an awareness-raising event during the World Day Against Homophobia. The group aimed to highlight the discrimination and stigmatization faced by LGBTI people in everyday life in Madagascar, and to put a human face to their community.⁷⁹

Human rights organisations in Namibia organized a five-day advocacy event in July 2017 to “celebrate the rich tapestry of Namibian LGBTI lives, while addressing social and policy discriminatory laws, policies and practices.”⁸⁰ The event, called ‘We Are One,’ ended with activists marching for better anti-discrimination laws during the country’s first pride parade.⁸¹

Conclusion

Though regional surveys of public sentiment towards LGBTI people often report dismal numbers, we see an interesting, seemingly contradictory, trend happening in South Africa: though the majority of South Africans (72%) believe that same-sex sexual activity is “morally wrong”, a majority (51%) feel that gay South Africans deserve the same rights as all other citizens.⁸² Similarly, a 2016 survey found Namibia and Mozambique to be two of the most tolerant countries in Africa,⁸³

⁷² “Na Etiópia - Lambda Colhe Experiência Para Apoiar Refugiados Lgbt Em Moçambique” *LambdaNEWS*. February 2019.

⁷³ “SA launches first national HIV plan for LGBTI people” *ENCA*. 16 June 2017.

⁷⁴ “First South African study looking at HIV prevalence in transgender women contributes to global 90-90-90 target” *Human Sciences Research Council*. 10 January 2018.

⁷⁵ Pre-Exposure Prophylaxis (PrEP) is a daily pill that reduces HIV infection risk in HIV-negative individuals by 92 - 99%.

⁷⁶ Lungani Zungu, “PrEp pill to save sex workers from HIV/Aids” *IOL*. 1 April 2018.

⁷⁷ The Global Fund, “Mozambique and Global Fund Launch New Grants” *Reliefweb*. 8 February 2018.

⁷⁸ “La première coalition des associations LGBT de l’océan Indien est née” *IMAZPress*. 6 October 2016.

⁷⁹ “Société : Sensibilisation Contre L’homophobie” *TVMADA - RADIODADA*. 17 May 2017.

⁸⁰ “Authenticity in Diversity” *99FM*. 26 July 2017.

⁸¹ Michaela Morgan, “Namibia just held its first official Pride parade” *SBS*. 31 July 2017.

⁸² Sutherland, Carla, B. Roberts, N. Gabriel, J. Struwig, and S. Gordon. “Progressive prudes: a survey of attitudes towards homosexuality & gender non-conformity in South Africa.” (2016).

⁸³ Dulani, Boniface, Gift Sambo, and Kim Yi Dionne. “Good Neighbours? African Express High Levels of Tolerance for Many but not for All.” (2016).

which as a whole is also trending towards tolerance among the young and well-educated.⁸⁴

It's also worth noting that legislative advancements made in the sub-region over the past years have retained their strength and have not been weakened by religious exemptions; the South African government even closed a loophole that allowed civil servants to decline to perform same-sex weddings. Though there remain a significant number of criminalizing countries in the sub-region, progress made in South Africa, Mozambique and Namibia offer hope as to the future of LGBTI people in neighbouring countries.

Recent SOGI Developments in Angola and an Overview on Other African Lusophone Countries

By Rui Garrido.⁸⁵

Angola

On 23 January 2019 Angola joined the list of countries that decriminalised same-sex acts between consenting adults. The Penal Code of 1886, inherited from Portuguese colonialism, criminalised anyone who partook in the practice of “vices against the nature.”⁸⁶ Same-sex sexual relations were illegal under that provision, and it was generally understood as criminalising same-sex sexual acts. Under article 71, for the offence of “vices against nature”, the first time that the crime was committed the sentence was the bond of “good conduct” or “freedom under surveillance”, and for those who re-offended, the sentence was surveilled freedom or internment.⁸⁷ It is not known of any case targeting LGBTI people based on that provision.

The enactment of the new Penal Code was the end of a long journey that took more than a decade to conclude. Angola started the revision of its Penal legislation in 2004 through a presidential order that created the Commission for the Reform of

Justice and Law. This commission mandated, among other things, the drafting of a new Penal Code for the country.⁸⁸

In recent years, the Angolan State has tried to be transparent, especially when it is under international scrutiny. In 2014, during the 2nd UPR cycle, in the national report, Angola argued that intimacy between consenting adults was protected under constitutional law, and the state was unaware of any case of discrimination based on sexual orientation.⁸⁹

In 2016, Angola submitted its national report to the African Commission on Human and Peoples' Rights. The report stated that there are no laws criminalising same-sex relations between adults, and that the draft law which approves the new Penal Code prohibits discrimination based on sexual orientation.⁹⁰ This reference was not made under article 2 (non-discrimination) of the African Charter on Human and Peoples' Rights, but under article 3 (right to dignity) of the Protocol on Women's Rights. Despite the reference to sexual orientation and the absence of criminal offence against LGBTI peoples, the Angolan authorities seem to misconceive, or not fully understand the issue of sexual orientation, as it is treated under the implementation measures of women's protocol. Under the same “right to dignity”, LGBTI issue are grouped with prostitution and sexual violence against women, girls and children. This reinforces the Angolan authorities' misunderstanding of the subject.

In June 2018, the Ministry of Justice and Human Rights granted the legal recognition to the association IRIS Angola, the first LGBTI association in the country.⁹¹

Regarding the new Penal Code approved on 23 January 2019,⁹² it is a significant shift from criminalisation to protection. In fact, the new Penal Code introduced “sexual orientation” as an aggravating circumstance in the provision establishing the general guidelines for the

⁸⁴ Michael Morris, “LGBT community still faces high levels of violence - report” News24, 4 December 2017.

⁸⁵ Rui Garrido, Ph.D candidate in African Studies at ISCTE-IUL, Portugal.

⁸⁶ Penal Code of 1886, article 71(4).

⁸⁷ *Id.*, Article 71(1).

⁸⁸ Presidential Order No. 124/12, 27 November 2004.

⁸⁹ *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21: Angola*, A/HRC/WG.6/20/AGO/1, para. 143, 4 August 2014.

⁹⁰ *Six and seventh report on the implementation of the African Charter on Human and Peoples' Rights and initial report on the Protocol on the Rights of Women in Africa 2011 – 2016*, article 22, Government of Angola (2016).

⁹¹ “Governo valida primeira associação LGBT do país”, *Novo Jornal*, 28 June 2018.

⁹² The bill that was approved can be read [here](#).

determination of penalties.⁹³ Additionally, article 172(1) establishes the crime of threatening to perpetrate a crime against someone, which could affect their “sexual self-determination”. Notably, article 241 criminalises acts of discrimination based on sexual orientation with regard to the provision of goods and services, employment and obstructing economic activities. Articles 215, 216 and 217 raise the penalties for acts of insult, defamation and disrespect of the deceased (respectively) when they are committed because of the victim’s sexual orientation. Furthermore, incitement to discriminate based on sexual orientation is criminalised under article 382. Last but not least, article 284 explicitly includes prosecution based on sexual orientation in the provision on crimes against humanity. The expression “sexual orientation” appears 12 times in the Code. However, no reference is made to “gender identity”, “gender expression”, or “sex characteristics”, so there is certainly much space for further advocacy and progress.

The Penal Code was approved by a vast majority of MPs in Parliament — 115 votes in favour, 7 abstentions and only 1 vote against— and was described by the leader of the People’s Movement for the Liberation of Angola as “genuinely Angolan”.⁹⁴

Cape Verde

Cape Verde is considered one of the most consolidated African democracies and a country with high levels of social acceptance of homosexuality.⁹⁵ The legal framework is not repressive towards sexual orientation, and the reform of the Penal Code in 2003 removed the criminalisation of the “vices against nature”, but no protection was granted to sexual orientation.

However, in 2008, Cape Verde enacted protections against discrimination based on sexual orientation in employment under the New Labour Code.⁹⁶ Furthermore, the 2015 amendment of the Penal Code stated that “the current circumstances

demand an adequate response for some kinds of murder,⁹⁷ in particular those motivated by hate of the sexual orientation or gender of a person”.⁹⁸ The amendment of article 123 establishes a penalty of 15 to 30 years imprisonment for murder committed on the basis of the victim’s sexual orientation or gender identity.⁹⁹ Cape Verde is the only African Lusophone country that criminalises hate crimes based both on sexual orientation and gender identity.

Guinea Bissau

Guinea Bissau was the first country to reform its Penal Code after independence from Portugal. In 1993, the Law-decree No. 4/93 (Penal Code) decriminalised same-sex activity but granted no protection to sexual orientation or gender identity. Social attitudes in the country are not tolerant, with the exception of the capital city Bissau, in which the LGBTI community have some space to be open.¹⁰⁰ In a recent interview, a local NGO director stated that there are some cases of violence targeting people based on their sexual orientation or gender identity and that Guinea-Bissau lacks legal protections for LGBTI people.¹⁰¹

Mozambique

Even though the legal framework of the country is not hostile to sexual orientation or gender identity, there is still much that could be improved. In 2007, the Labour Law introduced prohibition of discrimination based on sexual orientation as a fundamental principle to the Right to Work.¹⁰² In 2015, a new Penal Code entered into force, removing the criminalisation of the “vices against nature”, but no protection was granted to sexual orientation or gender identity.

The Mozambican State failed in the legal registration of the NGO LAMBDA Mozambique, a process started by LAMBDA in 2008.¹⁰³ In 2017, the Constitutional Council of Mozambique declared article 1 of Law no 8/91 unconstitutional,

⁹³ See: Article 71(1)(c): “(...) The following are the only aggravating circumstances: when the perpetrator commits the crime (...) because of discrimination based on (...) sexual orientation (...)”.

⁹⁴ “Parlamento aprova novo código Penal mas UNITA condena legalização do aborto”, *O País*, 24 January 2019: “Members of Parliament approve new Angolan Criminal Code” *Agência Angola Press*, 23 January 2019.

⁹⁵ *Good neighbours? Africans express high levels of tolerance, but not for all*, Afrobarometer, article 12, (2016).

⁹⁶ *Decreto-Legislativo No. 5/2007* (Código Laboral Cabo-Verdiano), 16 October 2007, articles 45(2) and 406(3).

⁹⁷ *Legislative-Decree No. 4/2015*, 11 November 2015.

⁹⁸ *Id.*, p. 2177.

⁹⁹ *Id.*, p. 2179.

¹⁰⁰ “I Have to Be Open”, *New York Times*, 23 June 2018.

¹⁰¹ “A invisibilidade LGBT na Guiné-Bissau”, *RFI International*, 2 September 2018.

¹⁰² *Law No. 23/2007* (Labour Law), article 4(1), 1 August 2007.

¹⁰³ For more information on the process led by LAMBDA see: “Registe Lambda Igualdade”, *Lambda Website*.

which allows the registration of associations in the country in accordance with the principles of “moral order”. The Constitutional Council found that the reference to “moral order” is in contravention with article 53(3) of the Mozambican Constitution of 2004, which only forbids the registration of military associations or those that promote violence, racism or xenophobia.¹⁰⁴ This decision gave new strength to the aspirations of LAMBDA to become legally registered as an NGO.¹⁰⁵

São Tomé e Príncipe

São Tomé and Príncipe removed criminalisation of the “vices against nature” in 2012, when the new

Penal Code entered into force.¹⁰⁶ Article 130 (qualified murder) of the Penal Code defines sexual orientation as an aggravating circumstance of this type of crime, giving sexual orientation the same protection as racial, political or religious hate. Furthermore, sexual orientation was introduced in the law on domestic and familial violence, and was adopted 4 years before the Penal Code. Article 2 of Law No. 11/2008 states that every woman, man and child has their fundamental rights inherent to their personhood, regardless of their sexual orientation, among other factors.¹⁰⁷ The same law recognises domestic violence as a human rights violation.¹⁰⁸ There are no records of any association working with LGBT human rights in the country.

¹⁰⁴ [Acórdão No. 07/CC/2017](#), atinente a declaração de inconstitucionalidade do artigo 1 da Lei nº 8/91, de 18 de Julho – Lei que regula o direito à livre associação, requerido pelo Provedor de Justiça.

¹⁰⁵ “[Moçambique: É inconstitucional recusar legalização de associação de minorias sexuais](#)”, *Deutsche Welle*, 14 November 2017.

¹⁰⁶ [Law No. 6/2012](#) (Approving Penal Code).

¹⁰⁷ Law No. 11/2008, 29 October 2008, article 2.

¹⁰⁸ *Id.*, Article 6.

GLOBAL PERSPECTIVES

LATIN AMERICA AND THE CARIBBEAN

STATE-SPONSORED HOMOPHOBIA 2019



LATIN AMERICA AND THE CARIBBEAN

Latin America and the Caribbean, Before the Challenge of a New Time

Coordinated by Luz Elena Aranda Arroyo,¹ Darío Arias² and Pedro Paradiso Sottile.³

Introduction

By Luz Elena Aranda Arroyo, Darío Arias and Pedro Paradiso Sottile.

The Latin American and Caribbean region finds itself in a historic moment of transition and political dispute, where the alliances between anti-rights religious fundamentalist sectors and the ultra-conservative political forces are advancing in a dangerous way.⁴ This puts in tension and risks the gains achieved by movements through the social, political and cultural struggle, after a stage that we can call a decade of achievements for the LGBT population and women.

The period of 2017-2018, as can be seen in the six essays of each of the sub-regions, began a tumultuous, unstable period with struggle and tensions. The elections of conservative right-wing

governments,⁵ the rise to power of neo-fascist projects,⁶ strategic alliances of the Catholic, Evangelical and neo-Pentecostal churches and its growing influence in the public debate,⁷ increase in social exclusion and poverty in the region from the implementation of neoliberal economic policies,⁸ the growth in violence due to prejudice of sexual orientation and gender identity and expression,⁹ migration and the rise in the murders of human rights defenders, makes a panorama of regional complexity and alertness.¹⁰

This picture however, meets resistance and struggle from powerful LGBTI and feminist movements that still continue being capable of counteracting this conservative onslaught and lead important advances.¹¹ These movements are probably the most hopeful social political force in this moment of history and the only ones that are

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⁴ Julio C. Gambina, "Los rumbos de la política en Nuestra América", *Nodal*, 3 January 2019: "Alerta Regional: No más fundamentalismos y violencia", *Sitio Web ILGALAC*, 17 May 2018.

⁵ The cases of the governments of Argentina, Chile and Colombia can be cited, the latter being the one of greatest concern. The electoral Observatory for LGBTI rights of ILGALAC informed on the proposals of each candidate to the presidency. The conclusion was that most of them were against the LGBTI rights.

⁶ On January 1, 2019, President of the Federative Republic of Brazil, Jair Bolsonaro took office. He holds an anti-rights, racist, misogynist and LGBTIphobic discourse.

⁷ Gisela Zarenberg, "Más allá del estupor: evangélicos y política en América Latina", *Oráculo y Revista Política y Gobierno*, México, 16 de enero de 2019.

⁸ Comisión Económica para América Latina y el Caribe, CEPAL, "Panorama Social de América Latina", Capítulos I y II.

⁹ See, among others: IACHR, *Violence against LGBTI persons in the Americas*, (2015); Colombia Diversa y Caribe Afirmativo, "[La discriminación, una guerra que no termina. Informe de derechos humanos de personas LGBT](#)" (2017); Asociación Nacional de Travestis y Transexuales de Brasil e Instituto Brasileiro Trans de Educación, *Dossier: Asesinatos y violencia contra travestis y transexuales en Brasil 2018* (2019).

¹⁰ The murder of lesbian, Afro-descendant and favela activist Marielle Franco in Brazil on March 14, 2018 is among the ones that had the greatest impact in the region and is still unpunished.

¹¹ Among these are the Advisory Opinion No. 24/17 of the Inter-American Court of Human Rights of November 24, 2017, the decriminalization of consensual same-sex sexual acts in Trinidad and Tobago, the ruling recognizing the murder of human rights defender Diana Sacayán as a hate crime motivated by her gender identity and as a *travesticide* in Argentina on June 18, 2018, the enactment of the Comprehensive Trans Law (*Ley Integral Trans*) in Uruguay on October 19, 2018, the enactment of the Gender Identity Law in Chile on 12 September 2018, the inclusion of non-discrimination based on sexual orientation and gender identity and new concept of unions in the new Constitution of Cuba, the measures of the Costa Rican government in favor of the LGBTI population on December 21, 2018, among others.

prepared for the challenges of this new era.¹² ILGALAC is committed to continue working and facilitating between organisations in order to promote the strength of equality and freedom throughout Latin America and the Caribbean.

Advances in equality, setbacks to overcome: the LGBTI+ agenda in the Southern Cone

By Alba Rueda.¹³

The living conditions of LGBTI+ people in the Southern Cone are affected through public policies, legislation and social organisations. Between 2017 and 2018 organisations worked for specific policies for the *travesti* trans populations –to raise awareness to their extreme vulnerability, avoidable deaths and the lack of public policies that guarantee their basic rights –and recognised the legislative absence and protections for intersex persons.

The situations are very different in the four countries of the ILGALAC sub-region, being more favourable for the LGBTI+ population in the Eastern Republic of Uruguay, the action of the Broad Front government has incorporated a

sustainable LGBTI+ agenda throughout its administration. In fact, the most significant advance so far has been the approval of the Comprehensive Trans Law in 2018, the law that offers the highest level of protection of the rights of trans persons in South America.¹⁴ Under the paradigm of human rights, the law promotes the adoption of affirmative action measure in favour of trans persons,¹⁵ establishes minimum quotas for jobs in the public sector,¹⁶ for professional training, scholarships and student support.¹⁷ Furthermore, the law provides comprehensive healthcare,¹⁸ a reparative regime for victims of violence during the dictatorship and the requirement to register gender identity in the official statistical information system.¹⁹

In Chile, the organisations achieved the legal recognition of gender identity,²⁰ despite conservative proclamations from President Sebastian Piñera. The law authorises a change in name and registered sex by administrative means and without the requirement of body modification.²¹ However, some organisations denounce that, as a consequence of the pressure of anti-rights groups, the law discriminates against children and married people.²²

The actions of the conservative and neoliberal governments have obstructed legislative advances for LGBTI+ in countries such as Argentina, where there had been no improvements at the national

¹² Jorge Galindo, "¿Latinoamérica feminista? Estrategias y retos del movimiento que busca la igualdad de género en la región", *El País*, 23 de octubre de 2018.

¹³ Trans activist, member of Mujeres Trans Argentina, researcher in sexual dissidence issues with the Department of Gender and Communications of the Centro Cultural de la Cooperación Floreal Gorini. She studied Philosophy at the University of Buenos Aires (UBA). She works at the Observatory of Discrimination of the National Institute against Discrimination, Xenophobia and Racism (INADI).

¹⁴ [Law No. 19,684](#) (Uruguay), "Comprehensive Law for transgender people" (Ley integral para personas trans), 26 October 2018.

¹⁵ Article 2 of the law declares "of general interest" the design, promotion and implementation of public policies and affirmative actions in the public and private sectors whose beneficiaries are transgender people.

¹⁶ Article 12 of the law establishes, for a period of fifteen years, that a series of public agencies of the three branches of the State must allocate 1% of the positions to be filled in the year by trans people who comply with the regulatory requirements to access such positions.

¹⁷ Article 13 of the law establishes a quota of no less than 1% (one percent) for trans people, in the various training and qualification programs implemented by the National Institute of Employment and Vocational Training (Instituto Nacional de Empleo y Formación Profesional). Article 17 of the law establishes that the agencies that grant scholarships and student support should provide for a 2% quota for transgender people and an 8% quota for the "Carlos Quijano" special Scholarship.

¹⁸ Article 21 establishes that every trans person has the right to comprehensive care to adapt their body to their gender identity, including surgical medical treatments. Also, it provides that for people under 18 years of age to access irreversible surgeries, in order to adapt their body to their gender identity, authorization or consent from legal representatives will be required.

¹⁹ Article 10 provides for the creation of a reparation regime for trans persons born before 1975, who can prove that they were victims of institutional violence or that they deprived of their liberty by State agents or by those who, without being so, had been authorized, supported or acquiesced. Article 5 incorporates the "gender identity" variable in all official statistical information systems, including censuses, continuous household surveys, reports from the National Civil Service Office and all public measurements that contain the variable "sex".

²⁰ Law 21,120 approved in November 2018 recognizes and protects the right to gender identity to those residing in Chile, including migrant trans people who have their Chilean document (Article 7).

²¹ "Historia de la ley de identidad de género en Chile", Organizando Trans Diversidades, 15 December 2018.

²² Legal guardians can litigate under the procedure established in articles 12 to 18 of the law. The law also provides for "Professional Support Programs" to advise and accompany transgender people under eighteen. If a person is married and changes their registration information under the Gender Identity law, they will be able to request the rectification of the marriage with final judgment of a family court.

level in 2017 or 2018. Although, organisations achieved labour quotas for *travesti* and trans in some localities,²³ the government of the Province of Buenos Aires –a province with *travesti* and trans labour quota laws enforced –has decided to block the implementation of the norm, refusing to regulate it.²⁴ At the same time, the neglect of the State denies access to basic healthcare for *travesti* and trans prisoners, which has led to the deaths of many of them.²⁵ Anti-rights groups have grown and strongly influenced the rejection of the draft law of voluntary termination of pregnancy and questioned the rights of the LGBTI+ community, especially targeting transgender children and/or their families, especially from the movement located throughout Latin America “Don’t mess with my children”.²⁶ Furthermore, the new social climate is blamed for an increase in violence against LGBTI+ people. Despite all of this, there have been some advances that marked a new horizon in the rights of LGBTI+ people, such as the recognition of non-binary names, the issuing of birth certificates without gender markers in the Province of Mendoza and the ruling of *travesticide* in the case of Diana Sacayan.²⁷

In Paraguay, the government of President Mario Abdo Benítez continued anti-rights policies of its predecessors.²⁸ Furthermore, the Paraguayan parliament came out against abortion and equal marriage,²⁹ the Ministry of Education banned all content related to the so-called “gender ideology”

and its own education minister called for the “burning of books with gender ideology”.³⁰ The country also became one of the main promoters of anti-rights groups and positions before the OAS.³¹ This data marks the gravity for LGBTI+ people, and it adds to the structural violence that is especially pronounced for trans people. There are no official statistics or public policies for the LGBTI+ population but there are high levels of violence and impunity.

The travesticide of Amancay Diana Sacayan

On 11 October 2015, Amancay Diana Sacayan (Trans Alternate Secretary of ILGA since 2014), was the victim of *travesticide* in her apartment in the city of Buenos Aires. This caused deep shock throughout the Argentinian LGBT movement and above all, the *travesti* and trans community in the country. Diana was a *travesti* advocate, activist and leader, born in the north of the country and raised since a child in the Buenos Aires urban area. She was part of the National Front which in 2012 achieved the passing of the Gender Identity Law and, years later, in the Province of Buenos Aires, supported the first labour quota laws for trans persons (today the law bears her name in her honour).³²

²³ The legislative agenda on the trans labour quota is a requirement advocated by all social organizations and many bills were introduced with a consensus of broad social and political sectors, but by decision of the government, they were not debated. The cities and towns where there are quotas in force are distributed in several provinces of the country: Buenos Aires, Chaco, Córdoba, Corrientes, La Pampa, Mendoza, Río Negro, San Luis, Santa Fe, Tierra del Fuego and Tucumán. See also: Agencia Presentes, “MAP: This is the trans job quota in Argentina,” 25 May 2018; “The trans labour quota enacted in Chubut”, El Patagónico, 17 May 2018; “The Trans Labour Quota Law enacted in FME”, La Unión Digital, 21 December 2018.

²⁴ See: Law 14,783, Province of Buenos Aires. At the time of the enactment of the law, the IACHR issued a press release welcoming the measure. In it, the Commission stated that “These types of measures seek to encourage trans persons’ access to public areas and to further the exercise of their economic and social rights. These measures contribute not only to reduce the levels of poverty faced by trans persons, but also to reduce homicides and police violence as a result of reducing the number of trans persons working in criminalized informal economies and bringing down stereotypes and prejudice related to gender identity”. IACHR, Press Release 122/15: “IACHR Congratulates Argentina for Passing Provincial Quota Job Law for Trans Person,” 30 October 2015. See also: IACHR, *Report on Poverty and Human Rights in the Americas*, September 7, 2017, para. 451: Ombudsman of the Province of Buenos Aires, *Right to work for transgender people and transvestites in the Province of Buenos Aires: Obstacles to the implementation of the labour quota law* (“Derecho al trabajo de las personas trans y travestis en la Provincia de Buenos Aires: Obstáculos para la implementación de la ley de cupo laboral”) (2018).

²⁵ Michelle Langrand, “83% of trans women in Argentina have suffered some kind of violence or discrimination”: UN expert”, Panorama, 18 June 2018.

²⁶ “Campaña de grupos “antiderechos” contra una niña trans salteña”, Agencia Presentes, 29 November 2018.

²⁷ “Cambiar el mundo desde el propio cuerpo”, *Página 12*, 3 November 2018; “Argentina emite por primera vez identificación sin especificar género”, *CNN en Español*, 6 November 2018; “Cómo es vivir en Mendoza sin “ser” hombre ni mujer: la historia de Caro Gero”, *Los Andes*, 13 November 2018; “Inédito en América Latina: personas no binarias lograron documentos sin sexo”, *Agencia Presentes*, 5 November 2018.

²⁸ “After Signs Of Progress, Paraguay Turns Its Back On LGBT Rights”, *Ozy*, 27 June 2018.

²⁹ “#Paraguay Cámara de Diputadxs se declaró ‘provida’: ‘Viola la Constitución’”, *Agencia Presentes*, 21 December 2018.

³⁰ “MEC prohíbe materiales sobre “ideología de género”, *ABC Color*, 10 October 2017; “Paraguay: el gobierno prohíbe difundir “ideología de género” en las escuelas”, *Notas Periodismo Popular*, 11 October 2017; “Ministro Riera se ofreció a quemar libros sobre ideología de género”, *ABC Color*, 6 October 2017.

³¹ See the article by Marcelo Ferreyra, in the section on International Human Rights Law in the present report.

³² Law 14,783 (Province of Buenos Aires, Argentina); “Diana Sacayan: This law is a response to the discourse on prostitution as work”, March, September 24, 2015. The enactment of the *travesti*-trans labor quota in the Province of Buenos Aires was

On 18 June 2018, the Court for Oral Criminal Proceedings No. 4 of the city of Buenos Aires, issued a ruling without precedent regarding violence against trans people in Argentina. This ruling recognised the term “*travesticide*” to qualify the crime and sentenced the accused to life imprisonment for committing aggravated murder due to “hate towards the gender identity of the victim” and for “gender violence” (articles 80.4 and 80.11 of the Argentinian Penal Code).³³ The progress of this judicial process was actively promoted by social organisations that formed the “Commission of Justice for Diana Sacayan”.³⁴ In 2018, the judicial decision was recognised with the “People’s Choice Gavel Award” organised by Women’s Link Worldwide in the category Gender and Justice Uncovered.³⁵

“Boys wear blue and girls wear pink”: the LGBTI agenda in the face of an extreme right-wing offensive in Brazil

By Bruna Andrade Ireneu.³⁶

The timeframe of this article covers the impeachment of Dilma Rousseff,³⁷ the increase in the protest movement *#ForaTemer* (*#TemerOut*) and the various plans to incarcerate ex-President

Luiz Inacio Lula da Silva.³⁸ During this period it is self-evident the dismantling of the policy of group conciliation carried out by the Worker’s Party (PT), which had achieved uniting in the same neo-developmental project, opposing groups such as evangelical leaders and sectors of the LGBT movement and feminists. After the impeachment, with the approval of the constitutional amendment that put a limit on public spending, the dismantling of social policies intensified and the situation will worsen still with the current government’s plan.

Yet, after 15 years of the launching of the program “Brazil without Homophobia” (the first government initiative for the benefit of the LGBTI population), Brazil continues to have a high rate of deaths due to homo/lesbo/transphobia. These murders claimed the lives of Dandara dos Santos,³⁹ Luana Barbosa⁴⁰ and Plinio Lima,⁴¹ among many others. Homophobia, sexism and racism operate as a means to produce lethal violence and systematic violations of the human rights of LGBTI persons in Brazil. Furthermore, Brazil is still a high risk place for defenders of human rights, being the country with the most murders of activists in the Americas. The most notorious case was that of the activist and councillor, Marielle Franco.⁴² These kinds of examples intensified further during the 2018 election period, in that a candidate publicly hostile to LGBTI recognition and who had explicitly fascist stances in his discourse was elected.

celebrated by the Human Rights Committee and by the CEDAW Committee, which not only recognized its value, but also urged Argentina to replicate this measure in other provinces and municipalities of the country (see: Human Rights Committee, *Concluding observations on the fifth periodic report of Argentina*, CCPR/C/ARG/CO/5, August 10, 2016, para. 3 and Committee for the Elimination of Discrimination against Women, *Concluding observations on the seventh periodic report of Argentina*, CEDAW/C/ARG/CO/7, for 31). 25 November 2018.

³³ Tribunal Oral en lo Criminal y Correccional No. 4 - Ciudad de Buenos Aires, *Causa Nro. 62.162/2015, CCC 62182/2015/TO1*, 6 July 2018.

³⁴ “*Empieza un juicio histórico por el travesticidio de Diana Sacayán*”, *Agencia Presentes*, 11 March 2018.

³⁵ “*People’s Choice Gavel: Murder of trans activist Diana Sacayán*”, *WomenLink*, December 2018.

³⁶ Bruna Andrade Ireneu is president of the Brazilian Association of Homo-culture Studies (*Associação Brasileira de Estudos da Homocultura*, “ABEH”) for the period 2019-2020. She is a social assistant, researcher, feminist, lesbian activist and professor at the Federal University of Mato Grosso (UFMT), Brazil, in the Department of Social Services.

³⁷ Re-elected in 2016, Rousseff suffered impeachment at the behest of the Judiciary, with the approval of some of the Legislature. The process stood out as being sexist and elitist in its design, notably evidenced in the arguments presented by those parliamentarians in the plenary session on the day of the impeachment vote in the Chamber of Federal Deputies, who spoke of the defence of the “traditional” family, “morals”, “good habits” and of economically liberal values, based on the criticism of social programs increased during the tenure of the Worker’s Party (PT).

³⁸ Ex-president Luiz Inacio Lula da Silva was arrested on the 7th of April 2018 and was later accused of corruption. His sentencing is still an object of contention for having taken place in the appeal’s court and for the media attention given in comparison to other corruption cases that involve right-wing individuals. Recently, the judge who sentenced Lula, Sergio Moro, resigned his post to become the Minister of Justice and Public Security in the Bolsonaro administration.

³⁹ “*Morte de Dandara: foram pelo menos três sessões de tortura*”, *O Povo Online*, 19 March 2017.

⁴⁰ “*Dois anos após morte, PMs são indiciados por agressão a mulher em abordagem em Ribeirão Preto*”, *G1 Globo*, 19 April 2018.

⁴¹ “*Cabeleireiro acompanhado do marido é morto a facadas na avenida Paulista*” *Revista Forum*, 22 December 2018.

⁴² Marielle Franco was a black, bisexual woman from a slum and elected to the Rio de Janeiro council for the Socialism and Liberty Party (PSOL), who had reported rapes committed by members of the army during the military intervention in Rio. 10 months ago the police investigations stalled and have not advanced with respect to finding the masterminds behind the crime. Jean Willys, gay, militant and defender of human rights, as well as a federal parliamentarian for the PSOL, has constantly received death threats, as with other legislators linked with fighting for social movements.

In the same year that the Federal Supreme Court determined that it will not be necessary to acquire legal authorisation, medical/psychological reports, nor surgical procedures in order to change one's name and sex before the civil registry,⁴³ Jair Mesias Bolsonaro is elected. His campaign utilised the same strategies of Donald Trump, having made use of "fake news",⁴⁴ among which stand out was the alleged existence of a "Gay Kit" distributed by the PT government.⁴⁵ At the same time, the election of Bolsonaro was not without resistance or collective organisation in the form of demonstrations and the movement #EleNao (#NotHim), with more than 40% of the population voting against him in the polls. After the election, out of fear of same-sex marriage recognition being repealed, civil registry offices across the country saw a 25% increase in this type of marriage.⁴⁶

In his first days as president, Bolsonaro reiterated his hate for the LGBTI community (the same hatred he expressed when he said: "I would prefer to have a criminal for a child than a gay child") by appointing to the charge of public policies for human rights, women and family, a pastor known for her support of "conversion therapy".⁴⁷ Damares Alves, with 2 weeks in government, announced to the media that for her "sex between women is an aberration"⁴⁸ and that under her watch "girls will be treated as princesses and boys princes". The minister reaffirmed her political stance that "girls wear pink and boys wear blue",⁴⁹ a phrase that triggered numerous protests on social media by artists, activists, researchers and politicians, questioning the state's attempt to present biology as a determinate to gender expression. There is a very strong consternation in the country against

the government's first measures which are an attack on gender, ethno-racial relations and sexuality in the school curriculum and the intensification of the criminalisation process of the indigenous population.

The threat of neo-fascism is a global movement, which requires that collective strategies unite different progressive sectors in defence of democratic liberties and republicanism. LGBTI activism must strengthen its links with movements that fight for land rights, housing, racial feminist equality and work. Whilst conscious as to not be seduced by the conciliatory homo-nationalist discourse which comes from antidemocratic sectors or to fear the struggle itself. Resistance thrives in the streets and tomorrow is another day!

The Andean Region, a Territory in Alert Marked by its Political Uncertainty and the Advance of Anti-Rights Groups

By David Aruquipa Pérez.⁵⁰

The policies of human rights protections for the LGBT population of the Andean Region have achieved significant advances in a legal sense.⁵¹ However, in practice exercising these rights are limited by the threats and pressures of neoconservative trends and the fragility of the

⁴³ "STF reafirma que pessoas trans podem o mudar nome no registro sem cirurgia", *UOL Notícias*, 15 August, 2018. The decision of the Supreme Court is binding for all civil registry offices. At the same time, the National Justice Council (the administrative body for Brazilian Judicial Power) enacted a provision that regulates the administrative process of changing one's name and gender in the country: *Provimento No. 73*, 28 June 2018. The ruling was highlighted by the Inter-American Commission on Human Rights. CIDH, *Comunicado de Prensa No. 85/18*: "CIDH welcomes the decision of the Brazilian Supreme Court to permit trans people to change their name through self-declaration", 23 April 2018.

⁴⁴ Fake news highlighted the distribution of books supposedly acquired by the Ministry of Education (MEC). Taking advantage of a controversial issue seeking to generate a discourse around "gender ideology" and to propose a bill titled "Schools without party". This fake news was put in the minds of Brazilians, especially those who yearn for a military regime, the small economic elite, religious profiteers and others attracted by the anti-corruption discourse.

⁴⁵ Under pressure from the evangelical block in Congress, in Dilma's first year in office, it vetoed the "School without Homophobia", an education initiative on sexual and gender diversity by the Education Ministry. See: "*Vetado por bancada religiosa, kit 'Escola Sem Homofobia' pode ser baixado na internet*", *Portal Aprendiz*, 11 February 2015.

⁴⁶ "*Casamento LGBT cresce 25% no país, diz associação; profissionais oferecem serviços gratuitos para celebrações*", *G1 Sao Paulo*, 7 November 2018.

⁴⁷ "*Exclusivo: Em clínica de 'restauração de sexualidade, Damares classifica homossexualidade como aberração*", *Forum*, 4 January 2019.

⁴⁸ "*Ministra brasileira volta a causar polémica: sexo entre mulheres é 'aberração'*", *TVI24*, 9 January 2019.

⁴⁹ "*Ministra Damares diz que 'nova era' começou: 'meninos vestem azul e meninas vestem rosa'*", *O Povo*, 3 January, 2019.

⁵⁰ David Aruquipa Pérez is an LGBTI activist and human rights defender, co-founder, former president and member of the Political Action Commission of Colectivo TLGB de Bolivia, Director of the Bolivian Campaign for the Right to Education (Campaña Boliviana por el Derecho a la Educación).

⁵¹ Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX). *Encuentro adelante con la diversidad. Relatoría. Incrementando la protección y respeto de los derechos humanos de los derechos LGBTI en la región andina* (2018), 6-18.

States in a time of political instability.⁵² The anti-rights groups come bringing a strategy of delegitimising the activism and classifying it as alleged “gender ideology”,⁵³ promoting the suppression of intrusive rights and the ending of comprehensive sex education and the promotion of coexistence in the public national curriculum.⁵⁴

The country of the sub-region of ILGALAC with the most advances is Colombia.⁵⁵ Yet still, according to different LGBTI organisations, they are at risk with the election of the extreme right-wing government of President Ivan Duque,⁵⁶ who has a track record contrary to LGBTI and women’s rights.⁵⁷ In fact, in his first months in office he appointed anti-rights civil servants⁵⁸ and did not apply Decree 762/2018 established by President Juan Manuel Santos.⁵⁹ The Colombian situation has one of its principle elements, the Peace Accord, between the State and the FARC-EP with a focus on gender and the recognition of LGBTI victims of the armed conflict that currently is partially being fulfilled and facing difficulties and threats. At the same time, it has seen a growth in the murders of the leaders involved in this process.⁶⁰

Another country that has made important advances is the Plurinational State of Bolivia. In effect, its political constitution contains recognition of the rights of diverse sexual orientation and gender identity populations and includes the LGBT population in the National Action Plan of Human Rights.⁶¹ In 2016, it approved the Gender Identity Law No. 807,⁶² which was a victory without precedent and bore the fruits of a long and sustained struggle for the transsexual/transgender population. Yet, five months after having adopted this norm, a group of national parliamentarians brought before the Plurinational Constitutional Court an action of unconstitutionality. On the 9th November 2017,⁶³ by means of the Plurinational Constitutional Sentence 76/20179, the Constitutional Court declared the unconstitutionality in the phrase “change of sex data” and from that moment operated an unjustified regression in the exercise of the rights of trans persons,⁶⁴ and the effects of this ruling has not been remedied until now.⁶⁵ Finally, one of the most important pending issues is the recognition of the families formed between same-sex persons.

In relation to the Bolivarian Republic of Venezuela the political, social and economic panorama

⁵² This phenomenon can be identified very clearly in the documentary “Gender under attack” (original title: “Género bajo ataque”) by director Jerónimo Centurión (2018): the film has specific sections entitled: “Peru, a threat that does not stop” (“Perú, una amenaza que no se detiene”) and “Colombia: the peace frustrated” (“Colombia: la paz frustrada”): Alfredo Serrano Mancilla, “The Invisible Footprint of Conservative Restoration” (“La huella Invisible de la restauración conservadora”), *Centro Estratégico Latinoamericano de Geopolítica (CELAG)*, 21 August 2018.

⁵³ AWID - Asociación para los Derechos de las Mujeres y el Desarrollo, “Discursos principales de la oposición” en *Derechos en riesgo, Observatorio sobre la universalidad de los derechos. Informe sobre tendencias en derechos humanos* (2017), 84-85.

⁵⁴ *Id.*, 73.

⁵⁵ The latest achievement obtained by the Colombian LGBTI movement was the judicial sentence for the crime of Anyela Ramos Claros murdered on February 9, 2017. In this case, the murder of a trans woman was recognized as “femicide” for the first time, according to the information supplied by Colombian Diversa. See: “Primer caso de homicidio de una mujer trans que es reconocido como feminicidio en Colombia” (First case of homicide of a trans woman that is recognized as femicide in Colombia), *Colombia Diversa*, 2018.

⁵⁶ Consultations on the current Colombian political context were made to Corporación Femm and the León Zuleta Collective.

⁵⁷ The electoral Observatory for LGBTI rights of ILGALAC issued a statement dated June 16, 2018 about the second round of the presidential election in Colombia informing that the then candidate for the Democratic Center, Iván Duque, did not include the LGBTI population in its platform policy and, on the other hand, made statements contrary to the rights of LGBTI people.

⁵⁸ One of them is Alejandro Ordoñez as Ambassador to the OAS. See: “Duque posesiona a Ordóñez como embajador de la OEA pese a las críticas”, *El Espectador*, 12 de septiembre de 2018.

⁵⁹ The National Decree No. 762/2018 (*Decreto Nacional No. 762/2018*) promulgates a national LGBTI policy and with the objective to promote and guarantee the exercise of civil and political rights, in particular the rights to life, liberty, integrity, security and effective judicial protection; guarantee the right to participation and promote and guarantee the exercise of economic and social rights.

⁶⁰ Information regarding the peace process in Colombia was facilitated to the authors by Corporación Caribe Afirmativo. For more information, see: “Caribe Afirmativo presenta línea base sobre derechos de las personas LGBT en los municipios de las Casas de Paz”, *Corporación Caribe Afirmativo website*, 17 November 2017.

⁶¹ Political Constitution of Bolivia (CPE), article 14; Cecilia Urquieta Pardo, “Bolivia, avances en derechos de la población TLGB” en *LGBTI, compendio regional de buenas prácticas gubernamentales de garantía y protección de derechos” editado por el Instituto de Políticas Públicas en Derechos Humanos de Mercosur* (2017), 77-84.

⁶² *Ley de Identidad de Género No. 807*, The procedure for the change of the name and sex of transgender and transgender people is established, allowing for the exercise the right to gender identity (*Se establece el procedimiento para el cambio de los datos del nombre y sexo de las personas transexuales y transgénero, permitiéndoles ejercer el derecho a la identidad de género*) (2016).

⁶³ “TCP declara ilegal matrimonio entre personas del mismo sexo”, *Los Tiempos*, 9 November 2017.

⁶⁴ “Bolivia declara ilegal el matrimonio homosexual y transexual”, *Desastre*, 10 November 2017.

⁶⁵ Consultations were held on the current Bolivian political context to activists of the TLGB Collective.

presents great complexity.⁶⁶ Currently the little progress made in legislative matters is combined with an unprecedented international political attack, a virtual economic and financial blockade that makes it difficult for the population to access basic goods and services,⁶⁷ and a very important migratory phenomenon. The advances in this country relating to the LGBTI issues in the last two years were in the field of universal social policies – social missions – that in this context show a great importance,⁶⁸ for the beginning of the discussion of equal marriage in the Constitutional National Assembly and with the opening of a public policy in the Caracas Town Hall.⁶⁹

In Ecuador, after a period of advances,⁷⁰ the change of government and the election of President Lenin Moreno in May 2017 caused alarm and uncertainty, in most part by it not continuing with the previous political process.⁷¹ In this context, two emblematic cases stand out: on the one hand,⁷² the ruling of the Constitutional Court No. 184/2018 which recognised the enrolment of a girl with two surnames from her two mothers,⁷³ and on the other, the judicial ruling in which a trans girl was registered on the civil registry record with her gender identity.⁷⁴

Finally, in Peru there has been a resistance with the growth of fundamentalist religious groups and from the instability due to the resignation of President Pedro Pablo Kuczynski.⁷⁵ There have been no advances in the recognition in the unions of same-

sex couples or in terms of gender identity.⁷⁶ The organisations of civil society demanded the compliance of the 2018-2021 National Plan of Human Rights (NPHR 2018-2021) and achieved the Inter-American Commission of Human Rights elevating Case 12.982,⁷⁷ “Azul Rojas Marin and Other” before the Inter-American Court of Human Rights (IACHR) for the State to remedy the institutional violence which occurred in 2008.⁷⁸

Homophobia in Mesoamerica

By Gloria Careaga Perez.⁷⁹

The Mesoamerican region includes Mexico and the majority of Central America: it covers Mexico, Guatemala, El Salvador, Belize, Honduras, Nicaragua and Costa Rica. Therefore, for this report it is important to refer to the region in this manner, which makes it possible to point out some aspects related to the colonisation of the region.

The condition of LGBT people in Mesoamerica has already eliminated any hint of legal signalling that explicitly criminalises their situation. Even if there have been few steps in the advancement in the protection of their rights – this has been done unevenly across the countries – the main challenge is centred on the problem of needing a cultural change that goes beyond its legal status, achieving

⁶⁶ Alejandro Fierro, “Venezuela entre legalidad y legitimidad”, Centro Estratégico Latinoamericano de Geopolítica (CELAG), 10 de enero de 2019.

⁶⁷ Alfredo Serrano Mancilla, “Sabotaje económico a Venezuela” Página/12, 7 January 2018.

⁶⁸ The Fundación Base Lésbica Venezuela, in an interview with the author, stated that the Presidential Council of Popular Power for Sexual Diversity (Decree No. 2161/2015) in coordination with the Ministry of Popular Power for Women and Gender Equity and the Ministry of the Popular Power for the Communes favor the mainstreaming of different social policies so that they also reach LGBTI people.

⁶⁹ “ANC abre debate sobre derechos civiles de la comunidad sexo género diversa en Venezuela”, Ciudad CCS, 18 October 2018: n an act chaired by Mayor Erika Farias, ordinances were proclaimed for the creation of an office for LGBT issues and the month of June was instituted as the Month of the Rebellion of Sexual Diversity. See: “Gaceta Municipal en pro de la Sexodiversidad”, Ciudad CCS, 1 June 2018.

⁷⁰ Cristian Barraza, “Experiencia gubernamental de Ecuador” en *LGBTI, compendio regional de buenas prácticas gubernamentales de garantía y protección de derechos* editado por el Instituto de Políticas Públicas en Derechos Humanos de Mercosur (2017), 95-111.

⁷¹ “Claves de la disputa política en Ecuador”, Centro Estratégico Latinoamericano de Geopolítica (CELAG), 2 December 2017.

⁷² Consultations were held on the Ecuadorian context with Asociación Valientes de Corazón.

⁷³ Corte Constitucional de Ecuador (Constitutional Court of Ecuador), *Sentencia No 184-18-SEP-CC*, Registro Oficial Año II. No 61, 11 September 2018.

⁷⁴ “Una niña transgénero de nueve años consigue cambiar su cédula de identidad en Ecuador”, *El País*, 10 de diciembre de 2018.

⁷⁵ The documentary film “Gender under attack” (original title: “Género bajo ataque”) of 2018 by director Jerónimo Centurión features a section entitled: “Peru, a threat that does not stop”.

⁷⁶ Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX). *Informe temático de personas LGBT en el Perú 2018. Perspectivas jurídicas y políticas* (2018), 7-17. Consultations on the current political context were held with the following organisations: Promsex, No tengo miedo and Alma Chalaca.

⁷⁷ Defensoría del Pueblo, *A dos años del informe defensorial No. 175. Estado actual de las personas LGBTI* (2018), 11.

⁷⁸ Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX), *Un caso de tortura sexual por orientación sexual* (2018).

⁷⁹ Gloria Careaga is a psychologist, professor at the Faculty of Psychology of the UNAM (Mexico), Coordinator of Fundación Arcoiris. She was Co-Secretary General of ILGA between 2008 and 2013.

integration and social recognition. Nevertheless, the economic, political and social conditions of the region do not indicate good expectations. The advance of conservative forces entrenched in the region since colonial times and the increased presence of evangelical churches from the United States represent a grave risk to the defence of human rights.

It is interesting that the two countries in the extremes of the region are where the greatest advances have been made in recent years. In Mexico, resulting from the democratisation process started in 1997 which opened up the possibility of electing officials from the country's capital and the creation of the local Congress for Mexico City (from where authorities of the centre-left or left were based), the advances in the protection of LGBT people have had an important impact for all the country. From 2009 it legalised same-sex marriage,⁸⁰ approved the Anti-discrimination Law that includes sexual orientation (2011) and the Identity Law (2015).⁸¹ Thanks to the active LGBT movement and the demand for the recognition of equal marriage, it has achieved this in 11 of the 32 states of the country, the most recent being Chiapas, Puebla and Baja California, which adopted it in 2017. Now Nueva Leon, Tamaulipas and Sinaloa are waiting for the approval of the resolution from the Supreme Court which mandated it in 2015, but has ordered its compliance before a writ of *amparo* in the last year.⁸²

The process of the approval of the Identity Law has gone through the same process, initially in Mexico City in 2008, and it approved a jurisdictional mechanism that allows a change in legal documentation. In 2015 it achieved simplifying the process to a simple administrative procedure.⁸³ This advance motivated legal action that has gone to the Supreme Court, although it still has not ruled on a final decision. Nevertheless, the LGBT

movement has achieved its approval in Coahuila and Michoacan (2018) and the process is pending in Jalisco.⁸⁴

In Costa Rica, equal marriage propelled by the LGBT movement has made big steps with the ruling of Consultative Opinion No. 24 by the Inter-American Court of Human Rights,⁸⁵ which was solicited by the same State.⁸⁶ This pronouncement, however, caused a big disturbance in the country, given that it coincided by some months with the start of the presidential electoral process, which was used by conservatives to stoke fears and spectres around its approval.⁸⁷ Costa Rica is a state with official recognition of the Catholic Church. However, in recent years the growth of Evangelicals and Pentecostals has come to occupy space in the Legislative Assembly. It is not unusual that one of the presidential candidates of neo-Pentecostal origin has taken advantage of circumstances to raise his chances of success with speeches for "the protection of the family", as happened in the first electoral round. His speeches were extremely discriminative and threatening, and began to gain popular support, but mostly among traditional religious Christian-Evangelicals, with support from their pastors and leaders.⁸⁸ As well as being an elected parliamentarian in the previous period, he had the advantage of being a pastor with regular appearances in the media.⁸⁹ It was necessary to agree on a coalition government between two parties in the second round in order to remove the possibility of a Christian government being elected.

This condition is a phenomenon that crosses the region. The presence of distinct Christian voices of this sort in the political space and the presence of conservative forces have inundated daily life of countries in the region with similar strategies. Taking advantage of failed governments that have impoverished large swathes of the population, the evangelical churches have offered support to

⁸⁰ The Legislative Assembly of Mexico City approved the reform of article 146 of the [Civil Code of the Federal District](#) in December 2009 and entered into force in March 2010. This provision is currently drafted in gender-neutral terms.

⁸¹ [Ley para Prevenir y Eliminar la Discriminación del Distrito Federal](#) (Law to Prevent and Eliminate Discrimination in the Federal District) (published in the Official Gazette of the Federal District on February 24, 2011), article 5. See, article 135 and subsequent provisions of the [Civil Code of the Federal District](#).

⁸² For more information, see the entry on Mexico in the section on same-sex marriage in this report.

⁸³ For more information on the legal regime for legal gender recognition in Mexico, see: ILGA: Zhan Chiam et. al., [Trans Legal Mapping Report 2017: Recognition before the law](#) (2017), 97.

⁸⁴ ["Buscan reconocer identidad de género de jaliscienses transexuales en documentos oficiales"](#), *W Radio*, 6 November 2018.

⁸⁵ Esta iniciativa ha sido aceptada, pero por fallo de la Corte, se podrá ejercer hasta inicios del 2020.

⁸⁶ For more information on the content of Advisory Opinion No. 24, see the article written by Lucia Belén Araque in this report.

⁸⁷ ["Discurso contra parejas del mismo sexo impulsa campaña presidencial de predicador costarricense"](#), *El Mundo*, 1 February 2018.

⁸⁸ ["En secreto Fabricio Alvarado pidió a pastores ayuda para su campaña"](#), *El País*, 25 de marzo de 2018.

⁸⁹ Genilma Boehler, "El fenómeno religioso cristiano en el siglo XXI con sus enlaces y proyectos seudodemocráticos: deseos, cuerpos y poder en las curvas de la América Latina", en Gloria Careaga, *Sexualidad, religión y democracia en América Latina* (México: Fundación Arcoiris, 2018).

marginalised sectors, tending to their basic needs and constructing a social fabric that pivots itself to the defence of the interests of their religion, whilst at the same time demonising alternative expressions, principally in gender and sexuality. However, its influence is not confined to the attention of these sectors, it is clear that its interest is directed to governance, and more and more they interfere in the electoral processes and lobby for their inclusion in the three branches of government of each country.

It is not unusual that Mexico, being one of the countries with the oldest tradition of state secularism, today has a distinctly evangelical party (PES) and its new president is publicly assumed as a Christian who has initiated a “moral renewal of the country” in his work program.⁹⁰

The other countries of the region have gone through period of profound violence, where the presence of Christian forces is not absent.⁹¹ The government of Nicaragua has established a strong alliance with the Catholic Church to indefinitely keep itself in power, and at the same time initiated a ferocious persecution against dissidents, among them women and LGBT populations. Honduras and El Salvador are being desolated by gangs which stem from *maras*, with the defence of a patriarchal model where sexual and gender dissent has no place.⁹²

Guatemala, confronts a condition of mixed violence where police repression and delinquency appear to be united against the population, but where conservative forces propel an initiative on the protection of life and the family. This implies grave setbacks and limitation on the advancement of the rights of women and LGBT persons.⁹³

In this geopolitical panorama, the struggle for human rights – in particular for LGBT people – appears uncertain. Even so, the work of organisations has not stopped, they seem to be stronger, despite many times facing great risks to their lives or the need to migrate for their protection. As it is, the LGBT people of these countries today represent an important challenge for Mexico and Costa Rica in regard to migrants and in response to their requests for asylum.⁹⁴

The Situation in the Spanish-Speaking and French-Speaking Caribbean⁹⁵

By Darío Arias,⁹⁶ Manuel Vázquez Sejjido⁹⁷ and Francisco Rodríguez Cruz.⁹⁸

The level of acceptance towards sexual and gender diversity in the Dominican society⁹⁹ is not reflected in the meagre legal progress achieved in the Dominican Republic.¹⁰⁰ Although lobbying by religious and fundamentalist groups has prevented the enactment of inclusive laws,¹⁰¹ the explicit inclusion of the LGBTI population in the non-discrimination chapter of the National Human Rights Plan in December 2018 is one of the achievements resulting from the work of local organizations.¹⁰²

⁹⁰ “Partido Encuentro Social (PES)”, *Animal Político*, 9 September 2014.

⁹¹ Gloria Careaga, *Sexualidad, religión y democracia en América Latina* (México: Fundación Arcoiris, 2018).

⁹² For more information on the human rights situation of the population in El Salvador, see, in general: IACHR, *Public Hearing: Protection of human rights defenders of women, LGBTI persons, and children in El Salvador*, 169 Period of Sessions, 1 October 2018; *Public Hearing: Situation of human rights of LGBTI persons in El Salvador*, 161 Period of Sessions, 21 March 2017. For more information on the human rights situation of the population in Honduras, see, in general: IACHR, *Public Hearing: Situation of human rights of LGBT people in Honduras*, 157 Period of Sessions, 5 April 2016.

⁹³ See, in general, IACHR, *Situation of human rights in Guatemala* (2017) and, in particular: paras. 121 a 124, 210, 30 a 385.

⁹⁴ See, in general: Alisa Winton, “Cuerpos disidentes en movimiento: miradas sobre movilidad transgénero desde la frontera sur de México”, *El Cotidiano* 202, (2017), 115-126.

⁹⁵ The authors would like to thank Sergia Tomás Rodríguez, Argentine activist, and Michaël Cousin, French activist, for their collaboration.

⁹⁶ Darío Arias is ILGALAC Co-Secretary general. See full mini-bio above.

⁹⁷ Manuel Vázquez Sejjido is Deputy Director of CENESEX and member of the regional board of ILGALAC.

⁹⁸ Francisco Rodríguez Cruz, journalist and gay activist of the Humanity for Cuban Diversity Network.

⁹⁹ Muñiz A, Melgen L, Moren C, Balbuena A, Instituto de Investigación Social para el Desarrollo (ISD). *Imagining the future: citizenship and democracy in Dominican political culture* (2017). Pages 122-131.

¹⁰⁰ The authors are especially grateful to human rights activist and defender Deivis Ventura of the Dominican Republic for the information about the context and situation of the country.

¹⁰¹ National Human Rights Commission. *Inform about situation of human right in Dominican Republic* (2018). Pages 49-50).

¹⁰² Ministry of Foreign Affairs of the Dominican Republic. *National Human Rights Plan Dominican Republic 2018-2022* (2018). Pages 78-85).

In Cuba,¹⁰³ the most significant achievement was the popular consultation and the referendum on a new Constitution that replaced the definition of marriage between men and women with a neutral wording, using the term “spouses”. The new constitutional text also includes the right of every person to found a family in various ways, overcomes old conceptions with regard to a couple’s “reproductive purposes”¹⁰⁴ and explicitly proscribes discrimination based on sexual orientation and gender identity.¹⁰⁵

During the debate, different forces opposing these rights emerged, especially Protestant denominations and homophobic groups. Consequently, for the Constitution to translate into effective rights, a new Family Code will have to be enacted within two years and it will have to be submitted to popular consultation and referendum.¹⁰⁶

Finally, the situation in the Francophone Caribbean is of grave concern. In Haiti¹⁰⁷ violence against LGBTI people has been on the rise and several regressive bills have been introduced in the Senate, such as the prohibition of same-sex marriage¹⁰⁸ or the ban against public demonstrations advocating for the rights of LGBTI people. Additionally, LGBTI people might be included among the categories of people who could be denied a “certificate of good reputation”, a document that is required in many job applications. However, effective activism prevented these initiatives to advance in the Legislature’s lower house.

A Slow, but Significant Journey – Recent Developments in the Caribbean Region

By Westmin R.A. James¹⁰⁹ and Luciën D. Govaard.¹¹⁰

The Caribbean region consists of sovereign nations and dependent territories (France, UK, USA and Holland); islands and continental areas in the

Caribbean Sea and in Central and South America. According to recent estimates, home to over forty-four (44) million people.¹¹¹ The Caribbean is rich in diversity; English, Spanish, French and Dutch are among its official languages and in addition to native indigenous populations, its people are primarily descendants of Africans, Asians and Europeans. Recent developments in Belize, Trinidad and Tobago, Guyana, Bermuda and Suriname are of particular interest when outlining SOGIE legal and social advances in this region.

Although “homosexuality” in and of itself is not a crime, laws criminalize same-sex sexual conduct between consenting adults. Among them are Antigua and Barbuda, Barbados, Dominica, Guyana, Jamaica, St. Kitts and Nevis, St. Lucia and St. Vincent and the Grenadines. Punishments for buggery range from ten (10) years in Jamaica, Belize, Grenada and St. Lucia, Dominica, St. Kitts & Nevis (with or without hard labour) fifteen (15) years in Antigua and Barbuda if committed, and life imprisonment in Barbados and Guyana.

The act of “buggery” was defined in Antigua & Barbuda, Dominica and Trinidad and Tobago as anal intercourse by: “a male person with a male person” or “a male person with a female person”. In St. Lucia buggery is limited to anal intercourse by a male person with another male person while in Jamaica buggery covered anal intercourse either with mankind or with any animal. In Barbados, St. Kitts and Nevis, St. Vincent and the Grenadines where buggery was not legislatively defined, the courts have interpreted it to include anal or oral intercourse by a man with a man or woman; or vaginal intercourse by either a man or a woman with an animal.¹¹² In Grenada and Belize, ‘unnatural’ connection’, or ‘carnal knowledge against the order of nature’ have been interpreted by the courts to include anal intercourse between consenting adults male or female, but also includes any ‘non-natural’ sexual intercourse between any

¹⁰³ The authors thank the CENESEX Community Social Network activists for providing information about the context and the situation in the country.

¹⁰⁴ New Constitution Project of the Republic of Cuba. Title IV “Citizenship”. Chapter III “Families”. Articles 81 and 82.

¹⁰⁵ New Constitution Project of the Republic of Cuba. Title IV “Citizenship”. Chapter I “General Provisions”. Article 42.

¹⁰⁶ Francisco Rodríguez Cruz. *What happened to same-sex marriage in the draft Constitution?* (2018).

¹⁰⁷ The authors are especially grateful to activist Charlot Jeudy, President of Kouraj, for the information Shared on the situation of LGBTI people in Haiti.

¹⁰⁸ “The Haitian Senate passes a law criminalizing homosexual marriage”. EFE Agency, 2 August 2017.

¹⁰⁹ Westmin R. A. James is a Lecturer in Law and Deputy Dean at the University of the West Indies Cave Hill Campus.

¹¹⁰ Luciën D. Govaard is the chair of the Caribbean forum for Liberation and Acceptance of Genders and Sexualities and Vice-Chair for the PANCAP Policy and Strategy Working Group on Stigma and Discrimination.

¹¹¹ “Caribbean Population 2019”, *World Population Review Website*.

¹¹² *R v Wiseman* (1718) Fortes Rep 91; *R v Bourne* (1952) 36 Cr App R 135.

two people, heterosexual couples included, regardless of the orifice(s) used.¹¹³

In Antigua and Barbuda, Barbados and Trinidad and Tobago there is also the offence of serious indecency, while in Dominica, St. Lucia, St. Vincent and Grenadines the offence is gross indecency. Guyana and Jamaica have the offence of gross indecency, but only when committed between two male persons. The act of “gross indecency” or “serious indecency” is an act other than sexual intercourse by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire. It was also an offence under the laws of Guyana, “being a man, in any public way or public place, for any improper purpose, appears in female attire; or being a woman, in any public way or public place, for any improper purpose, appears in male attire...”.

The 2018 High Court of Trinidad and Tobago ruling in *Jason Jones v AG of Trinidad and Tobago*¹¹⁴ established that buggery and serious indecency laws were unconstitutional in Trinidad and Tobago. The High Court of Trinidad and Tobago following a similar case of *Caleb Orozco v The AG of Belize*¹¹⁵ from Belize held that buggery law breached the constitutional rights of the gay men to equality, privacy and freedom of thought and expression. These decisions will no doubt have an impact on the law in the wider Caribbean jurisdictions. The Court

later ordered that the law be modified so it no longer applies to consensual sexual acts between adults in private.¹¹⁶ In 2018, the Caribbean Court of Justice (CCJ)¹¹⁷ evaluated the cross-dressing law in *McEwan et al v AG of Guyana*,¹¹⁸ brought by four trans women who were arrested and convicted. The CCJ concluded that the law was unconstitutionally vague and resulted in transgender and gender non-conforming persons being treated unfavourably because of their gender expression and gender identity.¹¹⁹

Ongoing cases pertaining to SOGIE are currently being litigated in Bermuda and Suriname. In Bermuda, the Court of Appeal upheld the Supreme Court's ruling that revoked parts of Civil Partnership law that prevented same-sex couples' marriage,¹²⁰ while in *Simson v. Suriname*,¹²¹ the official registry of a trans woman's sex change, following gender affirmative surgery — a case won at first instance — is being appealed by the Government of Suriname.

In its Advisory Opinion, OC-24/17, the Inter-American Court of Human Rights addressed issues concerning gender identity, same-sex relationships, and the rights of LGBTI persons.¹²² This Advisory Opinion applies to Barbados, Dominican Republic, Suriname and Haiti.¹²³ While many welcomed this development, it is still relatively early to outline its impact on Caribbean societies.

¹¹³ Supreme Court of Belize, *Claim No. 668 of 2010*, 10 August 2016.

¹¹⁴ Supreme Court of Trinidad and Tobago, *Jason Jones vs Attorney General of Trinidad & Tobago and others*, H.C.720/2017. CV.2017-00720, 4 April 2018.

¹¹⁵ *Ibid.*

¹¹⁶ The British Overseas Territories repealed their anti-sodomy laws in 2000. For more information, see section on legality of same-sex sexual acts in the Global Overview section of this report.

¹¹⁷ The CCJ is the highest court of appeal for Guyana, Belize, Barbados and Dominica.

¹¹⁸ Caribbean Court of Justice (CCJ), *McEwan et al v AG of Guyana* [2018] CCJ 30(AJ).

¹¹⁹ For more information see: Joint Press Statement from GTU, U-RAP and SASOD: “[Highest Caribbean Court Strikes Down Guyana's Crossdressing Law](#)”, 13 November 2018. Video of the delivery of the judgement can be accessed [here](#).

¹²⁰ *AG v Ferguson et al*; The AG is considering appealing to the Privy Council

¹²¹ “[Transgender wins case for sex change recognition](#)”, *The Daily Herald*, 12 January 2017.

¹²² For more information on the Court's Advisory opinion see the essay wrote by Lucía Belén Araque in International Law section of this report.

¹²³ These are the only countries in the Caribbean that have ratified the American Convention on Human Rights.

GLOBAL PERSPECTIVES

NORTH AMERICA

STATE-SPONSORED HOMOPHOBIA 2019



NORTH AMERICA

The Fight for Rights in North America: Progress and Pushback in the Shadow of the Trump Administration

By David J. Godfrey¹ and Kimahli Powell.²

Significant progress in the fight for equality has been made from local to national levels across the US and Canada over the past two years since the last *State-Sponsored Homophobia* report: a growing number of queer people are covered by non-discrimination provisions; cities, states and provinces are taking the lead on banning harmful conversion therapy practices; and intersex and gender non-conforming communities are beginning to receive hard-fought legal recognition.

Yet in the years since the 2015 US Supreme Court marriage equality ruling—and particularly since the installation of the Trump Administration in 2017—a wave of backlash has been growing that threatens to undermine progress towards LGBTQ equality. Faith-based and conservative campaigns have sought to either codify directly discriminatory policies like “bathroom bills” or, more insidiously, attempt to flout existing discrimination protections by claiming exemptions on the pretence of religious freedom. At the federal level, the Trump Administration has been hard at work undoing fragile protections, mostly for trans people, put in place through executive order by the Obama Administration.

In the short essay “America’s unpromising start to 2017”, included in the last edition of *State-Sponsored Homophobia*, Aengus Carroll and Lucas Ramón Mendos detailed some of the decisions made by the Trump Administration and the trouble they signalled on the horizon,³ including rescinding Obama-era guidelines instructing schools to treat trans students according to their gender identity,⁴ removing proposed census questions on sexual orientation and gender identity,⁵ and appointing Neil Gorsuch to the Supreme Court.⁶ Since then, Trump’s nomination of Brett Kavanaugh to fill the vacancy left by Justice Kennedy’s retirement has only increased concerns that the conservative tipping of the Court could lead to a backtrack on LGBTQ, sexual and reproductive health rights.⁷

Trump’s presidency has been characterised by governing via Twitter, where he frequently announces major policy changes, conducts diplomacy, and berates the media and his detractors. Trump’s reckless propensity for using Twitter as a tool for governing was perhaps best exemplified by his July 2017 tweet announcing that trans people would be banned from serving in the

¹ David J. Godfrey holds an MA in International Affairs from The New School and works in policy analysis and comparison, with a focus on LGBT rights in labor law. He has worked as a consultant for the United Nations Development Programme and a researcher with WORLD Policy Analysis Center, UCLA.

² Kimahli Powell is the current Executive Director of Rainbow Railroad. Kimahli has a wide range of experience in the non-profit sector and has spent more than fifteen years advocating for social justice, youth, arts and culture. He was the Director of Development and Outreach at the Canadian HIV/AIDS Legal Network, the Senior Development Officer at Dignitas International, Director of Development at the Inside Out Toronto LGBT Film and Video Festival in addition to holding other director-level positions with non-profit organizations in Toronto and the National Capital Region, where he studied Political Science at the University of Ottawa.

³ International Lesbian, Gay, Bisexual, Trans and Intersex Association: Carroll, A. and Mendos, L.R., *State Sponsored Homophobia 2017: A world survey of sexual orientation laws: criminalisation, protection and recognition* (Geneva: ILGA, May 2017), 163.

⁴ Dominic Holden, “The Trump Administration Just Withdrew Guidelines that Protected Transgender Students” *BuzzFeed News*, 22 February 2017.

⁵ “Media Advisory: Federal Government Rolls Back Important Data Collection on LGBT Populations,” *The Williams Institute*.

⁶ Julie Moreau, “Trump’s Supreme Court Pick Alarms LGBTQ Advocates” *NBC News*, 1 February 2017.

⁷ “Press Release: NCLR Responds to Trump’s Nomination of Judge Brett Kavanaugh to Fill Supreme Court Vacancy,” *National Center for Lesbian Rights*.

military,⁸ surprising even the President's own defence officials.⁹

In addition to these prominent, visible attacks on the LGBTQ community, the Trump administration has been orchestrating a quiet campaign to erase sexual and gender minorities, most pointedly targeting the trans community. In addition to trying to remove proposed questions on sexual orientation and gender identity from the 2020 census¹⁰ and a national survey of elderly citizens,¹¹ resources for lesbian and bisexual health were scrubbed from the Department of Health and Human Services' Office of Women's Health website in the fall of 2017.¹²

More recently, the same Department has begun leading efforts to establish a legal definition of gender as determined "on a biological basis that is clear, grounded in science, objective and administrable."¹³ Aside from fundamentally denying the existence of trans people, the move would allow the Administration to deny access to government funding for health programs, and exclude trans people from protection from sex discrimination provided under civil rights law. The Trump Administration's international record on LGBTQ issues has been similarly dismal.

The influence on public sentiment of Trump's rhetoric and policies regarding minority communities has been pronounced. In the first half of 2017, more LGBTQ people were killed in hate incidents in the US than in all of 2016.¹⁴ The National Coalition of Anti-Violence Programs, which tracks incidences of bias and hate crimes, recorded its highest number of anti-LGBTQ homicides to date in 2017, the majority (75%) of which were committed against people of colour. Previously, 2016 had been the deadliest year for LGBTQ individuals in the US, which signals a worrying trend.¹⁵

Canada makes amends

Though the Trump Administration's approach to LGBTQ issues has been largely antagonistic, the Trudeau Administration to the north has taken a decidedly conciliatory approach with the queer community. In November 2017, The Canadian Prime Minister delivered a historic apology to the LGBTQ community in the country for decades of "state-sponsored, systematic oppression and rejection."

On the occasion, the government introduced legislation – Bill C-66, the Expungement of Historically Unjust Convictions Act – that would "put into place a process to permanently destroy the records of convictions for offences involving consensual sexual activity between same-sex partners that would be lawful today."¹⁶

In June of 2018, a Canadian Federal Court Judge approved a settlement for the LGBTQ2 Purge class action lawsuit, which sought compensation for damages for members of the military and other federal agencies who were investigated and fired because of their sexual orientation, gender identity or gender expression. The scope covered anyone whose career suffered due to the practice between the years 1969 and 1995, making it the largest LGBTQ settlement anywhere in the world.¹⁷

Pushback

Religious exemptions

Religious exemptions are legal provisions that allow individuals, churches, and organizations to bypass non-discrimination protections for LGBTQ people on the grounds that treating them equally "would

⁸ Brian Bennett, "Trump, on Twitter, announced a ban on transgender service members. Now the military has to figure out what he means" *Los Angeles Times*. 26 July 2017.

⁹ Paul McLeary, "Trump Blindsides Pentagon in Transgender Policy Shift" *Foreign Policy*. 26 July 2017

¹⁰ "Media Advisory: Federal Government Rolls Back Important Data Collection on LGBT Populations" *The Williams Institute*.

¹¹ Matt Sedensky, "Federal surveys trim LGBT questions, alarming advocates" *AP News*. 20 March 2017.

¹² Rachel Berman "Overview of HHS's Office of Women's Health Website Overhaul: Removal of Resources and Corresponding Link Alterations on the A-Z Health Topics Page" *Sunlight Foundation's Web Integrity Project*. 21 March 2018

¹³ Erica L. Green, "'Transgender' Could be Defined Out of Existence Under Trump Administration" *The New York Times*. 21 October 2018.

¹⁴ Emily Waters, Sue Yacka-Bible "A Crisis of Hate: A Mid-Year Report on Homicides Against Lesbian, Gay, Bisexual and Transgender People." National Coalition of Anti-Violence Programs (NCAVP). 2017

¹⁵ Alia E. Dastagir "2016 was the deadliest year on record for the LGBTQ community." *USA Today*. 12 June 2017.

¹⁶ "Prime Minister delivers apology to LGBTQ2 Canadians" *Justin Trudeau, Prime Minister of Canada*. 28 November 2017

¹⁷ Jack Julian "Federal Court approves class action settlement for LGBTQ Canadians" *CBC*. 19 June 2018

violate their religious beliefs.”¹⁸ In the US, religious exemptions are most often claimed by small business owners refusing to provide a good or service, like flowers or a cake for a same-sex wedding, on the basis that doing so makes them “complicit” in what they see as something sinful. Since legalizing same-sex marriage, the US has seen a startling increase in the number of “religious exemption” bills. According to Movement Advancement Project, 20 states currently have some form of religious exemption law, and Alabama has gone so far as to enshrine religious exemption law in its constitution.¹⁹

In early 2017, President Trump prepared to sign an executive order pledging to “vigorously promote religious liberty” that contained language many feared could weaken antidiscrimination laws pertaining to LGBTQ people.²⁰ Though that language was removed from the final order, the policy gives faith-based organizations more political power, which LGBTQ advocates say could lead to legal discrimination.

Republicans made another attempt to establish religious exemptions similar to those removed from Trump’s executive order by reintroducing the First Amendment Defense Act (FADA) in March 2018.²¹ The bill, which would prevent the federal government from punishing businesses or individuals for violating non-discrimination laws because of their religious beliefs, is again failing to advance far in the Senate.

It is not only the federal government toying with the idea of greenlighting discrimination as religious freedom. In 2018 alone, state legislatures in Iowa, West Virginia, Kentucky, Oklahoma, Colorado, Georgia, Kansas, and Missouri considered bills that would provide religious exemptions to protections in the workplace, schools, health care access, adoption and foster care, and the provision of goods and services, among others.²² A 2015 Mississippi law that allows businesses and government officials to deny services to LGBTQ persons if it would conflict with their religious

beliefs came into effect in October 2017, when an injunction against it was lifted.²³

Court cops out on cake case

The fight over the legality of religious exemptions came to a head in mid 2018 when the US Supreme Court handed down its decision on the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* case. The case involved a bakery owner in Colorado who had been found to be in violation of the state’s non-discrimination law when he refused to bake a wedding cake for the marriage of a gay couple. The owner, claiming the state civil rights commission had violated his right to free speech, took his case to the Supreme Court seeking a religious exemption from non-discrimination law.

Yet the outcome of the case was not the clear mandate on the legality of religious exemptions that many were hoping for. This was partly due to a number of complicating factors that muddled the case from the beginning. For one, it was unclear whether the baker refused to bake any cake at all, or only one with a wedding message. At the time of the incident, gay marriage was not yet legal in the US, so the baker was also able to argue he was refusing to participate in an illegal activity. In the end, the Court ruled 7-2 in favour of the bakery owner, but on the narrow grounds that the state commission had failed to exercise neutrality in dealing with his religious exemption claim, another fact that complicated the case.

Though the decision didn’t directly rule on whether the baker was within his rights to refuse service to the gay couple, passages of the majority opinion reaffirmed that laws must protect the rights of LGBTQ persons,²⁴ stating that religious objections, “do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services...”²⁵ The question of the legality of religious exemptions from non-discrimination provisions is likely to make its way back to the Court given the increase in religious freedom bills and the ensuing legal battles.

¹⁸ “‘All We Want is Equality’ Religious Exemptions and Discrimination against LGBT People in the United States” *Human Rights Watch*. 19 February 2018.

¹⁹ Movement Advancement Project “[Religious Exemption Laws](#)” (web page). Accessed 15 February 2019.

²⁰ Kaelyn Forde “[LGBT activists react to Trump’s latest executive order](#)” *ABC News*. 4 May 2017.

²¹ Ashley Killough “Sen. Mike Lee reintroduces religious freedom bill, LGBTQ groups cry discrimination” *CNN*. 9 March 2018.

²² American Civil Liberties Union “[PAST LEGISLATION AFFECTING LGBT RIGHTS ACROSS THE COUNTRY \(2018\)](#)” (web page). Accessed 15 February 2019.

²³ Samantha Allen “[SCOTUS Lets Mississippi’s HB 1523, America’s Most Anti-LGBT Law, Stay in Place](#)” *Daily Beast*. 11 January 2018

²⁴ Douglas NeJaime and Reva Siegel “[Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop](#)” *The Yale Law Journal Forum*. 14 September 2018.

²⁵ James Esseks “[In Masterpiece, the Bakery Wins the Battle but Loses the War](#)” *American Civil Liberties Union*. 4 June 2018.

Trans military ban

Since Trump's abrupt announcement that trans people could no longer serve in the military, the ban has faced multiple challenges from civil rights groups,²⁶ and an injunction from federal courts.²⁷

In November 2018, the Trump administration asked the Supreme Court to fast-track a ruling on the ban, but the court denied the request. The Court also lifted three of the four preliminary court orders preventing Trump from enforcing the ban while the cases continue in the lower courts,²⁸ essentially allowing the policy to take effect, even if temporarily.²⁹ With the confirmation of two of Trump's Supreme Court nominees, and the resulting shift to a 5-4 conservative majority, it is a distinct possibility that the Court will hand him more victories like this one, and potentially less modest.

Bathroom bills

Trans people need access to public spaces and services in accordance with their gender identity in order to avoid awkward or dangerous encounters, to enjoy access to sanitation and a basic level of dignity afforded everyone else. In the US, opponents of trans rights argue that allowing trans people to use public facilities like restrooms and locker rooms that align with their gender identities puts women and children at risk from predators taking advantage of the policy.

Though a recent study³⁰ and common sense say this is not the case, it has not stopped a growing

number of state and local legislatures from introducing "bathroom bills" seeking to limit trans people's access to facilities of their choice. Bills in Texas,³¹ Virginia,³² and Washington³³ were defeated, along with a ballot measure in Anchorage, Alaska.³⁴ Bills in Alabama³⁵ and Missouri³⁶ are still being discussed, although the now-infamous North Carolina ban that sparked the national bathroom access debate was partially repealed in March 2017.³⁷

The issue has the potential to impact trans public school students on the national level. Under the leadership of Betsy DeVos, the United States Education Department indicated that it will not investigate or take action on complaints filed by trans students barred from using the restroom that matches their gender identity, confirming what had implicitly been the Department's stance on the issue from the beginning.³⁸ Though the Supreme Court declined to hear a prominent case regarding a student's right to use the school bathroom corresponding to his gender identity in early 2017,³⁹ the issue is likely to make its way back to the Court.⁴⁰

The trans bathroom panic is not unique to the US: conservative groups in Canada made the same argument against a 2017 bill criminalizing discrimination and bias crimes on the basis of gender identity, though it did not stop the bill from passing with a wide majority.⁴¹ Federal trans-sensitive policies on the placement of inmates in prison⁴² and airport screening procedures

- 26 "Complaint for Declaratory and Injunctive Relief" *American Civil Liberties Union*. 24 April 2018; "Complaint for Declaratory and Injunctive Relief" *Lambda Legal*. 29 August 2017; "Complaint for Declaratory and Injunctive Relief" *National Center for Lesbian Rights*. 9 August 2017.
- 27 Samuel Garrett-Pate "U.S. District Court Denies Motion To Dissolve Nationwide Injunction Blocking Transgender Military Ban In *Stockman v. Trump*", 18 September 2018.
- 28 Adam Liptak, "Supreme Court Revives Transgender Ban for Military Service" *The New York Times*. 22 January 2019.
- 29 Adam Liptak, "Supreme Court Revives Transgender Ban for Military Service" *The New York Times*. 22 January 2019.
- 30 Amira Hasenbush, Andrew R. Flores and Jody L. Herman "Gender Identity Nondiscrimination Laws in Public Accommodations" *The Williams Institute*. September 2018.
- 31 "Texas governor says 'bathroom bill' is no longer a priority" *NBC News*. 1 October 2018.
- 32 Laura Vozzella "In Virginia, Republican-led committee kills transgender 'bathroom bill'" *The Washington Post*. 20 January 2017.
- 33 Sydney Brownstone "For the Second Year in a Row, Anti-Trans Activists Fail to Turn in Signatures for Their Ballot Measure" *The Stranger*. 7 July 2017.
- 34 Samantha Allen "Alaska Voters Latest to Reject an Anti-Transgender Law" *Daily Beast*. 6 April 2018.
- 35 John Sharp "Alabama bathroom bill still moving forward despite setback in North Carolina" *Alabama.com*. 31 March 2017.
- 36 Kasandra Brabaw "Everything You Need to Know About 'Bathroom Bills'" *Refinery* 29. 31 March 2017.
- 37 Richard Fausset "Bathroom Law Repeal Leaves Few Pleased in North Carolina" *The New York Times*. 30 March 2017.
- 38 Dominic Holden, "The Education Department Officially Says It Will Reject Transgender Student Bathroom Complaints" *Buzzfeed News*. 12 February 2018.
- 39 Allison Turner, "Breaking: U.S. Supreme Court Remands and Vacates Gavin Grimm Case" *Human Rights Campaign*. 6 March 2017.
- 40 Samantha Allen, "This Could be the First Transgender Rights Case the Supreme Court Hears" *The Daily Beast*. 23 November 2018.
- 41 John Paul Tasker, "Canada enacts protections for transgender community" *CBC News*. 16 June 2017.
- 42 Kathleen Harris "Correctional Service flip-flops on transgender inmate placement policy" *CBC News*. 13 January 2017.

represented additional victories for the trans community in Canada.⁴³

Pushback in sex education

Though Canada's federal government has taken strides towards realizing LGBTQ equality in recent years, the country has also experienced efforts on the sub-national level to hamper progress. In July 2018, the government of Ontario cancelled a 2015 sex education curriculum that taught children about different sexual and gender identities after objections from religious groups.⁴⁴ Just a few months later, the Ontario government once again angered LGBTQ and human rights groups by passing a non-binding resolution supporting establishing a rigid definition of gender and dismissing gender identity theory as "unscientific, liberal ideology".⁴⁵

"Gender identity is recognized and protected as a human right in Ontario and under the Canadian Human Rights Act and the Criminal Code," ILGA co-Secretary General and Egale Executive Director Helen Kennedy pointed out. "It is protected for a reason. Trans people, and especially young trans and non-binary people, face a significant amount of discrimination on a daily basis."⁴⁶

Protections from discrimination

Protection from SOGIE-based discrimination

Protections from discrimination are indispensable to guaranteeing LGBTQ individuals the same rights to work, housing, family, and participation in civic life as their heterosexual counterparts. Though federal law in Canada provides many of these protections, provinces sometimes enact human rights laws to fill gaps left in federal protections. In 2017, the Canadian provinces of Nunavut and Yukon approved bills that expand non-

discrimination provisions to encompass gender identity and gender expression.⁴⁷ The bill passed in Yukon also allowed changing gender on a birth certificate without first undergoing gender-confirming surgery and gives citizens the option of recording their gender as other than male or female on government documents.⁴⁸

As the US does not currently have federal legislation protecting LGBTQ persons from discrimination in vital areas like work and housing, state laws are the only recourse available to many LGBT Americans. Currently, just under half (48%) of the population in the United States is protected from discrimination at work.⁴⁹ The situation improved slightly over the past two years, as bans on SOGI discrimination in different contexts were passed in a number of states across the US. The governors of Virginia, New Hampshire, and California signed into law bills banning discrimination based on sexual orientation and gender identity in the provision of state services,⁵⁰ in employment, housing and public spaces,⁵¹ and in long-term care facilities for the elderly,⁵² respectively.

Though New York State already has strong protections on the book, the Governor went as far as to sign an executive order banning state agencies and authorities from doing business with companies that tolerate discrimination.⁵³ Finally, during the November midterms, voters in Massachusetts made history when they voted to uphold a state law forbidding discrimination based on gender identity in public places, making it the first state to uphold trans protections on a standalone ballot measure.⁵⁴

"Conversion therapy" bans

Vancouver, British Columbia became the first Canadian city to ban conversion therapy in a

⁴³ Kathleen Harris "Airport screening rules revamped for transgender travellers" CBC News. 22 January 2017.

⁴⁴ "Canada province cancels new sex-ed curriculum after protests" BBC News. 12 July 2018.

⁴⁵ Alison Thornton "Harmful 'Gender Identity' Resolution Passed by Ontario Party" *Human Rights Watch*. 21 November 2018.

⁴⁶ "Statement Opposing Policy Resolution R4" *Egale Canada Human Rights Trust*. 19 November 2018.

⁴⁷ Rob Salerno "Nunavut passes trans-rights law" *DailyXtra*. 14 March 2017.

⁴⁸ Rob Salerno "Yukon government introduces trans-rights bill" *DailyXtra*. 26 April 2017.

⁴⁹ "State Non-Discrimination Laws", *Movement Advancement Project (MAP) Website*.

⁵⁰ "Governor McAuliffe Signs LGBTQ Executive Order at UVA" *NBC News*. 2017.

⁵¹ Stephen Peters. "New Hampshire Governor Signs Legislation Protecting Transgender People from Discrimination" *Human Rights Campaign*. 8 June 2018.

⁵² "Press Release: California Legislature Passes 'Bill of Rights' for LGBTQ Seniors in Long-Term Care." *Equality California*. 12 September 2017.

⁵³ "New York State - Governor Cuomo Signs Executive Order Banning All State Agencies and Authorities from Doing Business with Companies that Promote or Tolerate Discrimination" *Office of Governor Andrew M. Cuomo*. 4 February 2018.

⁵⁴ "Historic Victory: Massachusetts Voters Uphold Transgender Rights" *Freedom for all Americans*. 6 November 2018.

unanimous vote in June 2018,⁵⁵ while a similar ban was enacted in the province of Nova Scotia just a couple months later.⁵⁶ The ban passed in Nova Scotia applies not only to health professionals, but to people “in positions of trust or authority” more generally.

Seven more states in the US were added to the growing list of states that ban conversion therapy: New Mexico,⁵⁷ Rhode Island,⁵⁸ Washington,⁵⁹ Maryland,⁶⁰ Hawaii,⁶¹ New Hampshire,⁶² and Delaware.⁶³ Similar bans were enacted in New York City⁶⁴ and Milwaukee (Wisconsin).⁶⁵ On the federal level, Democratic lawmakers advanced a bill that would ban conversion therapy under the pretence of consumer fraud.⁶⁶

Conversion therapy bans continue to face strong opposition from religious communities in the US. The majority of state bans on conversion therapies apply only to licensed healthcare providers, meaning unlicensed religious leaders or advisors can still practice. A California lawmaker attempted to close this loophole by introducing a bill that would ban the practice for both minors and adults and applied to any commercially-available conversion therapy. However, the bill was withdrawn after strong pushback from conservative religious groups,⁶⁷ who argued that the broad language used in the bill infringed on their right to provide “therapy” to adults who come to them looking to change their sexual orientation. Though the bill would have only applied to cases where conversion therapy was being sold as a

“service”, and not to counselling provided free-of-charge, faith leaders pushed the narrative that the bill, “could even be used to ban the Bible or other printed materials.”⁶⁸

A recent study by the Williams Institute has shown that approximately 698,000 LGBT adults in the U.S have received “conversion therapy” at some point in their lives and estimates that 20,000 LGBT youth aged 13 to 17 will be subjected to such harmful treatments from a licensed healthcare professional before the age of 18.⁶⁹

Protection of intersex people

In 2017, Lambda Legal asked a US federal court to reopen the case of Dana Zzyym, an intersex activist whose request for an accurate passport, without a male or female gender marker, was rejected by the State Department for the second time.⁷⁰ In September 2018, the court ruled the US State Department could not deny Zzyym a passport.⁷¹

A few months prior, the California Senate approved a resolution calling on medical professionals to delay unnecessary surgery on intersex infants until they reach an age where they’re able to give their consent. The resolution makes California the first state to endorse the position that non-consensual, cosmetic genital ‘normalising’ surgery on intersex kids should only be an option when a child is old enough to participate in the decision.⁷²

⁵⁵ Craig Takeuchi “Vancouver becomes first Canadian city to ban anti-LGBT conversion therapy.” *Straight*. 6 June 2018.

⁵⁶ Michael Tutton “Nova Scotia’s Liberal government to ban conversion therapy for LGBTQ youth” *Global News*. 11 September 2018. Drew Schwartz “New Mexico Just Banned Gay Conversion Therapy for Minors” *Vice News*. 7 April 2017.

⁵⁸ Allison Turner “Rhode Island Legislature Sends Bill to Protect Youth from ‘Conversion Therapy’ to Governor’s Desk” *Human Rights Campaign*. 29 June 2017.

⁵⁹ “Washington Law Protects LGBTQ Youth from Conversion Therapy” *National Center for Lesbian Rights*. 29 March 2018.

⁶⁰ Scott Dance “Maryland becomes 11th state to ban conversion therapy for LGBT youth as Gov. Hogan signs bill.” *The Baltimore Sun*. 15 May 2018.

⁶¹ “Hawaii becomes 12th state to ban gay conversion therapy for minors” *Hawaii News Now*. 27 August 2018.

⁶² Stephen Peters “New Hampshire Governor Signs Legislation Protecting Transgender People from Discrimination” *Human Rights Campaign*. 8 June 2018.

⁶³ David Hudson “Delaware becomes 15th US state to ban conversion therapy.” *Gay Star News*. 24 July 2018.

⁶⁴ Erin Durkin “Conversion therapy meant to turn gay people straight to be banned in NYC under Council bill” *New York Daily News*. 30 November 2017.

⁶⁵ Mary Spicuzza “Therapy to change a child’s sexual orientation will be banned in Milwaukee” *Journal Sentinel*. 27 March 2018.

⁶⁶ Dominic Holden “Democrats are taking another shot at protecting LGBT kids from so-called cures” *BuzzFeed News*. 25 April 2017.

⁶⁷ Alexei Koseff “Gay conversion therapy bill dropped by California lawmaker.” *Sacramento Bee*. 31 August 2018.

⁶⁸ Melanie Mason, “California legislator shelves bill to ban paid ‘gay conversion therapy’ for adults” *Los Angeles Times*. 31 August 2018.

⁶⁹ Christy Mallory, Taylor N.T. Brown and Kerith J. Conron “Conversion Therapy and LGBT Youth” *The Williams Institute*. January 2018.

⁷⁰ “State Department Again Denies Intersex Citizen Passport, Even After Federal Court Tells It To Reconsider Policy” *Lambda Legal*. 26 June 2017.

⁷¹ “U.S. judge rules for Colorado intersex veteran denied passport” *NBC News*. 20 September 2018.

⁷² “California: Resolution Affirms Intersex Rights” *Human Rights Watch*. 28 August 2018.

Legal Gender Recognition (LGR)

The ability to update one's gender on identity documents has a profound impact on trans people's quality of life. Without these documents, everyday interactions like going through airport security, or checking into a hotel, or applying for credit can, at best, be uncomfortable and, at worst, fuel instances of hate, discrimination and even violence.

Achievements in legal gender recognition have been made on the local, state, and federal levels in Canada over the past two years. The governments of Newfoundland and Labrador⁷³ and British Columbia⁷⁴ amended their policies to allow people who do not identify as male or female to choose the gender marker 'X' on their state-issued IDs. Similarly, the Government of Canada announced in August 2017 that it would begin working to implement an 'X' gender marker in Canadian passports, and other documents issued by its immigration department.⁷⁵

In the US, state governments in Oregon,⁷⁶ Washington,⁷⁷ and Minnesota,⁷⁸ in addition to New York City,⁷⁹ instituted policies allowing people who don't identify exclusively as male or female to choose 'X' as their gender marker on government-issued IDs. Trans women in the states of Idaho⁸⁰ and Kansas⁸¹ filed lawsuits challenging the states' bans on updating birth certificates to correctly reflect a person's gender identity. Though the Kansas case is ongoing, a judge in Idaho ruled in favour of the plaintiff and overturned the state's ban.⁸²

Conclusion

In the US, the previous years of legal battles over discrimination protections and religious freedom have exemplified the tension between progress and

pushback, and set the stage for what will likely be extremely impactful and long-lasting court decisions to come. The debate over whether SOGIE are protected classes comes down to interpretation of Title IX of the Civil Rights Code of 1967: since 2017, at least two federal courts have ruled in favour of plaintiffs in three separate workplace discrimination cases where the plaintiffs were fired for their sexual orientation.⁸³ Despite these rulings, the Trump Administration, and Republicans at large, continue to argue that the term "sex" refers strictly to gender.

Similarly, whether anti-LGBT discrimination can be carried out as a protected form of free speech under religious freedom is a question that will undoubtedly find its way before the Supreme Court, and unlike the Masterpiece Cake case, a definitive ruling on the topic will have to be made. In both cases, the Supreme Court, now with two Trump nominees, has the potential to issue rulings that could adversely impact an entire generation of LGBTQ people in the US.

Outside the courts and on the societal level, the movement remains strong: US midterm elections in November 2018 delivered wins to more than 150 LGBTI candidates at federal, state and local levels; the most of any US election. And though Canada has seen some pushback on the subnational level, its federal government has proven to be a strong ally to the LGBTQ community, doing more to make up for its past wrongs than any other country before. While it's imperative to remain vigilant and guard against rising attempts at regression, recent years are a testament to the persistence and resilience of the LGBTQ communities of Canada and the US.

⁷³ "Gemma Hickey wins battle for gender-neutral birth certificate." *CBC*. 21 September 2017.

⁷⁴ Richard Zussman "B.C. now recognizes 'X' gender marker on driver's licence, birth certificate." *Global News*. 2 November 2018.

⁷⁵ "News Release: Minister Hussen announces major step forward in gender equality by making changes to passports and immigration documents." *Government of Canada*. 24 August 2017.

⁷⁶ Laurel Wamslet "Oregon Adds a New Gender Option to its Driver's Licenses: X" *NPR*. 16 June 2017.

⁷⁷ Emanuella Grinberg "Washington state offers third gender option on birth certificates" *CNN*. 4 January 2018.

⁷⁸ Paul Walsh "Minnesota now offers 'X' for gender option on driver's licenses" *StarTribune*. 3 October 2018.

⁷⁹ Brooke Sopelsa "Gender 'X': New York City to add third gender option to birth certificates." *NBC News*. 12 September 2018.

⁸⁰ "Lambda Legal sues over Idaho's Anti-Trans Birth Certificate Policy" *Lambda Legal*. 18 April 2017.

⁸¹ Zack Ford "New lawsuit challenges Kansas' ban on updating transgender citizens' birth certificates" *ThinkProgress*. 16 October 2018.

⁸² Nico Lang "Idaho Will Finally Allow Trans People to Change Birth Certificates Following Court Ruling" *INTO*. 6 March 2018.

⁸³ "Federal Court Rules Employers Can't Fire People for Being Gay." *Lambda Legal*. 4 April 2017; "Onward to the Supreme Court for Lambda Legal and Client Fired for being a Lesbian." *Lambda Legal*. 6 July 2017; Dominic Holden. "A Federal Court Just Ruled for Gay Rights in a Major Discrimination Case." *Buzzfeed News*. 26 February 2018.

GLOBAL PERSPECTIVES

ASIA

STATE-SPONSORED HOMOPHOBIA 2019



ASIA

Lights and Shadows in a Vast Region

Various authors. Introduction by Daryl Yang.¹

As the essays in this section reveal, the developments in SOGIE issues in Asia have been uneven. While some states shine brightly as beacons of hope, others have regressed into the shadows of intolerance. Nevertheless, it is anticipated that it is only a matter of time before the flames of change will spread across land and sea to reach those awaiting the arrival of freedom and equality through the tireless work of activists and allies.

Firstly, India, Nepal, Thailand, Vietnam and the Philippines stand out as the beacons of hope in the region. As Shakhawat noted in his essay on South Asia, the repeal of Section 377 of the Indian Penal Code is perhaps “the most historic event to take place” in recent memory. Nepal’s Supreme Court similarly issued a decision that enshrined equality and non-discrimination on the basis of SOGIE. The essay on Southeast Asia discusses the encouraging progress in the three ASEAN countries in terms of the potential legalisation of same-sex marriage and stronger legal protections for sexual and gender minorities. The triumph at the Indian Supreme Court has emboldened activists in other former British colonies to fortify their efforts to repeal the same laws in their countries. There are two ongoing constitutional challenges in Singapore over Section 377A of the Singapore Penal Code while activists in Malaysia, Sri Lanka and Myanmar have become increasingly vocal and visible following the Indian decision.

These encouraging developments stand in stark contrast to the regression seen in Indonesia and most of continental Asia, especially Central Asia and the Middle East, a likely result of the growing

religious fundamentalism in those countries. A similar trend can be observed in Hong Kong, South Korea and Taiwan as described in Minwoo Jung’s piece, where Christian conservative groups have become increasingly hostile in campaigning against SOGIE equality.

Despite these setbacks, the essays in this section also reveal the resilience and resistance of activists and SOGIE minorities. A key challenge faced by those championing SOGIE equality however is the lack of protections for their safety and rights as many human rights defenders have been subject to violence from both state organs and citizen vigilantes. This highlights the importance of an intersectional approach to human rights, where respect for the rights of SOGIE communities can be realised only with the entrenchment of strong democratic institutions founded on the rule of law.

While the outlook may seem bleak for Asia currently, it is hoped that things will gradually improve across the diverse societies in Asia as the hope and courage of activists and allies continue to reverberate through the continent.

A Mixed Report Card for South East Asia

By Lloyd Nicholas Vergara² and Zach ZhenHe Tan.³

Given the political and societal diversity of South East Asia, the report card for the region is mixed. In certain countries, progress appears ascendant. In Thailand, the military junta cabinet approved a bill

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- ³ Zach ZhenHe Tan will graduate with a Juris Doctor from Harvard Law School in 2019, where he now serves as an Editor for the Harvard Law Review. He has interned at a variety of public interest organizations, including GLBTQ Legal Advocates & Defenders and Asian Americans Advancing Justice. He graduated from the National University of Singapore with a Bachelor of Laws in 2016.

in December 2018 that would legalize same-sex civil unions.⁴ With an election likely to be called this year, the ultimate fate of the bill will be in the hands of whoever claims electoral victory and attains control of the Thai legislature.

There is also hope in Vietnam, where the government is contemplating legal protections for transgender people. As stated by a government spokesperson, “the bill stipulates how to identify a person whose gender identity is different from their assigned sex at birth through psychological evaluations.”⁵ It is expected that the bill would improve healthcare access for transgender individuals in Vietnam.

In the Philippines, the Department of Education, on June 29, 2017, issued its Gender-Responsive Basic Education Policy,⁶ which broadens the understanding of “gender” to include relations between same-sex partners,⁷ gender awareness, gender-based violence, gender-based discrimination, gender expression, and gender identity.⁸ On the judicial front, the Philippine Supreme Court heard, on June 19, 2018, oral arguments over a petition to legalize same-sex marriage, currently outlawed under the Family Code.⁹ The petition is still unresolved by the Supreme Court.

Despite this progress, significant portions of the region still remain unfriendly terrain for SOGIE issues. Still in the Philippines, the Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao was signed into law in July 2018, empowering the Bangsamoro Parliament to enact Shari’ah laws on minor criminal offenses.¹⁰ There is

potential that this power could be used to enact laws against LGBTQ Muslim citizens.

Meanwhile, the Indonesian Province of Aceh has begun enforcing the Aceh Islamic Criminal Code (*Qanun Jinayat*), which punishes same-sex sexual acts with 100 lashes.¹¹ In May 2017, two men were publicly inflicted with 83 lashes each for allegedly engaging in gay sex.¹² In July 2018, another two men were publicly lashed.¹³ Separately in January 2018, police officers in North Aceh arrested 12 transgender people, forcefully cutting their hair and shutting down the beauty salons where they worked. They were later released without being charged.¹⁴

Indonesia’s Pornography Law, which includes “bodily movements” in its coverage and imposes heavy fines as well as long prison terms,¹⁵ has also been used to target LGBTQ people. In April 2017, 14 men, who were occupying two hotel rooms in Surabaya, were raided for pornographic activities.¹⁶ In May 2017, police raided a club in Jakarta and detained 141 men also for alleged pornographic activities.¹⁷ A small respite came when, in December 2017, the Indonesian Constitutional Court, voting five-to-four, rejected the petition filed by the Family Love Alliance to make gay sex and sex outside marriage illegal. The court held that it was not its role to criminalize private behaviour or to usurp parliament by imposing laws on it.¹⁸

In Malaysia, the mood has been one marked by immense disappointment. In May 2018, a watershed election saw the first regime change in decades, one led by a diverse coalition that

⁴ “Thailand’s Junta backs bill approving same-sex unions”, *The Strait Times*, 26 December 2018.

⁵ “Vietnam and the LGBT rights making stride”, *Vietnamnet Bridge*, 20 May 2018.

⁶ *Gender-Responsive Basic Education Policy*, Republic of the Philippines: Department of Education, Dep. Ed. Order No. 32, 2017 (accessed 18 January 2019).

⁷ *Gender-Responsive Basic Education Policy*, iv. *Definition of terms*, paragraph b).

⁸ *Ibid.*, paragraphs d), e), f), i), and k).

⁹ “SC oral arguments on same sex marriage set for June 19”, *Philippine News Agency*, 6 March 2018 (accessed 18 January 2019).

¹⁰ *An Act Providing for the Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao, Repealing for the Purpose Republic Act No. 6734, entitled “An Act Providing for an Organic Act for the Autonomous Region in Muslim Mindanao” as amended by Republic Act No. 9054, entitled “An Act to Strengthen and Expand the Organic Act for the Autonomous Region in Muslim Mindanao”* (Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao), Organic Law for the Bangsamoro Autonomous Region in Muslim Mindanao, Article X, Section 4: The Official Gazette of the Republic of the Philippines (accessed 18 January 2019).

¹¹ “Indonesia: Aceh Province Law Expands Caning Punishment to Adultery and Homosexual Acts”, *The Law Library of Congress*, 28 October 2015 (accessed 18 January 2019).

¹² “Gay Men Caned in Front of Cheering Crowd in Aceh”, *Vice*, 24 May 2017 (accessed 18 January, 2019).

¹³ “Two Gay Men Caned Under Sharia Law In Aceh, Once Again”, *Vice*, 18 July 2018 (accessed 18 January 2019).

¹⁴ “Indonesia: Police arrests and attempts to ‘re-educate’ transgender people must end”, *Amnesty International*, 29 January 2018 (accessed 18 January, 2019).

¹⁵ “Indonesia passes tough new anti-porn laws”, *ABC News*, 31 October 2008 (accessed 18 January, 2019).

¹⁶ “Indonesia: ‘Gay Porn’ Arrests Threaten Privacy”, *Human Rights Watch*, 4 May 2017 (accessed 18 January, 2019).

¹⁷ “Indonesian Police Detain 141 Men in Gay Club Raid”, *NBC News*, 22 May 2017 (accessed 18 January, 2019).

¹⁸ “Indonesia’s Constitutional Court rejects petition to criminalise gay sex in victory for besieged LGBT minority”, *The Independent*, 14 December, 2017, (accessed 18 January 2019).

included both youths and progressives. However, this change has not translated into progress on SOGIE issues.¹⁹ From the top of the house, the new Prime Minister has expressly rejected “LGBT and same-sex marriage” as “things only meant for the West.”²⁰ This anti-SOGIE rhetoric is reflected throughout the rest of government and society. In a series of alarming events in August 2018, authorities cracked down on a popular gay nightspot in the capital city of Kuala Lumpur, a sharia court ordered a lesbian couple to be caned for same-sex intimacy, and a trans woman was brutally beaten on the streets while a crowd watched on.²¹

In Singapore, despite the lack of similar political headwinds, SOGIE individuals still face significant barriers to progress. In its most recent review of the country’s criminal laws, the Singapore government reaffirmed its position not to repeal Section 377A, the colonial era law that has since become the symbol of anti-LGBT discrimination in the city-state.²² Notwithstanding, a flicker of hope broke through when the Singapore Court of Appeal issued a landmark decision allowing a gay man’s bid to become the legal parent of a child he fathered through an overseas surrogacy.²³ However, in a mark of the cautious and conservative approach that the state takes toward SOGIE issues, the decision was narrowly framed to avoid any broad pronouncements on the rights of gay couples. Similarly, in response to this judgment, the executive and legislative branches have expressed an intention to review current laws in a bid to strengthen and reinforce what they believe to be a “public policy” against “non-traditional” family units.²⁴

In Myanmar, Section 377 - the same colonial-era law that was recently struck down in India - continues to be selectively enforced, with the media reporting at least two instances where charges have been filed against gay individuals.²⁵ In spite of this, LGBT individuals and allies continue to push back on harmful media narratives and fight to be seen and accepted in civil society.²⁶

As for Cambodia, Brunei, Laos, and Timor Leste, there are no recent reports of government discrimination based on sexual orientation in employment, citizenship, access to education, or health care.

Challenges and Opportunities in South Korea, Taiwan, Hong Kong, and Japan

By Minwoo Jung.²⁷

The mobilization of anti-rights groups and their political impact in many parts of East Asia have gotten much stronger in the past years, spawning an organized resistance against SOGIE rights. The new democratic governments in the region, namely those of Taiwan and South Korea, were both inaugurated with great expectations in terms of human rights protection and promotion yet have been compromised the fundamental rights of marginalized groups by allowing anti-rights practices to flourish. Despite these growing challenges, there have been crucial achievements in the areas of marriage equality and anti-discrimination in the region as well.

South Korea experienced a monumental leadership change in May 2017 soon after the impeachment of former President Park Geun-hye. Despite the expectations from civil society to advocate for the protection of various marginalized groups including sexual minorities, newly elected President Moon Jae-in, a former human rights lawyer, has done little to defend the fundamental rights of minority groups, making political decisions that endorse the growing hatred and intolerance often rooted in conservative religious grounds.

By the time around President Moon’s election, it was found that the South Korean army had targeted dozens of soldiers in a campaign against gay men in the military, and around 20 soldiers had been tracked down on gay dating apps, interrogated, and put on trial due to the

¹⁹ Malaysia Turns Towards Decommunity – But Leaves LGBT Rights Behind, *Newsweek*, 11 April 2018.

²⁰ “LBGT or sam-sex marriage not for Malaysia, says Dr. M”, *The Star*, 22 September 2018.

²¹ “Malaysia accused of ‘state-sponsored homophobia’ after LGBT crackdown”, *The Guardian*, 22 August 2018.

²² “Penal Code review committee: Wide-ranging proposals offer more protection for the vulnerable”, *The Strait Times*, 10 September 2018.

²³ “Singapore court allows gay man to adopt son in landmark ruling”, *Reuters*, 17 December 2018.

²⁴ “Government policy review will be mammoth task after gay man’s legal win, experts say”, *Today Online*, 19 December 2018.

²⁵ “Gay man with HIV charged under Myanmar sodomy law” *Washington Blade*, 2 November 2018: “Myanmar is arresting people for being gay under colonial-era sodomy law”, *Gay Star News*, 8 November 2018.

²⁶ “Year end review on LGBT rights”, *Myanmar Times*, 28 December 2018.

²⁷ Ph.D. candidate in Sociology, University of Southern California, U.S. (Email: minwooju@usc.edu).

discriminatory provision in the Military Criminal Code.²⁸ Article 92(6) of the Military Criminal Code outlaws “sodomy or other disgraceful conduct,” which prescribes up to two years in prison and disgraceful discharge for servicemen. Despite the domestic and international pressure from the National Human Rights Commission of Korea and the United Nations, the Constitutional Court upheld the provision’s constitutionality in July 2016.²⁹

State-sanctioned discrimination feeds the growing public hostility against sexual minorities. In the past two years, South Korea observed an important growth of pride parades and festivals across the peninsula beyond the capital city of Seoul, from the port city Incheon to the southern island Jeju. The growth of pride events, however, also triggered increased pushbacks by conservative religious groups. Many of pride parades in recent years faced intensifying counter demonstration and clashes by anti-rights protestors. The first pride parade in Incheon in September 2018, for example, was severely delayed as more than a thousand conservative Christian demonstrators blocked, and then attacked the pride participants both verbally and physically under police incompetence.³⁰

A decade-long effort of SOGIE groups to legislate anti-discrimination acts to protect people from sexuality and gender-based violence has been constantly blocked by conservative backlash and their successful lobby against SOGIE rights.

On May 24, 2017 marks an important milestone of SOGIE rights in the region as Taiwan’s Constitutional Court ruled in favor of marriage equality. The ruling stated that the current Civil Code is unconstitutional for discriminating against same-sex couples and gave lawmakers two years to legislate before same-sex marriage became automatically legal.³¹

However, inaction from the ruling Democratic Progressive Party, despite campaigning on a promise of marriage equality in the 2016 election, allowed anti-rights groups to utilize the new

referendum law to petition for referendum against marriage equality and SOGIE-inclusive gender equality education. In turn, marriage equality groups also launched counter referendum petition. Following a well-funded campaign of misinformation and scaremongering by anti-rights religious groups, Taiwan’s voters opted for a separate law to legalize same-sex unions rather than to change the Civil Code, denounced by the SOGIE advocates as failing to offer full equality.³² The majority also voted against the implementation of Gender Equity Education Act, the legislation of which promotes SOGIE-inclusive education in schools. Taiwan’s Ministry of Justice is now working on a same-sex marriage draft bill in response to results of the referendum, which will be presented to the Legislative Yuan before 1 March 2019.³³

Despite the setback in the anti-equality referendum results, nearly 4,000 same-sex couples have registered their partnerships in their municipalities and counties since 2015.³⁴

In Hong Kong, even though the anti-rights movements spread hatred and intolerance within the region, important achievements have also been made. In July 2018, at the end of a three-year long legal battle, Hong Kong’s Court of Final Appeal handed down a landmark ruling in favor of a British lesbian expatriate, requiring immigration authorities to recognize overseas same-sex marriages when issuing spousal visas previously available only to heterosexual couples.³⁵ However, the city’s definition of marriage “between one man and one woman” remains unchanged, and same-sex partnerships are still not recognized for those born and raised in Hong Kong. There are a few ongoing legal challenges relating to spousal tax benefits and equal access to public housing.³⁶

The region has also observed a significant breakthrough in terms of anti-discrimination in Japan. In October 2018, the Tokyo Metropolitan Assembly passed an ordinance that bans discriminatory treatment and hate speech based on sexual orientation and gender identity. The

²⁸ “Soldier sentenced to prison for having sex with another soldier”, *Hankyoreh*, 25 May 2017.

²⁹ “Constitutional Court upholds military’s ban on sodomy”, *Hankyoreh*, 4 August 2016.

³⁰ “Queer festival severely delayed by violent anti-gay protests in Korean port city”, *The Korea Herald*, 9 September 2018.

³¹ “Taiwan’s constitutional court rules in favor of same-sex marriage”, *Taiwan News*, 25 May 2017.

³² “Same-sex marriage referendums: Taiwan Civil Code may remain unchanged”, *Taiwan News*, 24 November 2018.

³³ “Taiwan’s justice ministry ‘brainstorming’ on same-sex marriage bill”, *Taiwan News*, 6 December 2018.

³⁴ “Taiwan has registered almost 4,000 same-sex couples”, *Taiwan News*, 8 December 2018.

³⁵ “‘Giant step forward for equality’ in Hong Kong as same-sex couples win rights to spousal visas in Court of Final Appeal”, *South China Morning Post*, 5 July 2018.

³⁶ “Gay civil servant will take case to Hong Kong’s top court in final bid to win spousal benefits for husband”, *South China Morning Post*, 30 July 2018.; “Married gay man sues Hong Kong government over rejected public housing application”, *South China Morning Post*, 23 November 2018.

ordinance, which is scheduled to take effect in April 2019, is aimed at realizing the Olympic Charter's anti-discrimination standards ahead of hosting the 2020 Summer Olympics and Paralympics. The city-wide act is designed to support same-sex couples' better access to hospital visits and shared renting of apartments. It also commits the city government to establish LGBT consultation centres and conduct public education about SOGIE rights. Moreover, the legislation is to regulate hateful rhetoric in public space and online³⁷.

Despite this promising step forward, Japan still has no national-level laws to protect sexual minorities from discrimination and does not grant legal recognition to same-sex couples, though increasing number of cities and districts have begun to offer same-sex partnership registration since 2015 without legal weight.

The People's Republic of China, Macau and Mongolia

By Ripley Wang.

First Chinese provision to ever include "sexual orientation" explicitly

It is noteworthy that The Specification on Information Security Technology and Personal Information Security —enacted by China's National Information Security Standardization Technical Committee in May 2018 (GB/T 35273-2017)³⁸— has included "sexual orientation" into the scope of protection in terms of personal information. This is the first time that the term "sexual orientation" is clearly and explicitly spelled out in the national regulations and provisions and a positive step towards the respect of the right to privacy.

Cases regarding employment discrimination

In Mr. C's case (a lawsuit brought by a Chinese trans man before local courts in south-west China), a final verdict was issued in July 2017. The court again ruled in favor of the plaintiff for the reason that the employer/defendant terminated the contract without a legitimate reason and that infringed the plaintiff's right to equal employment.

The court did not support the plaintiff's appeal that the wrongful dismissal was *de facto* a discrimination on the basis of his gender identity and gender expression. However, it made a strong and clear statement in the landmark verdict, saying that "an individual's personality right should be respected regardless of their gender identity and gender expression" and that "no one should be subject to discrimination on the grounds of gender identity and gender expression in the employment process."³⁹

In September 2018, a gay man, named Mingjue, brought a case to the labour arbitration commission in Qingdao City, seeking a legal remedy for employment discrimination against his employer. Mingjue claimed that he was fired by his employer—a nursery school located in the city of Qingdao—after his sexual orientation was exposed by the parent of a student. The decision issued by the Arbitration Tribunal of Labour Disputes on November 13, 2018, simply ordered compensation for violation of contract provisions stipulated in the Labor Law but did not find wrongful termination and discrimination on the grounds of sexual orientation.⁴⁰ In January 2019, Mingjue successfully filed the case to a District Court in Qingdao City, referring to the dispute of general personality right as the cause of civil case. The trial is expected to begin in February 2019.

With regard to the discussions on the Employment Non-discrimination Law, after the consultation, there is still no indication if and when this proposal was adopted and planned to make into law, judging from the NPC Standing Committee Plan for Legislation in 2017 and 2018.

Media coverage and censorship

As it relates to freedom of expression issues, the 2017 Media Monitoring Report on SOGIE Issues published by the China Rainbow Media Award indicates that the amount of media coverage made by the Chinese mainstream media was continuously declining during the recent years. Comparing to 867 reports in 2015, and 710 pieces of SOGIE-related news articles in 2016, only 447 news reports were found and documented in 2017. Regarding the GIE-related issues, the monitoring report finds that the proportion of news articles on

³⁷ "Tokyo adopts ordinance banning discrimination against LGBT community", *The Japan Times*, 8 October 2018.

³⁸ The Specification is not a mandatory regulation, but it is of great importance to China's Cyber Security Law and the protection of personal information in China. For more information see: Barbara Li, "Personal information security specification", *Norton Rose Fullbright Webiste*, January 2019.

³⁹ "Chinese court says employers should not treat workers differently based on gender identity", *Hong Kong Free Press*, 8 February 2018.

⁴⁰ "Gay Chinese teacher gets compensation, but no recognition of equal rights", *Inkstone*, 26 November 2018.

transgender people is increasing.⁴¹ The invisible and unrestricted censorship on the mainstream and social media, in general, makes some impacts on the decline of the number of news reports on SOGIE issues.

On June 30, 2017, the China Netcasting Services Association, an organization supervised by the State Administration of Radio, Film, and Television (SAPPRFT), issued a general rule which banning depictions of same-sex intimacy from online video and audio platforms.⁴² On November 25, 2017, Fan Chunlin, a man from Shanghai, filed a lawsuit with Beijing No. 1 Intermediate People's Court demanding SAPPRFT clarify to the policy basis for the regulation. The initial hearing was held on February 23, 2018, but thus far, no decision has been issued.

Furthermore, on April 13, 2018, Sina Weibo, one of China's biggest social media companies, initiated a campaign to "clean up" the platform in accordance with China's Cybersecurity Law, and the gay-themed content were targeted along with other contents related to violence and sex. The instance provoked intense opposition and outcry from the LGBT community and advocates. On April 16, the decision to censor gay content was reversed due to the public pressure. On May 9, 2018, Mango TV, a video-streaming site affiliated to one of China's most watched channels, Hunan TV, blacked out the performance of Ireland's Ryan O'Shaughnessy, during which two male dancers depicted a fraught relationship while airing the Eurovision song contest semi-final.⁴³

LGBT human rights defenders

After the new Law on the Management of the Activities of Overseas NGOs within China⁴⁴ was enacted in January 2017, apart from the challenges concerning funding and fundraising, Chinese LGBT human rights defenders and their organizations

have also been experiencing persistent stress, harassment, and intimidation from the relevant police officers. Moreover, these challenges have largely impeded their capacities to carry out their work and activities.

On January 8, 2018, the Civil Affairs Bureau of Guangzhou Municipality published a list of suspected illegal social organizations that were not registered with the civil affairs department,⁴⁵ and two of them were SOGIE-related organizations or groups, namely Guangzhou Gender and Sexuality Education Centre and Rainbow Group of Guangzhou Universities. Therefore, these two organizations were forcibly closed and cease their work. China's laws and policies allow any individuals to register social organizations, for example, the Regulation on the Administration of Registration of Social Organizations sets forth clear requirements for NGO registration. In practice, LGBT NGOs are usually rejected from registration even if they provide sufficient documents following the relevant laws and regulations.

Trans rights in China

Trans individuals are especially vulnerable to "conversion therapy" as trans identities are still on the list of mental illness of the 2001 edition of Chinese Classification of Mental Disorders.⁴⁶ Based on that classification, the current regulations regarding gender affirmation surgery require psychiatric or psychological treatment for at least one year in order to apply for sex reassignment surgeries,⁴⁷ resulting in "unwanted conversion therapy" being imposed on transgender people.

A 2017 survey report released by a Chinese NGO on transgender people reveals that 11.9% out of 1,640 respondents had been coerced to receive these types of "conversion therapy" by their parents or guardians.⁴⁸

⁴¹ "A Deeper Collaboration for a Better Tomorrow", *Shanghai Pride*, 28 Jan 2018.

⁴² 《网络视听节目内容审核通则》发布：应坚持以现实题材为主, 30 June 2017; "New Rules for Online Videos in China: 'No Displays of Homosexuality'" *Whats on Weibo*, 30 June 2017.

⁴³ "Eurovision 2018: Chinese broadcaster barred from airing final after censoring LGBT+ content", *The Independent*, 11 May 2018.

⁴⁴ *Law of the People's Republic of China on Administration of Activities of Overseas Nongovernmental Organizations in the Mainland of China*, promulgated by Order of the President of the People's Republic of China No. 44 on 28 April 2016.

⁴⁵ "Guangzhou Civil Affairs Bureau announces list of suspected illegal social organizations" (广州市民政局公布涉嫌非法社会组织名单), Accessed on February 3, 2019

⁴⁶ The Chinese Society of Psychiatry, *Chinese Classification of Mental Disorders Edition 3* (《中国精神障碍分类与诊断标准第3》), (Shandong Science and Technology Press, 2001).

⁴⁷ *Sex Reassignment Surgery Procedural Management Standard* (2017 Edition) 性别重置技术管理规范 (2017年版)

⁴⁸ Beijing LGBT Center, *2017 Chinese Transgender Population General Survey Report* (2017中国跨性别群体生存现状调查报告), p. 10. Accessed on 2017-12-30.

In terms of Legal Gender Recognition, trans people have the right to access sex reassignment surgery (available only to people over twenty years of age),⁴⁹ and to change their gender marker on identity documents including citizenship ID cards and household registrations in China after undergoing surgery.

In 2017, the National Health and Family Planning Commission issued a new Procedural Management Standard on Sex Reassignment Surgery⁵⁰ as well as a Quality Control Index of Clinical Application of Sex Reassignment Surgery,⁵¹ therefore repealing the old Standards.⁵²

Furthermore, following official written replies issued by the Ministry of Public Security⁵³ and the Bureau of Public Security,⁵⁴ citizens have the right to change their gender marker on citizenship ID cards and household registrations under the condition of completing full sex reassignment surgery. However, there are still great difficulties for trans persons to change their gender marker on various other official documents, including university diplomas, and other academic and vocational certificates.

Macau

Laws against employment discrimination on SOGIE grounds exist in Macau.⁵⁵ However, the majority of the LGBT people are unaware of such anti-discrimination protection in Macau, according to a research report released by Rainbow of Macau on 12 May 2016.⁵⁶

Same-sex marriage is not recognized in Macau and same-sex spouses are not eligible to hold visas as dependents under Macau law. In August 2018,

Public Security Police Bureau of Macau admitted in an interview that four applications had been received in total regarding same-sex spouse visa, but none of them have been approved.⁵⁷

Mongolia

On July 1, 2017, the much-anticipated new Criminal Code finally came into force, outlawing discrimination of any kind, with the protected grounds including sexual orientation, gender identity.⁵⁸ Despite the availability of protection of anti-discrimination legislation, LGBT people still report to face discrimination and violence both at home and in public on a daily basis. In November 2017, a transgender woman was arrested for being drunk and disorderly. She claimed that an officer pinned her to the floor and forcibly stripped her while in police custody. The police division responsible did not find the officer guilty of any wrongdoing. The Mongolia LGBT Centre helped the alleged victim file a complaint with the National Human Rights Commission. It is unknown if any disciplinary action has been taken against this officer.⁵⁹

As for Legal Gender Recognition for trans people, article 20(1) of the 2009 revised Civil Registration Law permits persons who have had gender reassignment surgery to have their birth certificate, and national identity card reissued to reflect the change. The LGBT Center of Mongolia reported to the 63rd CEDAW session 2016 that transgender people received minimal medical service and support from the local professionals to have the surgery because of the incapacity of the medical specialists. Transgender persons need to obtain gender reassignment surgery outside the country.

⁴⁹ Sex affirmation surgery is called by the Chinese government as sex reassignment surgery (SRS). In China, transgender persons are required to undergo these often unwanted sterilization surgeries as a prerequisite to enjoy legal recognition of their preferred gender.

⁵⁰ *Sex Reassignment Surgery Procedural Management Standard* (2017 Edition) <性别重置技术管理规范 (2017年版)>.

⁵¹ *Quality Control Index of Clinical Application of Sex Reassignment Surgery* (2017 Edition) <性别重置技术临床应用质量控制指标>.

⁵² *Sex Change Operations and Procedural Management Standard*. Health Office of Medical Affairs No. [2009]185. <变性手术技术管理规范 (试行)>. 卫办医政发〔2009〕185号.

⁵³ *Reply of the Ministry of Public Security to the Relevant Issues Concerning the Change of Citizens' Sex-related Marker on Household Registration after Sex Change* 《公安部关于公民实施变性手术后变更户口登记性别项目有关问题的批复》(公治〔2002〕131号).

⁵⁴ *Reply of the Bureau of Public Security to the Relevant Issues Concerning the Change of Citizens' Sex-related Marker on Household Registration after Sex Change* 《公安部治安管理局关于公民手术变性后变更户口登记性别项目有关问题的批复》(公治[2008]478号).

⁵⁵ Law No. 7/2008, article 6(2).

⁵⁶ Rainbow of Macau, *Survey on LGBTIs in Macau 2016* (2016).

⁵⁷ *Plataforma Macau, Exclusion*, (<排除在外>). Accessed on February 3, 2019.

⁵⁸ *Criminal Code of Mongolia* (as amended in 2015), article 14(1).

⁵⁹ Aubrey Menrntd, "Mongolian Pride: LGBTQ Activism In One Developing Country", *The Establishment*, August 15, 2018.

Current State of the Law on SOGIE in Central Asia

By Zhanar Sekerbayeva⁶⁰ and Syinat Sultanalieva.⁶¹

Located in between China, Russia and the Middle East, the five countries of Central Asia, while different in their economic development and geopolitical positionalities, are very similar in their attitude to the rights of lesbian, gay, bisexual, trans people. All of them have ratified key international treaties on equality and non-discrimination and regularly present their state reports to relevant bodies, but they all fall short in meeting international standards in their implementation, and in many cases, go in direct opposition to them.

For example, in Kazakhstan in 2018 the Ministry of Information and Communication developed two draft bylaws⁶² titled the "Instruction on Classification of Informational Products" and "Methodology of Defining Informational Products for Children (Not) Harming Their Health and Development". The original draft bylaws declared same-sex sexual acts a "perversion" and prohibited the dissemination of any information about LGBTIQ to minors under the age of 18. If they had been adopted in their original wording, public information related to LGBTIQ would have been banned from open access in printed media, internet, social networks and others. Additionally, the text of the draft bylaw on "Methodology (...)" contained inaccurate and stereotypical representation of LGBT people. In particular, paragraph 5 of the draft indicated: "Information

prohibited for distribution among children: a) encouraging children to commit acts that threaten their lives and/or health, including harm to their health, suicide, demonstration of the culture of the LGBT society (LGBT community, gay community, also LGBT community and gay community (from English LGBT community (gay community) - a community of lesbian, gay, bisexual and transgender (LGBT) people, united by common interests, problems and goals))."⁶³

According to the Kazakhstani Law on Public Health, trans people in Kazakhstan must undergo extensive physical and psychological examination, hormonal treatment, sterilization and sex reassignment surgeries to be able to submit their ID documents for gender marker change. However, thanks to advocacy efforts on the part of Alma-TQ initiative group of transgender people in Kazakhstan, a pool of ally medical specialists is willing to forgo some of these requirements in order to simplify the procedure. This is informal as of yet, although efforts are continuing to develop an official protocol (similar to the one developed in Kyrgyzstan, see below) which would simplify the procedure further.⁶⁴

The bylaws have now entered into force, however thanks to active advocacy by local LGBTQ groups in Kazakhstan, with support from foreign embassies, they do not contain provisions on "homosexual propaganda."⁶⁵

Until the constitutional referendum of 2016, Kyrgyzstan had a provision in its Constitution on direct applicability and precedence of international

⁶⁰ Zhanar Sekerbayeva is the co-founder of the Kazakhstan Feminist Initiative "Feminita". She is a feminist, powerlifter and poet. In her work she aims at expanding the concept of 'gender' in the general public discourse through activism by mainstreaming questions of gender identity in the academia. She graduated with Summa Cum Laude from the 'Gumilev' Eurasian National University in 2005, as well as from the 'Lomonosov' Moscow State University in 2009. In 2014 she enrolled at the European Humanities University (Lithuania) MA program in Sociology with focus on gender and culture, continuing now at the University of Tsukuba, Japan towards a PhD degree. Her doctoral dissertation focuses on the processes of regulating identities and "normalization" of transgender people in Kazakhstan and Japan, where she is interested in understanding how the gatekeeping practices of healthcare professionals may or may not be shaping the gender identities of transgender individuals as they seek legal affirmation. Her latest publication is a chapter in the "Women, Sport and Exercise in the Asia-Pacific Region: Domination, Resistance, Accommodation" edited by Molnar G., Sara N. Amin, Yoko Kanemasu, as part of the *Routledge Research in Sports, Culture and Society* series.

⁶¹ Syinat Sultanalieva is a queer-feminist activist and researcher from Kyrgyzstan, currently enrolled in a PhD program at the University of Tsukuba, Japan. She has started her activist work in late 2007 as a staff member of LGBT organization "Labrys" in Kyrgyzstan, where she was specifically interested in raising awareness and mainstreaming LGBT human rights both on national and international levels. As part of her advocacy work, she has prepared and presented alternative reports to the UN treaty bodies (CEDAW, UPR, CCPR) on the situation of LGBT people in Kyrgyzstan, Uzbekistan and Turkmenistan. She has since then moved back into the academia, where she has focused on engaging with feminism and LGBT issues from a Critical Theory point of view ever since.

⁶² Bylaws are secondary to laws, as the latter are passed by the Parliament, while the former are approved by executive bodies such as ministries and departments, and as such do not require public consultation. The bylaws are usually developed with an aim to qualify the implementation of a certain law.

⁶³ Draft bylaw on "Methodology of Defining Informational Products for Children (Not) Harming Their Health and Development", para. 5.

⁶⁴ *Law on Public Health and Health Care System*. Code of the Republic of Kazakhstan, Art. 88 § 3 (18 Sept. 2009) (unofficial translation).

⁶⁵ "Подзаконный акт о запрете «пропаганды» не прошёл" (The bylaw to ban "propaganda" did not pass), *Feminist Initiative "Feminita" Website*, 14 January 2019.

human rights treaties, while its citizens had a right to seek justice in international human rights bodies. The reform, however, rescinded all of these obligations from the government of Kyrgyzstan.⁶⁶ Moreover, a bill named “On the introduction of amendments into certain legislative acts of the Kyrgyz Republic”, registered on 6 May 2014, aimed to introduce a prohibition of distribution of any neutral or positive information about sexual orientation and gender identity in any public and private spaces (punishable by imprisonment of up to 1 year and heavy fines).⁶⁷ The draft law passed both first and second readings in 2014 and 2015. However, after being sent back for further editions it has not re-appeared on the parliamentary agenda since. This does not mean, however, that the draft law was struck down, as it is still listed as an active bill on the website of the Kyrgyz Parliament.

One of the initiators of the draft Law, MP Narynbek Moldobaev said that if it were up to him “he would shoot all of the LGBT people in Kyrgyzstan on the main square”, while the other initiator, MP Torobai Zulpukarov, mentioned that: “Very often homosexuals try to get themselves the same rights as in Europe, for example, like adoption of children or same sex marriage. But in Kyrgyzstan this is impossible, it is against our traditions. I am against this and I think any public actions of LGBT should be prohibited”.⁶⁸

At the same time, there are some positive outcomes in the country as well. In January 2017 the Minister of Health of the Kyrgyz Republic signed an order approving important clinical protocols and manuals for healthcare, including the “Manual on provision of medical and social care for transgender, transsexual and gender nonconforming people for medical professionals of all levels of the Kyrgyz Republic healthcare system and other institutions.”⁶⁹ This manual is a result of a decade of advocacy work conducted by the LGBT organization Labrys in Kyrgyzstan, which consisted of organising awareness raising and sensitization

trainings for medical specialists, round tables with Ministry officials and study visits to Ukraine and the Netherlands for key members of the Working Group on lobbying of the manual.

Same-sex sexual acts in Tajikistan were decriminalised in 1998, however this has not translated into equal rights and non-discrimination for LGBT people in the country. The Tajik police forces have been reported to have included “fighting against homosexuality” among their legally sanctioned duties to safeguard public order and morality.⁷⁰ Local LGBT initiatives report about active work of the “moral police”, who were tasked with combating the “spread of homosexuality” throughout the country.⁷¹ Their actions include intimidation, arbitrary arrest, physical or sexual abuse, blackmailing by the police, all with complete impunity. There is no redress for violence perpetrated against LGBT people, who are further threatened by police at any attempt to report these cases.⁷²

LGBT issues in Turkmenistan⁷³ and Uzbekistan⁷⁴ are in a similar situation. Both countries still criminalise same-sex sexual acts between consenting male adults. In Turkmenistan under Article 135 of the Criminal Code it is punishable by imprisonment for a maximum of 2 years,⁷⁵ and in Uzbekistan under Article 120 of the Criminal Code, for a maximum of 3 years. In Turkmenistan “homosexuality” is considered a mental disorder, so punishment may also include placement in psychiatric institutions for treatment. Neither of these countries have any provisions on female same-sex relations, although in Uzbekistan local groups have reported being detained and

⁶⁶ European Commission for Democracy Through Law (Venice Commission), *Kyrgyz Republic Draft Law On Introduction Of Amendments And Changes To The Constitution Comparative Table* (2016).

⁶⁷ Draft Law “On introducing amendments into certain legislative acts of the Kyrgyz Republic, such as Criminal Code, Administrative Code, Laws «On peaceful assemblies» and «On mass media»”, *Parliament of the Kyrgyz Republic Website*.

⁶⁸ Labrys Kyrgyzstan, *Shadow Report: Discriminatory Laws and Practices, Hate Speech and Hate Crimes Against LGBT Communities of Kyrgyzstan* (2015).

⁶⁹ “Ministry of Health Kyrgyzstan accepts protocol on transgender health”, *Labrys Website*, 4 September 2017.

⁷⁰ “А реев попрошу остаться. Зачем таджикские милиционеры ставят гомосексуалов на учет?”, *Asia Plus*, 3 November 2017.

⁷¹ International Partnership for Human Rights, “We just want to be who we are!” *LGBT people in Tajikistan: Beaten, Raped and Exploited by Police* (2017).

⁷² *Ibid.*

⁷³ A documentary (“*Turkmenistan: Forbidden Homosexuality*”) based on the story of a gay man who suffered violence by the police in Turkmenistan was released in 2015.

⁷⁴ For more information, see the entry for Uzbekistan in the “Criminalisation” section of this report.

⁷⁵ Labrys and Sexual Rights Initiative, *Submission on Turkmenistan – Third Round of the Universal Periodic Review* (2008).

blackmailed by the police for kissing inside their own car.⁷⁶

Stories of Triumph and Resilience from South Asia

By Shakhawat Hossain Rajeeb.⁷⁷

On May 19, 2017, Bangladesh's elite Rapid Action Battalion (RAB) raided a private party and detained 28 young men on suspicion of engaging in "homosexual activities".⁷⁸ However, the detainees were later arrested under the Narcotics Act as the police allegedly recovered contraband drugs in their possession. The First Information Report (FIR) also mentioned recovering condoms and lubricating gel tubes as an evidence of the men's will and preparation to engage in "unnatural activities". Activists claimed the unprecedented crackdown was to please the religious extremists, who have been grown significantly under the government patronage.⁷⁹

During the 3rd cycle of the Universal Period Review (UPR) held during the 39th session of the Human Rights Council (HRC) from 7 – 18 May 2018, Bangladesh received 11 recommendations – the highest so far – on LGBTI-related issues. The recommendations however did not enjoy the support of the Bangladesh delegates. Mr Shameem Ahsan, Permanent Representative of Bangladesh to the United Nations Office at Geneva, said that it was a religious, social, cultural, moral, and ethical issue in the country.⁸⁰

In Bhutan, Tashi Tsheten, an activist from Rainbow Bhutan, in an interview said there is a renewed momentum and hope within Bhutan's clandestine LGBTI community since the 2018 national election, which saw a center-left political party come into power. He claimed the LGBTI movement has gained significant momentum in recent years and has led to more public conversation around the issues. The

International Day Against Homophobia, Biphobia and Transphobia was celebrated in 2018 for the third consecutive time and was widely reported in local media.⁸¹

According to Tsheten, for the first time ever, one of the political parties, BKP, included the rights of LGBTI people in their manifesto for the general election of 2018. A marriage bill with gender neutral pronoun was placed during the 2018 summer parliamentary session but has been deferred due to the election. And now with the new government in place, Tsheten and the community believes that the conversation around the bill will be revived.

Bhutan is scheduled for its Universal Periodic Review in April 2019 and the community has been lobbying to LGBTI issues on the agenda. They are hoping the new government to accept recommendations related to Sexual Orientation and Gender Identity (SOGI).

For India and much of the world, the most historic event to take place in recent time was the repeal of Indian Penal Code 377. Our colleague, Arvind Narrain, has more on the decriminalisation case in his essay featured in this report.

Since the decriminalization, there has been a surge of pro-LGBT events and campaigns across India. Most of the major cities saw the Pride events taking place in a larger scale and with wider participation. More than 15,000 people—the highest so far—participated in the Queer Azaadi Mumbai Pride Parade.⁸² Kolkata was the first city to have a Pride walk after the Supreme Court verdict soon followed by Delhi and Bengaluru. Decriminalisation also encouraged pride events for the first time in smaller cities such as Shillong.⁸³

The Transgender Persons (Protection of Rights) Bill passed by the Indian parliament in December 2018 came under the fire of the very community that it sought to protect. Activists and civil society organizations have been protesting the bill claiming that it violates the Supreme Court's landmark National Legal Services Authority judgment of

⁷⁶ Central Asian Gender and Sexuality Advocacy Network (CAGSAN), *Human Rights Violation of Lesbian, Gay, Bisexual and Transgender Rights in Uzbekistan: A Shadow Report* (2015).

⁷⁷ Shakhawat Hossain Rajeeb is a gay rights activist from Bangladesh, where he led the country's first and largest platform of gay men, Boys of Bangladesh, for 13 years. Forced to exile due to threats and persecution, Rajeeb now lives in Stockholm and works with RFSL.

⁷⁸ "28 suspected homosexuals detained from Keraniganj", *The Dhaka Tribune*, 19 May 2017.

⁷⁹ "Bangladesh crackdown on gay men is another gesture of capitulation to Islamist extremists", *Scroll.in*, 29 May 2017.

⁸⁰ "Human Rights Council adopts Universal Periodic Review outcomes of Cameroon, Bangladesh and Uzbekistan", OHCHR Website, 20 September 2018.

⁸¹ "Social acceptance of LGBT community is growing in Bhutan", *BBS*, 21 May 2018.

⁸² "Taking everybody along", *Mumbai Mirror*, 3 February 2019.

⁸³ "After The Rain Comes The Rainbow: First Pride March In Shillong", *Feminism in India Website*, 17 September 2018.

2014, which recognized the right of transgender persons to identify their own gender.⁸⁴

Soon after the 377 verdict, the High Court of India's southern state of Kerala on ruled in favour of a lesbian couple who wanted to live together.⁸⁵ In a similar move, the High court of New Delhi ordered police protection for a lesbian couple who feared threat to life by their parents as they had been in a romantic relationship for around one-and-a half year and wished to live together as a same-sex couple.⁸⁶

In the Maldives, Yameen Rasheed, a prominent blogger and human rights defender, was found stabbed to death on 23 April 2017 outside his apartment building in Male.⁸⁷ He, in his blog, wrote extensively in support of secularism and actively acknowledged the existence of minorities, such as LGBTQI people and non-Muslims, in the Maldives.⁸⁸

In September 2017, the Supreme Court of Nepal issued a historic verdict stated that members of gender and sexual minority can get all the documents including citizenship and educational documents as per their gender identity. The court has also directed government officials to organize the orientation targeting gender and sexual minority.⁸⁹ However, Manisha Dhakal, Executive Director of Blue Diamond Society, said the new Citizenship Act fails to clarify the definition of transgender persons. In a recent statement, Joint-secretary of state management committee of the Parliament Sudarsan Khadka said the issue of LGBTI people was on the government's priority list. Khadka said this when representatives of the LGBTI community sought information on the citizenship bill amendment.⁹⁰ In another landmark

ruling, the Supreme Court of Nepal ordered the Immigration Department to provide Non-Tourist Visa to an American national who married a Nepali woman in California, USA.⁹¹

On May 5, 2018, the National Assembly of Pakistan passed the Transgender Persons (Protection of Rights) Bill, 2018 aimed at ensuring rights of transgender persons.⁹² Earlier, in June 2017, Farzana Jan became the first citizen of Pakistan to carry a passport that allows its bearer to select a gender other than male or female.⁹³

Two members of Pakistani human rights organisation TransAction Pakistan: Transgender Community Alliance were brutally attacked in Peshawar. On 22 January 2018, trans rights activist Shama was sexually assaulted by nine men and on 17 January 2018, trans rights activist Sonia was shot and injured in Peshawar. They were both attacked for their human rights work.⁹⁴ Earlier in August 2017, a transgender person was shot dead by unknown men in Karachi.⁹⁵

In one of the most public demonstrations to date, members of the Sri Lankan LGBTQI+ community held a press conference to protest the derogatory remark of the country's President Maithripala Sirisena against the LGBTIQ people.⁹⁶ Earlier in a statement, the community said President Sirisena should be held responsible for any homophobic incidents that Sri Lankan citizens may experience in the coming days.⁹⁷ In October 2018, Saakya Rajawasan, who identified as a bisexual caused a public stir by exposing the homophobic attitude of her school in a public statement.⁹⁸ The outpour of public support for Saakya was unprecedented in Sri Lanka.⁹⁹

⁸⁴ "'Need equality, not rehabilitation': Why the Transgender Persons Bill fails the community", *Times of India*, 20 December 2018.

⁸⁵ "India court rules lesbian couple can live together", *BBC*, 25 September 2018.

⁸⁶ "Delhi high court orders police protection for same sex couple", *Hindustan Times*, 1 October 2018.

⁸⁷ "Outspoken Maldives Blogger Who Challenged Radical Islamists Is Killed", *The New York Times*, 23 April 2017.

⁸⁸ "A collection of Yameen Rasheed's writings on Maldives, secularism, standing up for Maldivian minorities, and fighting religious radicalism #weareyaamyn #findmoyameehaa", *Hani-Amir Website*, 28 May 2017.

⁸⁹ "SC issues historic verdict : It is progressive decision with far-reaching implications: Panta", *Pahichan*, 27 September 2017.

⁹⁰ "LGBTI issues not govt priority: Joint-secretary", *The Himalayan Times*, 2 January 2019.

⁹¹ "SC: Allow homosexual couple to live together, Orders to provide Non-Tourist Visa to American National", *Pahichan*, 20 February 2018.

⁹² "NA passes Transgender Persons Protection of Rights Bill 2018", *Pakistan Observer*, 8 May 2018.

⁹³ "First passport issued with gender-neutral 'X' option", *The Express Tribune*, 24 June 2017.

⁹⁴ "Violent attacks on transgender members of trans rights organisation TransAction", *Front Line Defenders Website*, 23 January 2018.

⁹⁵ "Transgender person shot dead, dozens of suspects held in Karachi", *Geo News*, 30 August 2017.

⁹⁶ "Prez should apologize, says LGBTQ+ community", *Daily Mirror*, 7 November 2018.

⁹⁷ "Sirisena Should Be Held Responsible For Homophobic Incidents In Sri Lanka In Coming Days: Sri Lankan LGBTQI+ Community", *Colombo Telegraph*, 6 November 2018.

⁹⁸ "Colombo International School Homophobic Bullying Saga: Victimised Student Goes Public – Activists Commend", *Colombo Telegraph*, 8 October 2018.

⁹⁹ "Sri Lanka: British vice-principal bullies LGBT+ pupil", *76crimes Website*, 15 October 2018.

During the Universal Periodic Review of Sri Lanka in November 2017, the government noted the recommendations regarding the decriminalization of same-sex relations. However, the government accepted, six (6) recommendations to combat the discrimination faced by the LGBTIQ community.¹⁰⁰ This was a welcome change in attitude, which was commended by the activists in the country.¹⁰¹

In the Persian Gulf, Four States Still Impose the Death Penalty

By Nazeeha Saeed¹⁰²

The Persian Gulf states do not differentiate much from their neighbours in the Middle East and North Africa in their understanding and treatment of LGBT persons. In fact, criminalisation, arbitrary detention, social prejudice and hate speech in the media are common place in these countries.

In the United Arab Emirates (UAE), for example, article 356 of the Penal Code classifies as a crime the act of “crime of voluntary debasement”, established a penalty of a minimum sentence of one year imprisonment.¹⁰³ According to Human Rights Watch, the courts of the UAE utilised this article to condemn and sentence persons for sexual acts outside of heterosexual marriage, including same-sex sexual acts.¹⁰⁴ At the same time, some jurisdictions within the country’s federal system explicitly criminalise such acts, among them Abu Dhabi, where sexual acts “against nature” can be punished with up to 14 years imprisonment. In August 2017, two citizens from Singapore were arrested in a shopping centre and sentenced to one year in prison “for trying to look like women”. Later, an appeal’s court commuted the sentence to a fine and deportation.¹⁰⁵

In the Kingdom of Bahrain, the norms around public morality are utilised frequently to prosecute and detain LGBTI persons. Furthermore, the Bahraini parliament is currently debating a law to punish all men or women who publicly present themselves as “pretending to be the other sex”, or acting inappropriately, contrary to the moral and public customs of the Kingdom with a penalty of one-year imprisonment or a thousand dinar fine. According to the National Foundation of Human Rights in Bahrain, the proposal is characterised as being vague and flexible and is based on the appearance of the person and their resemblance to the other gender, without taking into account the physical and psychological aspects of each person.

In Saudi Arabia there are no written laws on sexual orientation or gender identity, but judges use unregulated Islamic precepts to prosecute suspected persons of having extramarital sexual relations, such as adultery and same-sex sexual acts. As Human Rights Watch affirms, if these types of relationships come about through digital media, judges and public prosecutors utilise further vague provisions contained in the Cyber Crime Law, which criminalises electronic activities that affect the “public order, religious values, public morality or the sanctity of private life”.¹⁰⁶ According to the organisation, in February 2017, the Saudi police detained at least 35 people from Pakistan, some were transgender women and one of them died in police custody. The Saudi authorities said that she had died “of a heart attack”, relatives of the victim pointed to the body which showed sign of torture.

In Iraq, at least since the start of 2017, various persons perceived as gay were brutally and quickly executed extra-judicially in regions under the control of the Islamic State Organisation (Da’esh).¹⁰⁷ The security forces of the organisation (*Diwan al-Hesba*) subjected the areas under their control to severe restrictions and penalties, including the execution of men accused of being gay, imposing the death penalty by

¹⁰⁰ *Report of the Working Group on the Universal Periodic Review: Sri Lanka*, A/HRC/37/17, 29 December 2017, para. 117.19-25.

¹⁰¹ “Sri Lanka commits to human rights protections for LGBTIQ people before the UN”, *Equal Ground Website*, 16 November 2017.

¹⁰² Nazeeha Saeed is a Bahraini journalist with thirteen years of experience in international media, press, radio and television. She provides coverage of human rights and politics. She has won multiple journalism awards, among them the *Johann-Philipp-Palm Award for Freedom of Expression and Press* in 2014. She is a defender of freedom of the press and expression and the rights of LGBTI people. She is also a trainer in the topics of security of journalists and press coverage of minority issues, especially those of LGBTIQ.

¹⁰³ The Penal Code of the United Arab Emirates was enacted by Federal Law No. 3 of 1987. Article 356: “[...] the crime of voluntary debasement is punished with a minimum of one year imprisonment [...]”. For more information, see the UAE entry in the section on “Criminalisation” in this report.

¹⁰⁴ Human Rights Watch, *Audacity in Adversity LGBT Activism in the Middle East and North Africa*, 74, 2018.

¹⁰⁵ “Two Singaporeans jailed in Abu Dhabi for wearing women's clothes” *The Straits Times*, 23 August 2017; “A man and a transgender woman have been sentenced to one year in jail for ‘crossdressing’”, *SBS*, 25 August 2017; “UAE: Stop Policing Gender Expression”, *Human Rights Watch*, 7 September 2017.

¹⁰⁶ Human Rights Watch, *Audacity in Adversity LGBT Activism in the Middle East and North Africa*, 72, 2018.

¹⁰⁷ For more information, see Iraq entry in the section on “Criminalisation” in this report.

throwing them from buildings (carried out from the tops of tall buildings) and later stoned.¹⁰⁸

In Kuwait, in addition to the criminalisation of extramarital sexual relations in a broad manner, sexual relations between men are also explicitly criminalised with a penalty of up to 7 years in prison.¹⁰⁹ In 2017, it was reported that Kuwait deported 76 men suspected of being gay.¹¹⁰ Also a report shows how the authorities detain trans-persons through a provision that was added to the criminal code in 2007 and prohibited “imitating the opposite sex”.¹¹¹

In the Sultanate of Oman, the criminal code imposes a prison term of one to three years for having consensual sexual relations with same-sex partners¹¹² and the Criminal Code of Qatar has its own with “instigating homosexuality”.¹¹³ Along with Qatar, the United Arab Emirates and Yemen could eventually apply the death penalty for same-sex sexual relations if they take the public stance that they are considered “harmful to society”. Even so, to date there are no records that this penalty has been imposed on LGBT persons in these countries.

In the Persian Gulf, LGBT persons in general hide their sexual orientation and non-conforming gender identity. Expressing them could put them at grave risk of violence and criminal prosecution, not only to themselves but their families too, who could also suffer rejection from society. For this reason, it is common for meeting places to be clandestine and hidden. Even so, these places are often subject to police raids that result in the arrest, public exposure and prosecution on charges against morality and violation of religious customs and teachings. At the same time, human rights institutions and associations do not include SOGI issues among their work.

Finally, it should be noted that the media in the Persian Gulf utilises pejorative and degradative terms to refer to LGBT persons, and also uses

strong hate speech in its contents, making humiliating references in their ways of dressing and behaving.

LGBTI Activists Fight Denial and Erasure in the Middle East

The author wishes to remain anonymous.

Recent years have seen some progress for LGBTI issues in the Middle East, though stories of government-sanctioned discrimination and censorship remain disappointingly common. On two separate occasions, Lebanese courts conceded that same-sex conduct should not be considered a criminal offense, though the legislature has yet to make any changes to the Penal Code provision used to persecute LGBT people.¹¹⁴

In Syria and Iraq, the impending end to the Islamic State's self-proclaimed caliphate comes as a relief to LGBT communities, though the future of their rights remains uncertain; both countries retain criminalizing provisions in law.¹¹⁵

Over the past two years, LGBT families in Israel were faced with setbacks in their fight for equal rights with heterosexual families. In July 2017, the Israeli government opposed a petition submitted by an LGBT organization asking that same-sex and common-law couples be allowed to adopt. The Israeli Child Welfare Services responded by arguing that having same-sex parents would be a difficulty for a child due to societal prejudice, tacitly sanctioning and perpetuating societal prejudice towards LGBT people.¹¹⁶ During protests that followed the decision, at least ten persons were reportedly arrested.¹¹⁷

The following month, the High Court of Justice rejected a petition made by the Israeli LGBT Association which demanded the state recognise marriage equality, expressing that amending the

¹⁰⁸ “Islamic State stones a youth accused of homosexuality in Mosul”, *Iraqi News*, 27 March 2017.

¹⁰⁹ The Penal Code of Kuwait was enacted through Law No. 16 of 1960, Article 193: “Sexual consensual acts between men of consenting age (21+ years old) will be prosecuted with up to 7 years imprisonment”. For more information, see Kuwait entry in the section on “Criminalisation” in this report.

¹¹⁰ “Kuwait Deports Dozens of Homosexuals in ‘Morality’ Crackdown”, *Albawaba News*, 11 August 2017.

¹¹¹ Human Rights Watch, “Kuwait: Country Summary”, 4, 2017.

¹¹² The [Penal Code of the Sultanate of Oman](#) was enacted through Royal Decree No. 7/74. For more information, see Oman entry in the section on “Criminalisation” in this report.

¹¹³ The [Penal Code of the Qatar](#) was enacted through Law No. 11 of 2004, Article 296. For more information, see Qatar entry in the section on “Criminalisation” in this report.

¹¹⁴ For more on Lebanon, please see the “Criminalization” section of this report.

¹¹⁵ For more on Syria and Iraq, please see the “Criminalization” section of this report.

¹¹⁶ “Israel Should Allow Adoption by Same-Sex Couples” *Human Rights Watch*. 20 July 2017.

¹¹⁷ Hagay Hacohen, “Ten Arrested During LGBT Tel Aviv Protest” *The Jerusalem Post*. 20 July 2017.

law to allow for same-sex marriage was the domain of the legislature, not the courts.¹¹⁸

Israeli rainbow families received more bad news in August 2018 when prime minister Netanyahu, caving to pressure from ultra-Orthodox parties, voted against a measure that would have granted single men and same-sex couples the same right to surrogacy as single women and heterosexual couples.¹¹⁹ Following the vote, thousands of people went on strike and took to the streets in cities across Israel, and two persons were arrested in Jerusalem as demonstrators were assembling outside the residence of the prime minister.¹²⁰

Following the demonstrations, the heads of 14 Israeli LGBT organizations released a list of demands from the government in order to ensure full equality and put an end to discrimination. The list included prevention of violence, legal recognition of same-sex families, and equality in health care, among others, and threatened continued protests if the demands were not met.¹²¹

Just a month prior, activists staged a demonstration blocking Tel Aviv's pride parade over what they see as the Israeli government exploiting their community to present itself as tolerant and progressive while also violating the human rights of neighbouring Palestinians. "While we're demonstrating here," said one of the protest organizers, "just a few kilometres away (Israeli soldiers) are shooting people exercising the right to protest."¹²²

Palestinian human rights activists regularly accuse the Israeli government of "pink washing," or trying to portray the country as progressive by comparing it to "backwards" Palestinian and Muslim societies.¹²³ Indeed, aside from a pilot programme allowing bisexual and gay men to donate blood¹²⁴, Israel's track record on LGBTI issues over the previous two years tarnishes the country's claims of social liberalism and tolerance.

In neighbouring Jordan, the government remains hostile towards LGBT issues and has shown it is

willing to censor free speech to erase its queer community. In August 2017, Jordanian MP Dima Tahboub filed a complaint against My.Kali, a publication covering human rights and LGBTQ issues. In her complaint to the Audiovisual Media Authority, Tahboub called the magazine "shawath", meaning "perverts" or "deviants."¹²⁵ Though media reported that her public war on the magazine had shut it down, magazine editors pointed out they had already been blocked for a year in the country.¹²⁶

The following year, Jordanian authorities announced the cancellation of an event discussing the impact of art in the fight against stereotypes because My.Kali was involved. Still, the magazine's founder has vowed to fight on in the face of censorship, saying, "In a region where we're denied recognition, this platform isn't waiting for anyone to provide us that, but claiming it and giving a voice to many."¹²⁷

In October 2018, the Lebanese authorities similarly attempted to stifle free speech by trying to shut down the NEDWA conference on gender and sexuality organized by the Arab Foundation of Freedom and Equality (AFE) for alleged "incitement to immorality." The conference was moved to a different location, but not before security officers took the details of all attendees from the hotel registry, worrying participants from oppressive countries like Egypt.¹²⁸

The status of LGBTI people in the Middle East in recent years gives cause for cautious optimism, as small steps towards equality are being realized. Yet, at the same time, instances of discrimination and censorship from authorities remain commonplace. Despite attempts at erasure, whether they be through silencing the press, cancelling assemblies, or refusing to recognize the rights of queer families, LGBTI activists across the region remain resilient and undeterred.

¹¹⁸ Ilan Lior, "Israel's High Court Rejects Petition to Recognize Same-sex Marriages" *Haaretz*. 31 August 2017.

¹¹⁹ Stuart Winer, "Caving to ultra-Orthodox, Netanyahu about-faces on gay surrogacy rights" *Times of Israel*. 18 July 2018.

¹²⁰ "LGBTQ Israelis hold mass strike, protests demanding equality" *+972 Magazine*. 22 July 2018.

¹²¹ "LGBT community lays out demands from government for 'full equality'" *Times of Israel*. 25 July 2018.

¹²² "LGBT Activists Block Tel Aviv Pride March With Pro-Palestinian Protest" *Palestine Chronicle*. 9 June 2018.

¹²³ Nada Elia, "Don't try to stop us from denouncing Israel's pinkwashing" *Middle East Eye*. 6 April 2018.

¹²⁴ Josh Jackman, "Israel to allow gay and bisexual men to donate blood – regardless of when they last had sex" *Pink News*. 11 January 2018.

¹²⁵ Jason Lemon, "This Jordanian MP is leading a war against the LGBT community" *Step Feed*. 1 August 2017.

¹²⁶ "Open Letter to Jordanian MP Dima Tahboub" *My.Kali*. 1 August 2017.

¹²⁷ Leyal Khalife, "Event in Jordan canceled because a queer publication was involved" *Step Feed*. 6 November 2018.

¹²⁸ "Lebanon: Security Forces Try to Close LGBT Conference" *Human Rights Watch*. 4 October 2018.

BRIEF COMMENTARY

Inside the Middle Eastern Closet*By Samar Shalhoub.*

While conflicts of various sorts have engulfed the Middle East in recent decades, many individuals are battling daily wars with both themselves and society. As freedom of expression is still not a right in these countries, freedom of 'gender-expression' has not even become possible in this corner of the world.

Although there are many countries in which SOGI issues are seen as human rights issues, Middle Eastern countries stand their ground against this idea. Faith-based and political ideologies act as a block when it comes to understanding, learning and even speaking about issues related to sexual orientation, gender identity or expression. Consequently, laws and policies around LGBTI rights in many Middle Eastern countries are not yet open for negotiation or change. Criminalizing provisions raises the red flag in the eyes of the local LGBTI communities, most of whom are engaged in prolonged struggles on a daily basis. These laws allow government and security forces to punish anyone that defies the hetero-binary world most people are forced to live in.

One cannot help but agree with the proverb "An enemy is one whose story we have not heard". For the large majority of these individuals, they have had to jump very difficult hurdles to get to where they are today. Some having to endure being forcibly injected with testosterone treatments, another being tortured by his father's Pitbull dogs for being a "sissy" boy or raped by male relatives to prove she is not a lesbian.

What governments often ignore is that by marginalizing these individuals from society, they are not only causing them psychological damage, but are also negatively impacting on the long-term demographics of their countries. By promoting such culture of non-openness, this attitude is reflected onto the caregivers of LGBTI individuals who use the same punishment-based approach with their children. It all boils down to the idea that, whenever an individual is not accepted either by their government or their family, they are dislocated from their origins and roots, and eventually find themselves in the need to seek refuge.

Having any open public discussion about the subject at hand is really difficult and usually considered a taboo in most parts of the Middle East. Quite often, opinions are formulated by the press and the media, but these rare instances only offer a distorted insight into the problems LGBTI individuals are facing by being showcased as a joke or portrayed as mentally ill individuals, who need treatment in order to be readjusted into society.

While doors of freedom are being shut by numerous law and policy makers, a minority of youth and advocates in the Middle East region are proving to be open to change in this regard. These groups are paving the road to a tolerant and safer environment for LGBTI individuals. Such courageous human beings are working for a rising "Spring" to be possible in the Arab world; so that one day, LGBTI individuals will be able to walk on the street, as any other individual would, knowing that they are entitled to live in an environment that accepts and protect them and that, if they are abused, they can speak up without having to keep hiding, all their lives, inside a closet...

Decriminalising the Right to Love: Navtej Singh Johar v. Union of India

By Arvind Narrain.¹

Introduction

The 6th of September 2018 marked a historic victory for a vibrant and vociferous LGBT movement in India, which for over seventeen years had been demanding the repeal of Section 377 of the Indian Penal Code. The Supreme Court in its decision in *Navtej Singh Johar v. Union of India*, struck down the 1860 law criminalising the lives of LGBT persons.

The decision itself built upon a history of struggle carried out relentlessly across the country which involved pride marches, protests, demonstrations as well as courageous individual acts of LGBT persons coming out in their workplaces, families as well as in the media. It is also important to remember those who contributed so much to the LGBT movement but are no more with us. Our collective efforts have opened out in ways small and big, a space in Indian society for respect and acceptance of sexual and gender diversity. The struggle of the last quarter century waged by thousands of people across the country has succeeded in creating a space of visibility and acceptance in Indian society around the loves and lives of the LGBT community. To recapitulate briefly on some of the legal high points in the struggle against a law of colonial vintage.

The legal backdrop

In 1950, the Indian Constitution came into force with the recognition that all persons are equal before the law. The significance of the constitutional framework was that it gave the community the language of universal human rights, which would apply to all persons without discrimination. The fundamental rights provisions

relating to equality, non-discrimination, life and personal liberty would apply to all persons.

However, it took 68 years for the Court to first acknowledge that universal human rights applied to LGBT persons as well. It was only with the decision of Shah C.J. (Chief Justice) and Murlidhar J. (Justice) in *Naz Foundation v. NCT Delhi*² in 2009, that the Courts for the first time applied the constitutional framework to LGBT persons finding that Section 377 violated the rights to equality, non-discrimination, privacy and dignity. This remarkable judgment which was truly ahead of its time was appealed by over 15 groups spanning the religious spectrum led by Suresh Kumar Koushal. On 11 December 2013, the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*,³ overruled the decision of the Delhi High Court and declared Section 377 constitutional. This decision was widely criticised, and the date of the judgment was appositely titled by Vikram Seth, 'a bad day for law and love'.⁴

However, in just a few months' time, the Supreme Court on 15 August 2014, *NALSA v. Union of India*,⁵ found that transgender persons were entitled to the full panoply of constitutional rights protections. There was an implicit contradiction between *NALSA* and *Suresh Kumar Koushal* as the full protection of rights guaranteed to the transgender community stopped at the door of their intimate lives.

Perhaps the judgment of greatest significance was the decision of nine judges in *Puttawamy v. Union of India*⁶ in which the Supreme Court found that the 'right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution'.

¹ This write up is based on Arvind Narrain, *Right to Love: Navtej Singh Johar v. Union of India: A Transformative Constitution and the Rights of LGBT Persons* (Bangalore: National Printing Press, 2018).

² 160 Delhi Law Times, 277.

³ 2013 (15) SCALE 55.

⁴ "S 377 Judgment 'A Stain' On SC: Vikram Seth", *Outlook*, 11 December 2013.

⁵ (2014) 5 SCC 438

⁶ (2017) 10 SCC 1.

In particular Chandrachud J. observed that evolution of fundamental rights protections in India, there are two ‘discordant notes’. One is the infamous decision in *ADM Jabalpur v. Shivkant Shukla*⁷ in 1976, in which the Supreme Court held that during the period when emergency subsisted, no person can move the Courts for enforcement of their fundamental rights. The other was *Suresh Kumar Koushal v. Naz Foundation* in 2013, in which the Court had in the course of upholding Section 377 referred to LGBT persons as a ‘minuscule minority’, had referred contemptuously to their ‘so-called rights’ and asserted that parliament should decide the matter. The opinion of the plurality authored by Chandrachud J. systematically dismantled the logic of *Koushal*. The Court in *Puttaswamy* strongly asserted that it was the responsibility of the Court to protect even so-called minuscule minorities, that the rights of LGBT persons were not so-called rights but real rights dwelling in privacy and dignity and it was the role cast by the Constitution upon the Courts to protect the rights of unpopular minorities in the face of the opinion of legislative and popular majorities.

The decisions in *NALSA v. Union of India* and *Puttaswamy v. Union of India*, overruled key aspects of the ruling in *Suresh Kumar Koushal*. At the same time Indian society had changed dramatically with an increasingly vibrant LGBT movement, the release of films with openly LGBT characters and greater public discourse on issues of sexuality. Thus, both legal developments and social developments had made *Suresh Kumar Koushal* increasingly untenable.

There was a sea change in the social and public perception of LGBT lives which was perhaps best captured in the contrast between the empathy that the judges who heard *Navtej Singh Johar* showed towards LGBT persons compared to the cruel indifference of the *Koushal* Court. In *Suresh Kumar Koushal*, the judges were adamant that the law criminalised sexual acts and not identities. The judges had contemptuously observed that LGBT persons were anyway a “minuscule minority” whose rights they referred to dismissively as “so-called rights”. The judges who heard *Navtej Singh Johar* were clear that Section 377 affected not only sexual acts but LGBT persons, that the right to privacy and dignity were real rights which applied to LGBT persons and that constitutional morality mandated that the rights of every minuscule minority were deserving of constitutional protection.

The judgment itself is an acknowledgment of the breadth and depth of the LGBT movement and references fact-finding reports, narratives of persecution, academic writing, poetry, literature, philosophy, law, and jurisprudence, weaving these diverse sources together to make an argument that Section 377 is violative of the promise of the Indian Constitution.

The other source the judgment relies on quite extensively is international law. In the range of comparative legal contexts cited, the Indian Supreme Court demonstrates an openness and a willingness to learn from the jurisprudential traditions of the world. The Court cites the decriminalisation decisions from Belize, Trinidad, Kenya, USA, Fiji, Hong Kong, European Court of Human Rights as well as soft law standards such as the *Yogyakarta Principles* and the *Yogyakarta Principles+10*.

Tonality of the judgment

What is most remarkable about the judgment is its tonality. It is not written in the register of cold logic, but with the emotional force of someone who is very moved by witnessing the unconscionable suffering inflicted on LGBT communities. The judges refer to the suffering of Oscar Wilde, Alan Turing, Khairati (the first reported decision on Section 377 which is of the arrest and torture of a transgender person singing in the streets), Nowshirwan (a Parsi shopkeeper arrested under Section 377), the poetry of Vikram Seth and the agony of his mother Leila Seth (Vikram Seth’s mother).

Chandrachud J. characterises Section 377 as a “colonial legislation” which has made it criminal for “consenting adults for the same gender to find fulfillment in love”. Chandrachud J. notes that, “the offence under Section 377 of the Penal Code – has continued to exist for nearly sixty-eight years after we gave ourselves a liberal constitution. Gays and Lesbians, Transgenders and Bisexuals continue to be denied a truly equal citizenship seven decades after independence”. The effect of legislations such as Section 377 on LGBT lives led him to observe that “civilization has been brutal”.

Apology

This extended meditation on the suffering imposed upon LGBT persons results in a judicial apology. An apology in essence has two dimensions, namely the acknowledgment of having done a wrong and the expression of a willingness to atone for it. *Navtej*

⁷ (1976) 2 SCC 521.

Singh Johar takes responsibility for having inflicted wrongs and seeks to atone for it. This sentiment is best captured by Malhotra J. who says, "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries".

This is important in the LGBT context, because the response to the unconscionable suffering which has been imposed upon LGBT persons is usually either indifference or pity. Rarely does one come across a judicial response which acknowledges complicity in the oppression and then promises atonement for having caused such suffering.

In *NALSA v. Union of India*, the Supreme Court noted the forms of suffering of the transgender community but did not go so far as to acknowledge its role in causing the suffering. This resulted in an important judgment but motivated by pity for the transgender community. However, in *Navtej Singh Johar* when the Supreme Court acknowledged the harm that its own historic indifference to the plight of the LGBT community had caused, it set the stage for a different kind of judgment.

The judgment broadened the ambit of its decision beyond individual petitioners to encompass the suffering of the entire LGBT community. The apology tendered in *Navtej Singh Johar* draws its strength and force from the other important apologies made for causing historic injustice; be it by the German nation to the Jews, by Canada to its indigenous inhabitants, by South African apartheid enforcers to those who suffered under their rule, and by the "regret" expressed by Britain for the spread of anti-sodomy laws in the Commonwealth.

However, an apology only has meaning if one wants to atone for the wrongdoing of the past. An apology is not only about the past but should really provide a pathway to the future. *Navtej Singh Johar* is rooted in a deep sense of responsibility for having been complicit in an egregious form of violation and then seeks to redress the wrong. As Chandrachud J. puts it, "It is difficult to right the wrongs of history. But we can certainly set the course for the future. That we can do by saying, as I propose to say in this case, that lesbians, gays, bisexuals and transgenders have a constitutional right to equal citizenship in all its manifestations".

This judgment can be seen as taking four different paths to "right the wrongs of history". Misra C.J. wrote for himself and Khanwilkar J. Justices Nariman, Chandrachud and Indu Malhotra wrote separate concurring opinions. All justices agreed with the conclusion that *Suresh Kumar Koushal* was overruled and that Section 377 should be

struck down insofar as it criminalised consenting sex between adults. However, they took different routes to arrive at their conclusion and in the process highlighted different aspects of the Constitution and how it applied to the lives of LGBT persons.

Freedom to choose in the intimate sphere

The judges were unequivocal that Section 377 brutally intruded into a zone of intimate decision which is entitled to constitutional protection. As Chandrachud J. put it,

the choice of partner, the desire for personal intimacy and the yearning to find love and fulfillment in human relationships have a universal appeal and the state has no business to intrude into these personal matters. Nor can societal notions of heteronormativity regulate constitutional liberties based on sexual orientation.

The opinion of Misra J. invokes Johann Wolfgang von Goethe, who had said "I am what I am, so take me as I am" – to stress the right to develop one's individuality against the demands of social conformity. Particularly in the context of LGBT persons, where the struggle is often to assert one's personhood, in an isolating, ostracising environment in which heterosexuality is the norm, this constitutional protection given to intimate choices against the dictates of societal conformity cannot be overstated.

Expansive interpretation of privacy and dignity

The judges followed the ruling in *Puttaswamy v. Union of India* which gave an expansive interpretation of privacy as not just meaning the right to do what one wants in the privacy of one's home but also encompassing the right to make decisions about who one chooses to be intimate with. As J. Malhotra put it, "The right to privacy is not simply the 'right to be let alone' and has travelled far beyond the initial concept. It now incorporates the ideas of spatial privacy, and decisional privacy or privacy of choice".

Chandrachud J. addresses the concern that privacy is only about granting protection to acts behind closed doors, by stating that, "It must be acknowledged that members belonging to sexual minorities are often subjected to harassment in public spaces. The right to sexual privacy, founded on the right to autonomy of a free individual, must capture the right of persons of the community to navigate public places on their own terms, free from state interference".

The question of privacy of choice was closely linked to the question of dignity. The sphere of dignity

includes, 'the right to carry such function and activities as would constitute the meaningful expression of the human self'. As per Misra C.J. if the freedom to exercise one's choice of partner is curtailed it impacts an individual's sense of dignity. Since Section 377 chills one's ability to express oneself, especially in matters so integral to selfhood, it impinges upon the sense of dignity of LGBT persons.

Recognition of the "right to love"

In an evocative section, Chandrachud J. quotes Leila Seth C.J. to make the point that 'what makes life meaningful is love'. The right to love emerges as a key aspect of the judgment with Chandrachud J. recognizing that "the right to love and to find a partner, to find fulfilment in a same-sex relationship is essential to a society which believes in freedom under the constitutional order based on rights".

The right to love has elements of autonomy and dignity and the defence of the right to love is rooted in the notion of constitutional morality and the idea of a transformative constitution.

When we say 'constitutional morality' we mean that the values of the Constitution rooted in the protection of the dignity and autonomy of the individual should prevail over prejudice masquerading as social morality against LGBT persons. Further our Constitution mandates that society must transform in the direction of greater respect for autonomy, dignity and choice of the individual, including in matters of who one chooses to love.

Thus, the right to love has profound implications in a society in which love across lines of caste and religion are deeply transgressive. 'The right to love' has the potential to disturb rigid social moralities and help us to begin questioning the structures which keep in place the rigid hierarchies of Indian society be it on the lines of caste, religion, gender or sex. In fact, Chandrachud J. appositely called "the right to love not just a separate battle for LGBT individuals but a battle for us all".

Stereotypical perceptions of the LGBT person violate the right to equality and non-discrimination

The judges were also clear that the guarantee of equality at its heart was the guarantee of equal citizenship. The criminalizing ambit of Section 377 violated this guarantee as it 'singles out people, by their private choices and marks them as 'less than citizens -or less than human'.

The harm of Section 377 is not just that it prohibits a form of intimate and personal choice but that it

encodes a stereotypical morality which has deep ranging social effects. As Chandrachud J. put it, Section 377, 'perpetuates a certain culture', based on 'homophobic attitudes' which make 'it impossible for victims to access justice'. Stereotypes about the LGBT community are widespread and pervasive, and it is these stereotypical perceptions which are responsible of the hatred, violence and discrimination which LGBT persons face on a day to day basis.

The fact that the Court ruled that one of the reasons for Section 377 to be ruled unconstitutional is that it fostered prejudices against LGBT persons, makes for an expansive reading of the anti-discrimination provision in Article 15 of the Constitution.

The analysis of the equality guarantee is very important as while, *Navtej Singh Johar* sees decriminalisation as an important assertion of 'full moral citizenship', it is the first step in the journey towards full equality of LGBT persons. As Chandrachud J. put it, "Decriminalisation is of course necessary to bury the ghosts of morality which flourished in a radically different age and time. But decriminalisation is a first step. The constitutional principles on which it is based have application to a broader range of entitlements".

Constitutional morality

This constitutional guarantee of the right to develop one's personhood and the right to equal citizenship is firmly anchored in the notion of constitutional morality as referenced by Justices Misra, Nariman and Chandrachud. The denial of the right to dignity of LGBT persons is incompatible with the morality of the Constitution. As Chandrachud J. put it, 'there is an unbridgeable divide between the moral values on which it [Section 377 is based] and the values of the Constitution'.

The idea of 'constitutional morality', the judges derives from Ambedkar. In the Constituent Assembly, Ambedkar had famously said that, 'constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it'. The fact that 'our people' have yet to imbibe constitutional morality leads Ambedkar to the conclusion that, "Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic".

Constitutional morality is thus an ideal, rooted in the Constitution and Indian society must transform to bring social morality into conformity with the constitutional ideals of respect for the dignity and autonomy of all its citizens. The judiciary, the executive the legislature and citizens must all work towards achieving this ideal of 'constitutional morality'. The judgment in *Navtej Singh Johar* is on

step in this journey of bringing social morality in alignment with constitutional morality.

The idea that majority opinion should prevail over the right to dignity and liberty of the minority is explicitly rejected. As Nariman J. put it, 'it is not left to majoritarian governments to prescribe what shall be orthodox in matters concerning social morality'.

By explicitly setting out the Court as a guarantor of minority rights, regardless of the opinion of 'popular or legislative majorities', the Court signals its determination to defend the Constitution. In a time when lynchings have become the order of the day and government remains a mute spectator, the role that the Courts have to play in safeguarding the right to life of minorities of all stripes and hues cannot be overstated.

It should be noted that citizens too have a role to play in achieving a society based on constitutional morality. As Chandrachud J. put it, 'Constitutional morality requires that all the citizens need to understand and imbibe the broad values of the Constitution'. The role of the Constitution is to produce 'a social catharsis' and that 'the ability of a society to survive as a free society will depend upon whether constitutional values can prevail over the impulses of the time'.

Idea of transformative constitutionalism and the way ahead

The logic of *Navtej Singh Johar* is anchored within what both Misra J. and Chandrachud J. call 'a transformative constitution'. According to Misra, 'the purpose of having a constitution is to transform society' to 'embrace therein', the 'ideals of justice, liberty, equality and fraternity'. The mandate to transform society in allegiance to the constitution is a task vested in the state, judiciary and in the citizen.

The mandate of a 'transformative constitution' vested in the state, civil society and judiciary and as Misra C.J. put it, aims to make Indian society 'more pluralistic and inclusive'. The Indian Constitution is not a *status quoist* document, but rather in Chandrachud J.'s words, 'an essay in the acceptance of diversity' and 'founded on a vision of an inclusive society which accommodates plural ways of life'.

The fact that the Constitution must transform and democratise relations in society be it between dominant caste and oppressed caste, man and woman as well as majorities and minorities of every stripe and hue is the key to the Constitution. If the

deeply hierarchical relationships in society are not challenged and transformed, democracy would be meaningless, and the Constitution would be mere words on paper. This insight flows from Ambedkar who (is cited by Chandrachud J.) famously said that

Without fraternity, liberty [and] equality could not become a natural course of things. It would require a constable to enforce them...Without fraternity, equality and liberty would will be no deeper than coats of paint. Unless one builds a society based on fraternal and egalitarian relations by combating the divisions of caste, religion, gender and sexuality, the Constitutional promise of equal citizenship will remain a mirage. The Constitution mandates that we collectively build such a society.

If the idea of a 'transformative constitution' is applied to the challenge to Section 377, then there is still a lot of work to be done post this remarkable judgement. If a law has taken root in social, cultural and a legal consciousness, the challenge of eliminating the prejudice which the law has fostered is still immense. One has to only think of the prejudice and violence still being faced at the hands of the state and society by the 'Denotified Tribes' even post the repeal of the colonial era Criminal Tribes Act in 1948.

It is this immense task of combatting the prejudicial attitudes which were encoded in Section 377 which has to continue. Nariman J. was cognisant of this challenge and mandated the Union of India to give 'wide publicity to the judgment' and conduct 'sensitisation and awareness training for government officials and in particular police officials in the light of observations contained in the judgement'.

While Nariman J. emphasises the role of the Union government in combating prejudice and stereotypes in accordance with the principles of the judgment, Chandrachud J. issues an important plea to civil society to continue to work to combat prejudices and realise full equality for LGBT persons in line with the mandate of a transformative Constitution.

Thus, as far as the LGBT movement in India is concerned there is important work ahead in popularising the judgment and using it as a tool to change societal prejudices against LGBT persons. In short, the task of converting societal prejudice into constitutional morality lies ahead. Strengthened immeasurably by *Navtej Singh Johar*, we can see that 'though the arc of the moral universe may be long, it bends towards justice'.

GLOBAL PERSPECTIVES

EUROPE

STATE-SPONSORED HOMOPHOBIA 2019



EUROPE

Europe – Increased Visibility, Populist Backlash and Multiple Divisions

By Manon Beury¹ and Yuri Yoursky.²

As recorded on a country-by-country level in the annual reviews of ILGA-Europe, regarding sexual orientation, gender identity, gender expression, and sex characteristics (SOGIESC), public comprehension, legal progress and political reception are embedding in complex and varied ways across the continent. While presenting some of the important gains in 2017 and 2018 towards social and legal equality in the region, this essay focuses on the current pressures and lived realities where such progress is under strain, non-existent or backsliding through lack of implementation. In the current era of populist rhetoric across the region, foundational legal issues regarding the role of international law and transnational agreements, as well as the accountability of State institutions are being evoked.

Of significance to all 27 Member States of the European Union (EU), the European Court of Justice conferred legal certainty on what had proven a major stumbling block in the lives of same sex partners.³ On 5 June 2018, the Court ruled that the term 'spouse', for the purpose of granting a right of residence to non-EU citizens, includes same sex spouses.⁴ Bringing the European total to 16 States, in 2017, marriage equality was achieved in

Malta,⁵ Germany,⁶ and Austria⁷, and came into force in Finland (having being signed in February 2015).

However, as it is often the case, the widespread activist, media and political focus for marriage equality conceals other fights that are far from being won. As discussed in the second half of this essay, the denial of trans identities as 'ideology', LGBTI asylum seekers, children in LGBT families, and victims of violence based on SOGIESC, for example, rarely make their way to the European headlines and democratic debates. Yet, these individuals are amongst the most vulnerable to the backlashes that affect our communities.

Despite, and in part fed by, the legal developments that pertain to SOGIESC in some parts of Europe, homophobic and transphobic fears persist and are currently finding platform across most European States: family or traditional values, 'gender ideology', religious, or sovereignty arguments – much akin to what has been overtly (legally) happening in Russia since 2006, culminating in the 2013 federal anti-propaganda law.⁸ Although the wider European region, through the Parliamentary Assembly of the Council of Europe (PACE) has

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³ Manon Beury, 'The CJEU's judgment in Coman: a small step for the recognition of same-sex couples underlying European divides over LGBT rights', *Strasbourg Observers*, 24 July 2018.

⁴ CJEU, Judgment of the Court (Grand Chamber) of 5 June 2018, *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*, Case C-673/16.

⁵ Marriage Act and other Laws (Amendment) of 2017, Act No. XXIII, 1 August 2017.

⁶ Gesetz zur Einführung des Rechts auf Eheschließung für Personen gleichen Geschlechts, 20 July 2017, Bundesgesetzblatt Jahrgang 2017 Teil I Nr. 52.

⁷ Verfassungsgerichtshof, G 258-259/2017-9, 4 December 2017.

⁸ Article 6.21 (Promotion of Non-Traditional Sexual Relations Among Minors) of Federal Law No 135-FZ, 2013.

strong and systemic discursive mechanisms that generally include SOGIESC in their scope, divisions on these issues crystallised more than ever across the European family during the past two years.

Looking East

Russia, Chechnya

The outrageous setback in human rights equality and protections in Russia in 2013, predicated on the idea that knowledge of sexual and gender diversity is harmful to children, is still emitting disturbance throughout the world. Specifically, the negative resonance across the whole Eastern Europe and Central Asia (EECA) region is increasingly evident in the dialogues and actions of States, where right-wing forces are gaining support from their compatriots and also from European and US interests.

Laws that ban what is colloquially-known as 'gay propaganda' - anti-propaganda or promotion laws - have not only significantly detracted from anti-discrimination agendas on the parliamentary levels in some of these countries,⁹ but have also revealed overt governmental encouragement to officially harass individuals who identify as LGBTI. As a state of legal stasis appears across the EECA region regarding the harms of the propaganda laws and the vulnerabilities left exposed with lack of legal protection against discrimination, violence, stigmatization and discrimination continue unabated, and largely unaddressed.

Numerous individual cases, NGO documentation and media reportage have demonstrated that, based on their SOGIESC, people are routinely subjected to unpunished verbal and physical abuse in Russia. For example in August 2018, in the public media, the mayor of Novoulyanovsk, after withdrawing the approval for a gay pride action, explicitly indicated that he and his office will determinedly "protect the traditional family values" and they would be no gay parade in their city.¹⁰

That individuals on the basis of a specific characteristic - their sexual orientation, and indeed their gender expression - are being targeted and tortured in a Council of Europe sub-State,

Chechnya, has been the primary object of international concern in the recent period. Certainly since the 2013 federal law, Chechnya has been on an anti-LGBT rampage, as recorded by Amnesty International and others who have been on the ground, who reveal that there is currently a 'gay purge' being exercised in Chechnya.¹¹ This purge has abducted, tortured, and killed dozens of men who are either perceived to be or actually gay, and none of those atrocities have been punished by the government.¹² Moreover, the government's overt ridicule and denial of these events provides an unofficial 'green light' for these abuse to continue with impunity.

Despite the intransigent position Russia has claimed since enacting the 2013 law, and a series of other laws that limit the establishment or funding of civil society organisations, there were two events of legal significance that happened during 2017-2018 which may help inform ongoing advocacy. The first of them is the ECHR ruling in *Alekseyev and Others v. Russia* the ECHR joined 51 applications from seven applicants into one case, which concerned the continuous refusal of Russia to approve LGBT persons to hold rallies. The court denied Russia's claim that public order trumped the plaintiff's Article 11 ECHR right to assembly, and the court also found Article 13 violations, regarding the denial of an effective remedy through the Russian courts' delays and frustration of process.¹³ Therefore, the decision formally acknowledged the applicants' right to hold public rallies, and Russia's obligations under the European Convention on Human Rights. The second event was when 15 countries used the OSCE platform to file official questions to Russia, in which they demanded that Russia officially provide a statement on the Chechnya issue.¹⁴ Russia did not in fact provide any credible response to the matter.

At present, the Russian State acts with violent impunity and concisely illustrates what state-sponsored homophobia looks like in the modern era. For those LGBTI citizens who are harassed or purged there is little justice available to them, and there is the ever-present chill-factor that the anyone could be targeted next. None of the branches of power in Russia have yet attempted to step in and protect these individuals' their human rights and freedoms that pertain to them

⁹ 'Life in the Closet: The LGBT Community in Central Asia', *The Diplomat*, 29 January 2019.

¹⁰ 'Local Authorities Withdraw Approval For Russia's First Gay-Pride Parade', *RadioFreeEurope*, 16 August 2018.

¹¹ 'Russia: One Year After 'Gay Purge' In Chechnya, Still No Justice For Victims', 4 April 2018.

¹² Ibid.

¹³ *Alekseyev and Others v. Russia*, 2018, ECHR.

¹⁴ The Government of the UK, "Human Rights Violations And Abuses In Chechnya: Statement To The OSCE Permanent Council", 2018.

intrinsically as human beings. Concurrently, a highly homophobic public feels encouraged by such an official position to further discriminate and even harm people based on their SOGIESC, getting away unpunished.

The wider EECA region

In wider focus, the Eastern European and Central Asian region has been both restless and divided when it comes to protection from violence or discrimination based on sexual orientation, gender identity and gender expression. Currently, it does appear that aligning with the public policy (at least legislative) standards congruent with human rights principles that are inclusive of SOGIE, and as interpreted within the European Convention, has been positive motivator for changes in the EECA region. Moldova, Ukraine, and Georgia, whose socio-legislative contexts are focused on below, were successful in introducing amendments into their legislations that include SOGI and offer LGBTI individuals, at least, some level of official protection. However, these amendments continue to be challenged in these parliaments through petitions.

No other State within the EECA adopted any protective mechanisms relating to SOGIESC during 2017-2018: and it is evident that some of their legislative loopholes create motivation for governmental and public harassment around LGBT organizing, as discussed below.

Both Ukraine and Moldova successfully adopted specialized anti-discrimination clauses that have an open list of protected grounds; although SOGI is not among them, sexual orientation and gender identity are included as protected attributes in their Labour Codes.¹⁵ Notably, only Georgia thus far has been able to expressly introduce SOGI into its anti-discrimination legislation and Criminal Code.¹⁶ Ukraine and Moldova have not yet included SOGI in its administrative or criminal legislation. However, the Supreme Court of Ukraine interpreted that the open list of anti-discrimination grounds includes both sexual orientation and gender identity.¹⁷ Nonetheless, drafts to introduce anti-propaganda legislation are periodically registered in all three of these

countries. Communities that are set to protect the “traditional family values” and their children from being “confused” and exposed to “evil” often hold anti-propaganda actions and register respective petitions.

Despite the positive aspect of these legal amendments, there is still a long way to go for these three countries. Because of years of discrimination and stigma, LGBTI individuals and organisations are still reluctant to use the new defense mechanisms to file action against discriminators, and it may be challenging for the courts to evolve strong jurisprudence on some of these issues. Moldova and Ukraine’s hate crime laws do not enumerate SOGI as an aggravating factor, and therefore SOGI remains a non-justiciable ground for appeal.

In terms of public assembly, Ukraine has been the most successful among the EECA countries: three ‘Gay Pride’ events were held in 2016-2018 with considerable protection and assistance from the police, and with no instances of successful counter-violence or counter-actions.¹⁸ However, after the parade, some people were assaulted in the city, evidently based on animus to LGBTI people. The Gay Pride in Moldova in 2018 did not raise critical concerns either.¹⁹ There are still many loopholes and much legislation missing that would create a sophisticated anti-homophobic protection and defense mechanism, but these are highly positive steps that lay the foundation for anti-discrimination in these countries.

Unfortunately, these three States are unusual across the range of EECA countries, none of which have been able to introduce SOGIE into their anti-discrimination, or other targeted, positive laws.²⁰ Lithuania, and Belarus contain provisions that to some degree mirror the 2013 Russian anti-propaganda law, in the sense that they are adopted to “protect” the “traditional family values” and the children from moral degradation.²¹ No administrative or criminal offences have been adopted to supplement these laws. Parliaments in Kyrgyzstan, Kazakhstan, Poland, Romania, Tajikistan, Azerbaijan, and Armenia were not successful in passing anti-propaganda laws as of yet, although petitions continue to be made.²²

¹⁵ Fedorovych, I and Yoursky, Y., 2018, *Legislative Analysis Related to LGBTQ Rights and HIV in 11 CEECA Countries*, ECOM.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ IGLYO, *Expression Abridged: A Legal Analysis Of Anti-LGBT Propaganda Laws* (2018).

²² *Ibid.*; Fedorovych, I and Yoursky, Y., 2018, *Legislative Analysis Related to LGBTQ Rights and HIV in 11 CEECA Countries*, ECOM.

Central Europe has proven itself uninspiring with regard to approaching anti-discrimination legislation. Where advocates draw attention to the issues regarding discrimination regarding health, privacy, access to justice amongst many other issues, they can face challenging circumstances. Armenia, despite an active LGBTI community, has interfered with NGO Pink Armenia's attempts to raise the public awareness of the toxic discrimination that is ongoing in the country: its posters were removed from across Yerevan city without any explanations; similarly, two LGBT movies were removed from the Golden Apricot Film Festival programme without any commentary on the matter.²³

During the period under review, Azerbaijan's law enforcement conducted countless raids on LGBTI premises and individuals, arrested them, performed forced medical examinations and even blackmailed them, justifying the actions under the "necessity to protect public order" clause.²⁴ Although Georgia adopted SOGI as an enumerated status in its 2014 Law of Georgia on the Elimination of All Forms of Discrimination, five LGBTI persons were assaulted in Batumi and received no effective support from the police. Further, the court that convicted the murderer of transgender victim Zizi Chekalidze did not consider transphobia as an aggravating circumstance while delivering the judgment.²⁵

In Central Asia, Kyrgyzstan's parliament adopted in its first reading of its anti-discrimination draft legislation which is inclusive of SOGI: this draft has not as yet been approved or adopted as law, so its destiny is still under scrutiny.

In Macedonia, an anti-discrimination bill is also under parliamentary consideration, which may be inclusive of SOGI: observers are cautiously hopeful as Macedonia successfully ratified the Istanbul Convention,²⁶ and has also committed to removing the homo- and transphobic wording from the educational curricula.²⁷

Looking West

Within the European Union it has become abundantly evident that entrenched fractures divide sections of the populations along ideological, and increasingly politicized, lines. Growing nationalism and defiance towards EU institutions, which culminated in Brexit but is palpable everywhere, coexists in symbiosis with conservative and religious forces deploying various strategies to counter social justice progress in gender equality, sexual and reproductive health and rights, SOGIESC inclusion, migration, trade unions, and various other traditionally 'progressive' causes. These retroactive forces are indeed frequently met with determined opposition to maintain and protect the gains made in equality and human rights-based legislation, but the fact that attempts are being made to erode foundational principles continues to sound warning bells.

In September 2016 in Finland, a petition to repeal same-sex marriage illustrated that a roll-back on acquired rights is always a possibility (it failed and the 2015 marriage bill entered into force in 2017 as scheduled).²⁸ A common form of backlash that has reoccurred throughout Europe is the rejection of non-traditional forms of families encouraged by religious communities. For example, in the 2018 Romanian constitutional referendum concerning the definition of marriage, which inflamed rather polarized views, a boycott strategy led by human rights activists in the country proved successful, and the referendum did not get enough votes to be valid.

The recognition of systemic violation of the human rights of trans and intersex people gained ground as more European States adopted legal gender recognition in 2017 and 2018 (see 2018 TGEU Trans Rights Europe Map & Index,²⁹ and ILGA-Europe Annual Review 2018).³⁰ In the landmark case *A.P., Garçon and Nicot v. France*,³¹ the European Court of Human Rights ruled that the sterilisation requirement for eligibility procedure violated trans people's right to private life. Non-consensual surgeries on intersex children were outlawed in

²³ *Annual Review Of The Human Rights Situation Of Lesbian, Gay, Bisexual, Trans And Intersex People In Europe*, ILGA Europe, 2018.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Istanbul Convention Action against violence against women and domestic violence: The Convention in brief*, Council of Europe website.

²⁷ *Ibid.*

²⁸ *Valiokunnan mietintö*, LaVM 1/2017 vp-KAA 2/2016 vp, 15 February 2017.

²⁹ TGEU, *Trans Rights Europe Map & Index*, 2018.

³⁰ ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2018*, May 2018.

³¹ *A.P., Garçon and Nicot v. France*, Nos. 79885/12, 52471/13 and 52596/13, 6 April 2017.

Portugal,³² and the issues relating to such practices were publicly debated at national and European levels bringing more public awareness and education to the issue (see ILGA-Europe Annual Review 2018).³³

However, the various important discussions on gender identity, gender expression and sex characteristics in particular that are emerging have shed light on deeply polarised opinions, revealing a variety of conceptual fault-lines within the public mind regarding the hierarchy of rights. As SOGIESC issues gain greater visibility and granularity within European media and pop culture, a consequent effect is the exposure faced by our communities and their allies.

The populist discourse on what has been framed as 'gender ideology' which has spread worldwide in this period serves as an illustration on how arguments picked in the queer rhetoric may be distorted to work against our causes.³⁴ As illustrated in the section on Russia in this essay, the issue goes far beyond gender itself, implicating any variations in sexual orientation from a perceived 'norm', under a rubric of public morality and particularly the protection of minors from such 'disturbing' or 'harmful' influences. These anxieties have taken concrete form in 2017 and 2018, such as the Hungarian ban on gender studies,³⁵ and Italian schools blacklisted by 'pro-family' conservative groups in Bologna.³⁶ Hopefully, State initiatives which are positive, such as the Welsh government's decision to make Relationship and Sexuality Education part of the curriculum from 2022,³⁷ will act as a coherent force to redirect the conversations away from the polarities this 'gender ideology' thinking imposes.

One year after the European Bisexual Conference (EuroBiCon) materialised,³⁸ the first European Lesbian Conference took place in Vienna in 2017, with the express aim to focus on lesbians' needs, struggles and oppression, to empower, increase visibility and broaden networks.³⁹ As an organizer of the 2nd Lesbian Conference (to be held in Vienna in April 2019) remarks: "The results of many European countries' elections have, in the last few months, brought to power individuals and movements deeply dangerous for LGBTI women, which means specifically hostile to lesbians".⁴⁰

As ILGA-Europe reported in 2018, there is a critical lack of external funding available to organisations working with SOGIESC issues,⁴¹ and further, financial pressures can unduly influence the agendas pursued, at times at the expense of those most precarious in our communities. The Fundamental Right Agency of the European Union noted that shrinking space for civil society affects LGBTI people particularly.⁴² This trend is striking in some Eastern European countries and in Turkey,⁴³ where in 2018 Istanbul Pride and Pride events were banned for the fourth year in a row. These breaches of the freedoms of assembly and association, justified by the government on safety grounds, coincides with a crackdown against Turkish NGOs and the detention of leading SOGIESC rights activists with 'terror' propaganda charges, such as Ali Erol who was released in February 2018.⁴⁴

The rise of various forms of violence based on actual or perceived SOGIESC is an undeniable reality,⁴⁵ confirmed in anecdotal data from across the continent. However, there is still a lack of even, quantifiable data across the European region, and the mechanisms to collect such information. Even

³² Lei 75/XIII/2 (GOV), 11 April 2018.

³³ ILGA-Europe, *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe 2018*, May 2018.

³⁴ Sonia Corrêa, 'Gender Ideology: tracking its origins and meanings in current gender politics', *Engenderings LSE Blog*, November 2017.

³⁵ 'Hungary to stop financing gender studies courses: PM aide', Reuters, 14 August 2018.

³⁶ Silvia Bignami, 'Il Family day e Forza Italia schedano le scuole di Bologna: "Insegnano il gender"', La Repubblica, 15 September 2017.

³⁷ 'Kirsty Williams announces focus on healthy relationships in major reforms to 'Relationships and Sexuality' education', Welsh Government website, 22 May 2018.

³⁸ EuroBiCon (website).

³⁹ European Lesbian* Conference Report, December 2017.

⁴⁰ European Lesbian* Conference (website).

⁴¹ 'New ILGA-Europe report reveals reality of funding for LGBTI activism in Europe and Central Asia', ILGA-Europe website, 30 April 2018.

⁴² European Union Fundamental Rights Agency, *Challenges facing civil society organisations working on human rights in the EU*, January 2018.

⁴³ 'Ankara ban on LGBTI events continues as Turkish courts reject NGO appeals', ILGA-Europe website, 23 February 2018.

⁴⁴ European Parliament resolution of 8 February 2018 on the current human rights situation in Turkey, P8_TA(2018)0040.

⁴⁵ Nielz Muižnieks, 'The long march against homophobia and transphobia', The Commissioner's Human Rights Comment, 31 August 2017, Council of Europe (website).

when laws protecting LGBTI people from hate crimes exist, questions and variance around their implementation and documentation remain: linked to the capacity and willingness of police forces to recognize them in the first place, and courts to adjudicate thresholds.

Efforts to recognise hate speech or speech that aims to incite violence against persons based on a particular characteristic, particularly when defended under a freedom of expression rubric, were made in Sweden in 2018,⁴⁶ and later in that year in Switzerland.⁴⁷ Relatedly, sustained activity that is designed to change a person's sexual orientation or their gender identity – generally referred to a 'conversion therapy' – is slowly gaining recognition and recognition of where vulnerability lies is emerging. Malta's law in this regard sets the bar beyond just professionals carrying out this abusive 'treatment', but also it applies to anyone performing on a minor. A 2018 bill in Ireland, which has received positive responses from the houses of parliament, if passed would outlaw anyone from practicing such 'therapy' on anyone.⁴⁸

LGBTI asylum seekers, most particularly women,⁴⁹ are reportedly exposed to violence in European governments' facilities and camps.⁵⁰ In the context of uneven and enduring "crisis" responses to European migration and asylum, and the absence of official statistics on asylum claims based on SOGIESC across the region, LGBTI individuals are often left largely unaided when making their claims. Targeted as 'other' within populist rhetoric for either or both foreigner or SOGI status, and to address the fear of false claims and the 'floodgate' issue, the European Union,⁵¹ civil society

organisations,⁵² and ILGA-Europe,⁵³ have developed guidelines and common standards in order to ensure that the specific needs and rights of LGBTI asylum seekers are respected by national committees performing asylum assessments. In 2018, the matter reached the European Court of Justice,⁵⁴ which ruled to ban psychological tests for assessing asylum claims based on sexual orientation.

Family law is an area of ongoing, albeit slow, progress in which some positive developments are taking place in Europe, notably with regard to the status and well-being of children in LGBT families. In 2017, the Italian courts recognized a gay couple's foreign adoption,⁵⁵ and in another case the adoption of a child born by surrogacy by the partner of the biological father.⁵⁶ In France, the High Court⁵⁷ reached a parallel decision in a surrogacy case and, in 2018, the French National Advisory Committee on Ethics recommended to extend medically assisted procreation to single women and lesbian couples.⁵⁸ In 2018, Malta allowed same sex couples to access *in vitro* fertilization, and its marriage equality law assures that same-sex couples enjoy all the rights associated with marriage, including joint adoption.⁵⁹ Automatic co-parent recognition for female same-sex couples following fertility treatment was voted for in Finland.⁶⁰

Within the ongoing progress made in legislative provisions towards equality in Europe, a certain shadow regarding the buoyancy or solidity of such progress has emerged. In many cases, a step forward encounters a backlash and raises debates on first principles that activists thought settled long ago (and indeed may have been in law). This is

⁴⁶ 'Greater legal protection for trans people on the way in Sweden', ILGA-Europe website, 18 May 2018 (updated 14 November 2018).

⁴⁷ 'Swiss Senate votes to improve protection on grounds of sexual orientation but not gender identity', ILGA-Europe website, 29 November 2018.

⁴⁸ *Prohibition of conversion therapy bill* (2018).

⁴⁹ Human Rights Watch, 'Greece: Dire Risks for Women Asylum Seekers', 15 December 2017.

⁵⁰ Kate Lyons, 'Abused and ignored: LGBTI asylum seekers let down by the system', The Guardian, 4 March 2018.

⁵¹ European Union Fundamental Rights Agency, *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*, March 2017.

⁵² International Commission of Jurists, *Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners' Guide*, Practitioners' Guide No. 11, February 2016.

⁵³ Sabine Jansen & Jol Le Droff, *Good Practices Related to LGBTI Asylum Applicants in Europe*, ILGA-Europe, May 2014.

⁵⁴ CJEU, Judgment of the Court (Third Chamber) of 25 January 2018, *F v. Bevándorlási és Állampolgársági Hivatal*, Case C-473/16,

⁵⁵ Corte di Appello di Trento, *Ordinanza*, 23 February 2017.

⁵⁶ Tribunale per i minorenni di Firenze, sezione adozioni, *Decreto di riconoscimento di sentenza di adozione straniera*, 7 March 2017.

⁵⁷ Cour de cassation, *Première chambre civile, arrêt no. 824*, 5 July 2017.

⁵⁸ Comité Consultatif National d'éthique, *Contribution du Comité Consultatif National d'Éthique à la révision de la loi de bioéthique 2018-2019, Avis 129*, 25 September 2018, pp. 120-122.

⁵⁹ Act No. XXIV of 2018 to amend the Embryo Protection Act, 1 June 2018.

⁶⁰ 'Congratulations Finland!', ILGA-Europe website, 28 February 2018.

particularly striking in countries where same-sex marriage was voted, but related rights such as second-parent adoption are still being debated and vividly opposed today. Finland, in this regard has been instructive: it took almost three years for marriage equality to enter into force while civil service and inter-related legal provisions were being prepared for. In Ireland, four years after marriage equality, donor-assisted lesbian co-parents are still denied both names on their child's birth certificate.⁶¹

The authority and influence of the major European institutions on human rights across the region is clearly extremely varied. Transnational issues - free movement of individuals and families, granting asylum to LGBTI individuals and SOGIESC human rights defenders, the recognition of children born

by medically assisted procreation or surrogacy, funding SOGIESC rights organisations and many other issues remain unresolved. The Russian-type 'sovereignty' approach demonstrates virtual impunity for gross violation and blanket oppression. The economic tie-in aligned to the adoption of anti-discrimination legislation that Ukraine, Moldova, and Georgia demonstrate, may indicate a certain positive trend, but such an approach also lends fuel to populist claims of 'foreign' imposition. The work of presenting LGBTIQ lives in each State belongs to the activists on the ground to speak with their own populations, institutions of State, allies, policy makers and media, to demonstrate that diversities SOGIESC status, and inclusion in policy, is neither alien nor immoral.

CHECHNYA

Banishing Devils - Chechen Authorities against Laws of Life?

By Ekaterina Petrova.⁶²

The complex and challenging situation with human rights in the North Caucasus region has been attracting the attention of international organisations for some time, particularly in relation to the stark news of brutality directed against LGBT people in Chechnya in 2017 and 2018.

There are seven republics in the region: Adygeya, Ingushetia, Dagestan, Kabardino-Balkariya, Karachai-Cherkessia, North Ossetia, Chechnya, and within each of them varying levels of nationalistic and religious influences. In recent years, the political situation in Russia, and particularly Chechnya, has empowered conservative and fundamentalist forces across all aspects of society.

A 2016 report (draft resolution) of the Parliamentary Assembly of the Council of Europe⁶³

alerted the Council of Europe that despite the Russian delegation's acceptance and agreement to the 2010 Resolution 1738,⁶⁴ impediments and delays in implementation continue, effectively denying "human rights and rule of law" in the region. Specifically, terrorism, impunity of officials, access to justice, non-performance on ECHR decisions, and the vulnerability of human rights NGOs were identified. The Rapporteur also noted that his attempts to visit the region had been actively frustrated by Russian authorities.

The two reports quoted above (2010 and 2016) remark on the implementation and effect of the strict dress code in place in Chechnya, noting threats and violence towards women who break it. A joint shadow report discussed by the UN Committee on the Elimination of Discrimination

⁶¹ Stephen Rogers, 'New bill will allocate same-sex couples to use 'parent' on birth certificates', *Irish Examiner*, 11 January 2019.

⁶² Ekaterina Petrova is a feminist and lesbian activist from Saint-Petersburg, Russia. She worked with Chechen refugees who were victims of the anti-LGBT campaign in the republic.

⁶³ Parliamentary Assembly of the Council of Europe (Committee on Legal Affairs and Human Rights), *Human rights in the North Caucasus: what follow-up to Resolution 1738 (2010)?* (2016).

⁶⁴ Parliamentary Assembly of the Council of Europe, *Resolution 1738 (2010): Legal remedies for human rights violations in the North Caucasus Region*, 22 June 2010.

against Women (CEDAW) in 2015, identified setting of religious rules for women and girls dress-codes, marriage and family discrimination, gender-based violence—including marriage of underage girls, female circumcision—and so-called “honour killings” as issues of major concern.⁶⁵ Also in 2015, research entitled “Life and the Status of Women in the North Caucasus”, based on interviews in Chechnya, Ingushetiya, Cabardino-Balkariya and Dagestan, illustrated the lived effects of family budget pressure, limitation of movements because of traditions, and domestic violence.⁶⁶

Prior to early 2017, very little was known or written about LGBT people’s lives in North Caucasus region, including by Russian SOGI-related groups, although there had been some reports of transgender individuals fleeing family and police violence and death threats. At the end of March 2017 information about extensive torture and killings of gay men in Chechnya became known.⁶⁷ However, it was not until the end of 2017 when the first reports of detentions of lesbian and bisexual women and girls became known, amidst fears that police had lists of women’s names, and also their social media identities.

Other than Adygeya and North Ossetia, the predominant religion in other republics is interpretative of Islam. In addition to the Sharia law, the influence of traditional ‘adat’ tribal code of conduct and conflict resolution between individuals, communities, and tribes remains strong. Across the Northern Caucasus, the ‘adat’ held that the ‘Teip’ was the chief reference for loyalty, honour, shame and collective responsibility.⁶⁸ ‘Adat’ set norms according to traditional standards, such as ‘honour killings’, blood feuds, bride abductions and the persecution and killing of LGBT people a ‘washing away the shame’ that the victims have brought to their ‘tribe’.

In modern Chechnya the concept of the ‘tribe’ is deeply ingrained: regarding the ‘shame’ generated by a family member being known or perceived to be gay, lesbian, bisexual or transgender, both authorities and local society apply pressure on family to punish them. State authorities have also denied the existence of LGBT people by saying ‘such’ people would be killed very fast, and the

people claiming refugee status must not be Chechen.⁶⁹ The rhetoric of national moral superiority pervading the Chechen political space, helps explain why political and spiritual leaders deny the very existence of sexual or gender diversity in Chechnya.

It is a further twist that the people who commit ‘honour killings’, as reported, often consider themselves as “victims of the situation”, forced to carry out the act: they love their family member, but they feel they have no other choice when the person “crossed the line” and “become a gay, lesbian, bisexual and/or transgender”. To allow the entire family live “properly”, the family feels it must purge or “wash away the shame” to allow the family resume normality. There are recorded cases of family members trying to help their LGBT relatives escape, at their own personal risk.

Currently, Chechnya is presenting as the most dangerous for LGBT-identified or LGBT-perceived people among the Caucasian republics. The legacies of two recent wars have resulted in widespread weapon/gun-ownership high levels of PTSD (post-traumatic stress disorder) amongst the general public, and high levels and aptitude for violence. Further, during and after the wars, socially and politically radical interpretations of Islam came into the republic with Middle East missionaries.⁷⁰

What has been described here is a situation whereby a person’s sexual orientation or gender identity is not considered a private matter but has implications for their families and wider community. The social institution of the family in the North Caucasus region includes the extended family and the “shame” generated by deviations may result in the family’s exclusion from social communications and events, and where people will avoid marrying members of this family. “Honour killing” help to repair a family’s reputation and are generally carried out by the male members of families. However, “honour killings” pose significant challenges to later investigation: they may have been organised as an accident, a disappearance or a poisoning. Relatives and neighbours rarely voluntarily come forward as witnesses. There are particular silences around “honour killings” of LGBT

⁶⁵ Russian Justice Initiative (RJI) & Chechnya Advocacy Network, *Submission concerning the Russian Federation’s Compliance with the CEDAW Convention in the North Caucasus Region* (2015).

⁶⁶ “Life and the Status of Women in the North Caucasus. Report summary on survey by Irina Kosterina”, Heinrich Böll Stiftung, 20 August 2015.

⁶⁷ “Убийство чести [Honour Killings]”, *Novaya Gazeta*, 3 April 2017.

⁶⁸ Egor Lazarev, *Laws in Conflict: Legacies of War and Legal Pluralism in Chechnya* (2018).

⁶⁹ “Gay Chechens flee threats, beatings and exorcism”, *BBC World*, 6 April 2018.

⁷⁰ Olga Breining. «The ‘Chechen Syndrome’ in Contemporary Russian Literature» (paper delivered in November 2016 at the ASEES annual convention).

people. It is understood that the executor thinks that his efforts will be rewarded after his death.

Before a killing, relatives reportedly often try to change their LGBT family member through various forms of violence: beatings, placement under house arrest for months or years, and imposed isolation through removal of all communication devices. A version of “conversion therapy” is also prevalent — the “djinn expulsion” — a form of exorcism found commonly in society and in some mosques. The procedure variously includes physical restraint, and high-volume reading of the Koran through screaming in the ears of the person or headphones. The exorcist speaks to the bad spirit or “djinn”, asking about its location in the body, the way it entered into a person, about its desires. Then the exorcist persuades “djinn” to escape the body, through threatening him. To make the ‘djinn’ exit the body will often require physical pressure of the body part where the “djinn” allegedly resides. In some mosques, it is the mullah who decides

whether a “djinn” exists, but if none is detected the outcome may be worse because this may be interpreted that the person has consciously chosen their non-traditional sexual behaviour, and therefore seeks and deserves death.

International and Russian human rights activists report that the situation in the North Caucasus, especially Chechnya, is critical. But it must be noted that the conservative part of North Caucasus society does not agree: they are disgusted by several new trends: unfiltered access to information has increased, women have become more empowered and independent (increasing numbers of women are initiating divorces and refusing to marry a second time), and a social conversation about the existence of queer people has even begun. SOGI issues are a largely marginal topic for the North Caucasus, but these issues have quietly begun to be spoken out loud. Like so many other parts of the world until a problem is stated aloud, it ‘does not exist’.

GLOBAL PERSPECTIVES

OCEANIA

STATE-SPONSORED HOMOPHOBIA 2019



OCEANIA

Ebb and Flow: Victories and Resistance in Oceania

By ILGA Oceania.

The socio-legal situation of LGBT people in Oceania has yielded mixed results: some incredible gains and progress, but also heart-breaking pushbacks because of the misinformation and campaigns wielded by the powerful Christian right or the religious right and their extremist conservative agenda and policies.

Though consensual same-sex sexual acts remain criminalized in just under half of the countries in the region, grassroots LGBTIQ groups and advocates are becoming increasingly visible across the region and are vocally lobbying their governments and the international community to recognise and protect their rights. And despite resistance from conservative groups and, at times, their own governments, their efforts have yielded a number of results.

Australia

Aboriginal Australian Sistergirls & Brotherboys

There has been a lot of public and media attention given to Aboriginal LGBTIQ populations in Australia highlighting the dire situation of Black Rainbow / Aboriginal Rainbow lack of access to resources specifically in the fight for more awareness to be raised on Aboriginal LGBTIQ high suicide rates. Miss Ellaneous, an Aboriginal Australian Sistergirl entertainer won the prestigious Artist of the Year Award at the Australian LGBTI Awards 2019. In her speech, she highlighted the plight of Aboriginal Sistergirls and Brotherboys.

In Ella's words: "I am honoured to have been recognised and acknowledged for my artistry and I'm lucky to be working in a career that not only creates change but allows me to pursue my passion of creating much needed visibility to my black and culturally diverse community. We currently have an

epidemic of suicide in this country which is twice the national average for my Aboriginal and Torres Strait Islander community. And although not documented, we know that a large proportion of this is within our BrotherBoys, SisterGirls & Rainbow community".

Following up on research and data, Andy Archipelago has started to archive the Aboriginal Rainbow as part of his thesis in indigenous gender and sexual diversities.¹

Marriage equality referendum

The postal survey on marriage equality in Australia heavily dominated news in the region for much of the latter part of 2017, ending in a 61% 'yes' vote and leading to the legalization of same-sex marriage shortly thereafter.

The battle for marriage equality in Australia was fraught with the issue of religious exemptions, and though the final bill contained some exemptions, they weren't as broad as those that exist in areas like education and work. Australia's very drawn-out, very visible debate on the issue of marriage equality put many religious and conservative groups across the region at unease, leading to re-entrenchment at the prospect of marriage equality arriving on their shores.

Despite that, at the end of 2017, Australia followed in New Zealand's footsteps and became the second country in the region to legalise same-sex marriage, and marriage equality became the law of the land in Australia with the passage of the *Marriage Amendment (Definition and Religious Freedoms) Act 2017* three weeks after the country voted to legalise the practice in a nationwide postal survey. Though the results of the postal survey were positive, many LGBTIQ organizations came out against the non-binding survey.² As explained above,³ from a human rights perspective, the

¹ "Archiving The Aboriginal Rainbow", Aboriginal LGBTIQASGBB Archive And Portal (website).

² Jordan Hirst, "Rule Out New 'Postal Plebiscite', Marriage Equality Campaigners Say", *QNews Magazine*. March 2017.

³ Read more about the implications of referendums that put our rights to a vote in the essay written by Elena Brodeala and Vlad Viski in the first section of this report.

majority voting on the rights of a minority is inherently problematic and puts LGBTIQ communities at risk of and through acts of hate speech, discrimination, and violence.⁴

And indeed, in the lead-up to the postal survey, marriage equality opponents released offensive television⁵ and newspaper campaigns,⁶ while the incidence of homophobic vandalism and attacks increased across the country.⁷

Pardons, apologies and decriminalisation

In 1997, Tasmania became the last Australian state to decriminalise sexual activity between consenting males. Twenty years later, the Tasmanian government issued an apology to those whose lives were impacted by the discriminatory law,⁸ and a year later passed a bill allowing them to apply to have convictions for same-sex sexual acts expunged from their criminal records.⁹

Similar bills soon followed in the states of Queensland¹⁰ and Western Australia,¹¹ and now there are calls for the government of Australia to deliver a *national* apology to former service members who were dishonourably discharged on the basis of their sexual orientation.¹²

Advocacy and activism

The Federal Government's Department of Foreign Affairs and Trade (DFAT) has been organising meetings in 2018 with the view of forming a consortium of human rights NGOs in Australia to share, network and collaborate on major issues affecting the lives of LGBTIQ in Australia, and this planning and massaging culminated in its DFAT NGO Forum in Canberra in February 2018 which included NGOs such as Equality Australia, Edge

Effect, Planet Ally, Kaleidoscope Trust Australia amongst many that attended.¹³

Protections from discrimination

While federal non-discrimination law in Australia has been grappling with the question of religious exemptions, the past two years have seen significant progress in discrimination protections at the state level.

During this time, Queensland became the second state to remove the so-called "gay panic" defence from the state's Criminal Code. The defence had been successfully used by two men who had murdered a man over an unwanted sexual advance in 2008; both men were granted shortened reduced sentences.¹⁴

In June of 2018, the Australian state of New South Wales passed a bill protecting LGBTIQ people from vilification, making it a crime to threaten or incite violence against people on the basis of a protected characteristic. Activist groups pushed for the legislation as a response to some of the nasty campaign ads directed at the LGBTIQ community during the run-up to the postal survey on marriage equality.¹⁵

Rainbow families in South Australia had cause for celebration when the state government passed bills allowing equal access to assisted reproductive treatment and unpaid surrogacy.¹⁶ Similarly, Northern Territory passed a bill granting the legal right to adopt children to de facto and same-sex couples.¹⁷

Hate incidents & discrimination

A review of 88 suspicious deaths that took place New South Wales between 1976 and 2000

- ⁴ Rodney Croome, "Why a referendum on gay marriage is a bad idea" *The Sydney Morning Herald*. 29 April 2013.
- ⁵ Michael Koziol, "Shorten blames Turnbull for 'total rubbish' TV ad from same-sex marriage opponents" *The Sydney Morning Herald*. 30 August 2017.
- ⁶ Paul Karp, "Homophobic anti-marriage equality material surfaces in postal survey campaign", *The Guardian*. 21 August 2017.
- ⁷ Melissa Davey, "Rocks thrown through windows amid spate of homophobic attacks", *The Guardian*. 26 September 2017; Dr Saan Ecker, Ebony Bennett, "Preliminary results of the Coping with marriage equality debate survey" *The Australia Institute*. December 2017.
- ⁸ Lane Sainty, "Tasmania Has Apologised To People Convicted Of Historical Gay Sex Offences", *BuzzFeed News*. 12 April 2017.
- ⁹ Murray Silby, "Breakthrough as Tasmania expunges historical homosexual convictions" *SBS News*. 9 April 2018.
- ¹⁰ Jesse Jones, "Queensland apologises for gay sex convictions" *Star Observer*. 11 May 2017.
- ¹¹ "Historical Homosexual Convictions Expungement Bill passes lower house" *Out in Perth*. 23 February 2018.
- ¹² Melissa Davey, "'Injustice was official': call for national apology to gay former military personnel" *The Guardian*. 25 September 2018.
- ¹³ "Australia's DFAT NGO Forum", *Australian Department of Foreign Affairs and Trade (Website)*, 8 February 2018.
- ¹⁴ "Queensland abolishes 'gay panic' as criminal defence for murder", *BBC News*. 21 March 2017.
- ¹⁵ Jessie Jones, "New Vilification Laws in NSW to Protect All LGBTIQ People" *Star Observer*. 22 June 2018.
- ¹⁶ Matthew Wade, "South Australia Gives Same-Sex Couples Access to IVF and Unpaid Surrogacy", *Star Observer*. 1 March 2017.
- ¹⁷ Leigh Andrew Hill, "Northern Territory allows same-gender couples to adopt", *Out in Perth*. 14 March 2018.

revealed that almost a third were suspected or confirmed to be driven by gay-hate bias.¹⁸

After receiving pressure from advocates and victim's families, the government of NSW decided to open an inquiry into the hate crimes, looking specifically at how police handled the cases and why the state's justice system may have failed to protect victims or provide justice for their families.

Many feel that the NSW police force, which has a documented history of homophobia, failed to properly respond to and investigate the murders.¹⁹

Legal progress on gender identity issues

In June 2017, the United Nations Human Rights Committee issued a decision stating that Australian laws barring married trans people from changing the sex on their birth certificate are in violation of international human rights law. In six states, married persons wishing to change their gender on legal documents had to first divorce.²⁰

When marriage equality came to Australia later that year, the Bill included a provision outlawing 'forced divorce' provisions and giving states twelve months to amend their legislation.²¹ This, coupled with pressure from LGBTIQ and other advocacy groups, led to the provision being scrapped soon after in Victoria²², New South Wales²³, Queensland²⁴, and Northern Territory.²⁵ Though Western Australia missed the deadline to amend their laws, they did so in February of this year, leaving only Tasmania at odds with federal law.²⁶

Religious exemptions

The marriage equality debate in Australia was accompanied by an ugly public battle over religious exemptions.

Religious exemptions are legal provisions that allow individuals, churches, and organizations to bypass non-discrimination protections for LGBTQ people on the grounds that treating them equally "would violate their religious beliefs."

Though civil society groups have expressed the marriage Bill "struck a fair balance" between civil rights and religious freedom, there has been increased debate over exemptions in non-discrimination law that allow religious institutions, particularly schools, to discriminate against employees and students for being LGBTIQ.²⁷

The impact of these exemptions was given a face in 2017 when Craig Campbell, a teacher at a Baptist college in Perth, was fired for revealing he was in a same-sex relationship.²⁸

The story brought increased visibility to the issue, with reports on calls to remove the exemptions from law and to oppose the "right" of religious schools to fire staff or expel students on the basis of their sexual orientation or gender identity.²⁹

In this regard, the Prime Minister has pledged to close religious exemption loopholes in law.³⁰

Intersex rights

More than 20 intersex human rights defenders from Australia and New Zealand came together for an historic gathering in Darlington, Sydney in March of 2017. The event led to the "Darlington Statement",³¹ which addresses key priorities for the Intersex community, and that advocates consider to be "the basis of much of our work over the coming years."³²

The Statement informed a shadow report submitted to the UN Human Rights Committee that found, "evidence of continuing harmful coercive

¹⁸ Lucy Cormack, "'Ugly part of our history': Sydney's wave of gay-hate deaths exposed", *The Sydney Morning Herald*. 26 June 2018.

¹⁹ Laurence Barber, "NSW Gay Hate Crimes to Be Subject of New Inquiry", *Star Observer*. 19 September 2018.

²⁰ Lane Saint, "A Married Transgender Woman Fighting For A New Birth Certificate Won The Backing Of The UN" *BuzzFeed News*. 19 June 2017.

²¹ Jordan Hirst, "Calls For State Premiers To Scrap 'Forced Transgender Divorce' Laws", *QNews Magazine*. February 2018.

²² Jesse Jones, "Victoria Becomes the Third State to Scrap Forced Trans Divorce", *Star Observer*. 24 May 2018.

²³ "NSW marriage laws amended to include transgender people", *South Coast Register*. 6 June 2018.

²⁴ Ben Smee, "Queensland scraps law forcing married transgender people to divorce", *The Guardian*. 14 June 2018.

²⁵ "Northern Territory moves to update gender laws and remove 'forced divorce'", *Out in Perth*. 24 November 2018.

²⁶ Leigh Andrew Hill, "WA amends laws to end forced divorce for trans and gender diverse people", *Out in Perth*. 13 February 2019.

²⁷ Paul Karp, "Marriage equality campaign seeks abolition of religious rights to discriminate", *The Guardian*. 14 February 2018.

²⁸ Claire Moodie, "Is it really the Christian way? Teacher who lost job after revealing he was gay speaks out", *ABC News*. 6 December 2017.

²⁹ Paul Karp, "Most Australians oppose religious schools' right to fire staff based on sexuality", *The Guardian*. 13 May 2018.

³⁰ Paul Karp, "Scott Morrison will change the law to ban religious schools expelling gay students", *The Guardian*. 12 October 2018.

³¹ "Darlington Statement", *Intersex Human Rights Australia* (website).

³² Morgan Carpenter, "Publication of Darlington Statement, a common platform on intersex community goals in Aus/NZ" *Intersex Human Rights Australia*. 10 March 2017.

practices” against intersex persons in Australian hospitals and made recommendations for guaranteeing the rights of intersex Australians.

The primary recommendation was to stop unnecessary, irreversible surgery on children born intersex for the purpose of assigning them a sex, a position that was affirmed by the UN Human Rights Committee.³³

In September 2018, the Australian government responded. The Australian Human Rights Commission acknowledged the lack of national guidelines on how to treat people born with variations in sex characteristics and launched a major consultation on how to best protect their rights.

The project, which incorporated input from intersex individuals and organizations, sought to “identify key issues and obtain perspectives on current practice, evaluate approaches taken to medical interventions in Australia and other jurisdictions, and develop recommendations for a nationally consistent human-rights based approach to decision-making about medical interventions”,³⁴ and the study is ongoing.

Health

A 2017 survey of trans and gender-diverse youth in Australia found that 48% of participants had attempted suicide, and about three in four reported experiencing anxiety or depression.³⁵

As is the case universally, queer and trans youth in Australia are at a markedly higher risk for depression and suicide than their heterosexual and cisgender peers.

Australia’s ongoing marriage equality debate was also deeply intertwined with the mental and physical health of its LGBTIQ population.

A 2017 study of lesbian, bisexual and queer women in Australia found that “forty percent of women had

experienced some form of abuse or harassment” in the past twelve months, marking an increase on previous years.³⁶

A number of NGOs banded together to launch a campaign using the link between discrimination and suicide rates to urge Australians to vote in favour of marriage equality.

According to them, “as many as 3000 youth suicide attempts could be averted each year with a ‘YES’ vote for marriage equality.”³⁷

As a response to high rates of depression and suicide among queer and trans Australians, the government’s peak body for LGBTIQ health announced a new plan for strategic action to address the crisis.

The plan aims “to respond to LGBTIQ people in current need, to provide interventions to those who are at risk, and to interrupt the structural factors that contribute to overrepresentation of LGBTIQ people in mental health and suicide statistics.”³⁸

“Conversion therapy”

Though there is no federal ban on “conversion therapy” in Australia, this is a situation that local activists are lobbying to rectify.³⁹

In September 2018, the Australian Senate passed a motion seeking to ban “conversion therapy” across the country in response to new Prime Minister Scott Morrison stating that conversion therapy, “wasn’t an issue for him.”⁴⁰

Though not legally binding, the motion urges the Federal Government to pressure states to ban the practice. Victoria is currently the only state in Australia that has a Commissioner charged with investigating and bringing charges against practitioners of conversion therapy,⁴¹ and is currently seeking to ban the practice outright in law.⁴²

³³ Morgan Carpenter, “Shadow Report submission to the UN Human Rights Committee” *Intersex Human Rights Australia*. 19 September 2017.

³⁴ “Protecting the Human Rights of People Born with Variations in Sex Characteristics in the context of Medical Interventions” Australian Human Rights Commission. July 2018.

³⁵ Strauss, P., Cook, A., Winter, S., Watson, V., Wright Toussaint, D., Lin, A. “Trans Pathways: the mental health experiences and care pathways of trans young people. Summary of results.” *Telethon Kids Institute*. September 2017.

³⁶ Amy Coopes. “Counting the toll of toxic public debate: research shows surge in abuse of lesbian, bisexual and queer women” *Croakey*. 14 July 2017.

³⁷ #mindthefacts “#mindthefacts – vote ‘YES’ for better youth mental health”, *The University of Sydney* (website).

³⁸ Sally Morris & Ross Jacobs “National LGBTIQ Mental Health and Suicide Prevention Strategy: A new strategy for inclusion and action”, *National LGBTI Health Alliance*. December 2016.

³⁹ Paul Karp, “Gay conversion therapy ban found to be LGBTIQ Australians’ top priority”, *The Guardian*. 3 August 2018.

⁴⁰ Matt Moore, “Australia’s Senate passes a motion seeking to ban ‘conversion therapy’”, *Gay Times*. 16 September 2018.

⁴¹ Jesse Jones, “Anti-gay ‘Conversion’ Practitioners Could be Prosecuted in Victoria”, *Star Observer*. 17 May 2018.

⁴² “Victorian Government aims to outlaw Gay Conversion Therapy”, *Murray Campbell*. 17 May 2018.

Immigration and asylum

Australia's controversial immigration policies have been reported to have a profound impact on LGBTIQ migrants seeking asylum on the grounds of their sexual orientation or gender identity.

In May 2017, Australia began closing its Immigration Detention Centre in Manus Island, Papua New Guinea, telling detainees to "consider their options": stay in Papua New Guinea or another third country, temporarily relocate to a transit centre, or return home voluntarily.⁴³

The Australian Green Party officials criticised the move as "profoundly cruel" to LGBTIQ people, as they can't return to the countries they fled because of their sexuality, and can't stay in Papua New Guinea where same-sex sexual acts is punishable by up to 14 years in prison.⁴⁴

The following year, an immigration judge in the country came under fire from the federal court for showing "extreme illogicality" when it rejected the appeal of an Indian asylum seeker seeking protection in Australia because of his sexual orientation.⁴⁵

New Zealand

Pardons, apologies and decriminalisation

In New Zealand, it's believed over 1,000 people were convicted before the law criminalising same-sex sexual acts was overturned in 1986.

In 2017, the New Zealand Parliament issued a formal apology for the policy, recognising, "the tremendous hurt and suffering those men and their families have gone through, and the continued effects the convictions have had on them."⁴⁶ The following year, Parliament unanimously passed a bill to expunge those convictions, but stopped short of providing compensation.⁴⁷

The move angered many gay rights activists in New Zealand, who are fighting for compensation for the damage done by the law.⁴⁸

Advocacy and activism

In the recent cycle of the UN's Universal Periodic Review (UPR), New Zealand received several recommendations to add gender identity, gender expression or sex characteristics as specifically prohibited grounds of discrimination in Article 21 of the Human Rights Act of 1993 and to amend the Human Rights Act of 1993 to explicitly prohibit discrimination on the basis of gender identity and intersex status. Additionally, Chile recommended putting an end to non-consensual medical procedures which affect intersex persons.⁴⁹

Prior to the UPR, Justice Minister Andrew Little's speech⁵⁰ was, in many ways, as useful as the recommendations themselves. Minister Little made robust statements and was very unequivocal about the gaps in New Zealand's human rights record.

It was a statement of intent from the government, and allows New Zealand to take a strong approach to its advocacy, including, as Minister Little alluded to, a broad review of the Human Rights Act, including amending section 21(1)(a) to include gender identity – which is in line with the Labour party's Rainbow (incorporating gay, lesbian, bisexual, transgender, intersex akava'ine, fa'afafine, fa'afatama, fakafifine, fakaleiti, fakaleiti (leiti), mahu, palopa, takatāpui, tangata ira tane, vakasalewa, whakawahine agender, asexual, brotherboy, gender diverse, gender fluid, genderqueer, nonbinary, pansexual, queer, sistergirl, trans feminine, trans masculine, transexual, trans) policy.⁵¹

The New Zealand Government's Oral Response⁵² to the full UPR Report with of all 194 recommendations in Geneva, was that they have not taken a position on the recommendations and will carefully consider their position through an

⁴³ Helen Davidson and Ben Doherty, "Manus Island detainees told to 'consider options' as closure of centre begins", *The Guardian*. 15 May 2017.

⁴⁴ Matthew Wade, "Greens Urge Government to Resettle Queer Refugees Currently on Manus Island", *Star Observer*. 24 May 2017.

⁴⁵ Ben Doherty, "Tribunal criticised after rejecting asylum seeker's appeal over homosexuality", *The Guardian*. 18 January 2018.

⁴⁶ "Watch: The moment Amy Adams apologises on behalf of Government for convicting gay men for homosexual acts prior to 1986" TVNZ. 5 July 2017.

⁴⁷ "We're sorry: Parliament passes law to allow wiping of convictions for gay men" *The New Zealand Herald*. 3 April 2018.

⁴⁸ Eleanor Ainge Roy, "New Zealand gay rights activists demand compensation over convictions", *The Guardian*. 19 March 2018.

⁴⁹ "New Zealand – UPR" *ILGA Website*.

⁵⁰ "Justice Minister Andrew Little's Pre-UPR Speech" *Beehive NZ Government Speeches*, 21 January 2019

⁵¹ "New Zealand Labour Party's Rainbow Policies" *New Zealand Labour Party website*.

⁵² "NZ Government UPR Response", *UN WebTV*, 25 January 2019.

inter-agency process and decision by Cabinet.⁵³

The next stage of the UPR is the adoption of the recommendations at the 41st session of the Human Rights Council in July 2019 and although there is no formal process for civil society involvement between now and then, civil society are working hard on the ground in their advocacy to meet with government officials before they officially respond to the recommendations.

Legal progress on gender identity issues

In New Zealand, advocates were frustrated with the results of the 10-year milestone of a Human Rights Commission report called the 2008 Inquiry into Discrimination Experienced by Transgender People.⁵⁴ The inquiry, the first of its kind in the world, was launched in 2006 to learn more about trans people's experience with discrimination, including barriers to health services and legal gender recognition.⁵⁵

The Commission's resulting report made nine key recommendations to improve the lives of trans people, including strengthening discrimination protections, improving access to healthcare, and simplifying the process of changing one's legal gender through documentation.

The 10-year anniversary showed frustratingly little progress had been made towards realizing the recommendation: there had been no improvement in access to healthcare, birth certificates were still difficult to amend, and questions about sexual orientation and gender identity were not included on the 2018 Census.⁵⁶

However, the government did make some progress in October 2018 when it announced it would remove a cap on the number of publicly-funded gender affirmation surgeries it would provide.

Health

HIV rates in New Zealand have been steadily rising since 2011, and reached their highest to date in 2016, with the majority of new infections among men who have sex with men.⁵⁷ Just months prior to the release of the figures, the Ministry of Health of New Zealand decided to cut funding for a landmark HIV prevention study among men who have sex with men, despite an internal report outlining the dangers of discontinuing the research.⁵⁸

The previous caps of three male-to-female surgeries and one female-to-male surgery every two years had resulted in a waitlist of 50 years for the 105 people seeking the surgery.⁵⁹

"Conversion therapy"

In June 2018, a New Zealand television network unveiled "conversion therapy" happening at religious organisations in the country. The investigation exposed Church organisations, a School Teacher and a Trainee Counsellor as they talked to an undercover journalist offering or describing such treatments.

When they were formally approached, however, all of them denied that what they were offering was in fact conversion therapy.⁶⁰ A couple months later, a petition was launched asking the New Zealand House of Representatives to ban the practice.⁶¹

Immigration and asylum

Forty people were reported to have been granted refugee status in New Zealand in the five years preceding 2017 on the grounds of their sexual orientation and gender identity.⁶²

Three of the most recent cases granted by the Immigration and Deportation Tribunal include a bisexual Pakistani man, who lived with a transgender woman in Whangarei and Auckland, a lesbian teacher from Russia, and a gay man from

⁵³ *Draft report of the Working Group on the Universal Periodic Review: New Zealand*, A/HRC/WG.6/32/L.1, 23 January 2019.

⁵⁴ Sarah Harris, "10 years on from Human Rights Commission's inquiry into transgender discrimination", *New Zealand Herald*, 22 January 2018.

⁵⁵ "To Be Who I Am: Report of the Inquiry into Discrimination Experienced by Transgender People".

⁵⁶ Sarah Harris, "10 years on from Human Rights Commission's inquiry into transgender discrimination", *New Zealand Herald*, 22 January 2018.

⁵⁷ Anna Loren, "NZ records highest-ever number of HIV diagnoses in 2016", *Stuff*, 31 May 2017.

⁵⁸ Michelle Duff, "Ministry of Health declines funding for HIV prevention study, despite known risks", *Stuff*, 10 March 2017.

⁵⁹ Thomas Coughlan, "Gender affirmation surgery cap lifted", *Newsroom*, 16 October 2018.

⁶⁰ "New Zealand TV shows expose on gay conversion therapy", *Out in Perth*, 17 June 2018.

⁶¹ "Petition of Max Tweedie for Young Labour and the Young Greens: Ban Gay Conversion Therapy", *New Zealand Parliament (web page)*, accessed 27 February 2019.

⁶² "LGBT asylum seekers granted refugee status in NZ", *Radio New Zealand*, 18 June 2017.

Myanmar living in New Zealand whose wife had discovered his sexuality through a Facebook page.

The Pacific

Decriminalisation

In the Pacific, none of the criminalising states repealed its laws against consensual same-sex sexual acts between March 2017 and January 2019.

There is some positive and promising signs when in August 2017, the Cook Islands appeared to move towards decriminalisation following a planned overhaul of the 1969 Crimes Act. The local organisation Te Tiare Association (TTA) participated in the public consultation held in July 2017 to that effect,⁶³ and it was even reported that Christian leaders came out in support, noting that though “it is not right”, same-sex sexual acts should not be treated as a criminal offence.⁶⁴ To date, the Crimes Bill 2017 remains on hold and does not appear to have advanced in the legislature.

Marriage equality

In light of growing momentum towards marriage equality in the region, the Governor General of the **Solomon Islands** reiterated in a speech that same-sex relations are illegal in the country and that, “Promoting same sex marriage is like changing the law of gravity by legislation.”⁶⁵

Similarly, a coalition of religious, women's, youth groups and local chiefs in **Vanuatu** started a petition to declare their opposition to marriage equality in the country after rumours spread that lawmakers were planning to introduce a bill on the issue.⁶⁶

Certainly, the Pacific is shaping up to be a hot-spot in the foreseeable future for issues such as marriage equality, especially in line with Pacific Leaders public comments in Samoa⁶⁷, but it is not a priority for the Pacific human rights defenders currently.

Pardons, apologies and decriminalisation

In the Pacific, there no current plans in any of the jurisdictions to mirror the judicial and statutory regimes in Australia and New Zealand that have pardoned men who were cautioned or have historical convictions under previous legislation that criminalised same-sex sexual acts, and there are no apologies being planned.

Both pardons and apologies are the results of successful decriminalisation efforts and with a number of Pacific countries that still criminalise same-sex sexual acts, it is unlikely that these will occur anytime soon.

Advocacy and activism

Civil society and grassroots organisations across the Pacific have been busy launching initiatives to improve health, raising awareness around human rights issues, and advocating for better policies to support LGBTIQ people.

A coalition of LGBTIQ advocates started a petition in June 2018 lobbying the Pacific Islands Forum, the organisation that oversees the region's political and economic policy, to pressure its 18 member states to, “support full inclusivity, equity and equality for all people of the Pacific.”⁶⁸ The petition calls on the Forum to compel member states to decriminalise same-sex sexual acts in countries where colonial-era laws are still on the books, denounce homophobia and transphobia, and include gender and sexual minorities in positions of leadership.⁶⁹

In Fiji, civil society groups are pushing back against violence perpetrated against the trans community. Organisations are conducting research into transgender-based violence and trans women's access to justice,⁷⁰ training police officers in how to handle LGBTIQ cases with sensitivity⁷¹ and launching a campaign against teen pregnancy and

⁶³ Rashneel Kumar, “LGBT group makes submission”, *Cook Island News*, 31 July 2017.

⁶⁴ Rashneel Kumar, “Not right in God's sight”, *Cook Island News*, 2 August 2017.

⁶⁵ “Same sex marriage cannot populate the world, the Governor General says,” *SIBC*, 8 June 2018.

⁶⁶ Jonas Cullwick, “Civil Society Organizations Oppose Same Sex Marriage”, *Daily Post of Vanuatu*, 7 April 2018.

⁶⁷ “Samoan Prime Minister Against Marriage Equality”, *RNZ*, 12 December 2017.

⁶⁸ Shannon Power “Enough is enough, it's time to decriminalize homosexuality in the Pacific Islands”, *Gay Star News*, 29 June 2018.

⁶⁹ “Decriminalize and Protect the Rights of LGBTIQ People in the Pacific Islands Now!”, *Change.org*, accessed February 26, 2019.

⁷⁰ “Transgender-based Violence and Access to Justice Research” *Haus of Kameleon (web page)*, accessed February 26, 2019.

⁷¹ Iva Danford, “Tudravu reassures LGBTIQ Community police will do what needs to be done if member turns up at a police station” *Fijivillage*, 20 November 2019.

STI transmission by making free condoms available at bars, clubs, and motels around the island.⁷²

Samoa similarly has a strong presence from LGBTIQ grassroots organisations who have been carrying out awareness-raising campaigns since 2008. The Samoa Fa'afafine Association met with representatives of media outlets to discuss fair media reporting on LGBTIQ issues after a national newspaper misgendered a trans woman while reporting on her death.⁷³

The Association also organised a week-long series of initiatives to tackle discrimination, stigmatisation and gender-based violence in Samoa.⁷⁴

Sadly, the Samoa Fa'afafine Association and the Pacific region were struck by tragedy early last year when the Association founder and President, So'oalo To'oto'oalii Roger Stanley passed away. Dozens of people attended and paid their homages at her funeral service, and the country's Prime Minister delivered a eulogy during the ceremony calling for all to respect Fa'afafine and Fa'atama.⁷⁵ In a statement released, OutRight Action International memorialised Roger as, "courageous and dedicated to making the world a better place for LGBTIQ people everywhere," and demonstrated that her loss was felt by LGBTIQ activists across the Pacific region and around the world.⁷⁶

Tonga Leiti Association, a prominent LGBTIQ civil society organisation in Tonga, was similarly faced with misfortune early last year when tropical cyclone Gita, the worst to hit the main islands in 60 years, seriously damaged the organisation's center and shelter. The Association quickly set to work rebuilding the Center, which serves as much-needed refuge to LGBTIQ people who may otherwise face discrimination in housing.⁷⁷

In addition to operating the shelter, the Association has carried out campaigns in the country's schools against trans bullying,⁷⁸ and provides the community with HIV testing, counselling services, and capacity building on HIV testing and sensitisation.⁷⁹

Protections from discrimination

Pacific LGBTIQ populations continue to face derogatory public comments from their leaders as in Fiji,⁸⁰ despite Fiji having granted sexual and gender minorities protection against discrimination in Article 26 of the 2013 Fijian Constitution.⁸¹

Papua New Guinea (PNG) has one of the highest rates of HIV infection in the world,⁸² and still criminalises same-sex sexual activity with a 14 years imprisonment sentence and with two per cent of the adult population being HIV positive. Human rights actors and activists have called for PNG to change its laws, and if it "refuses to decriminalise homosexuality on the grounds that it is a breach of human rights, then it should consider doing so as a means of improving health".

The common thread amongst Pacific nations is despite the lack of legislative support in protecting LGBTIQ Pacific citizens in areas of health care, education, employment, housing, freedom of expression, association and assembly, asylum and migration, family and community and relationship recognition, their lived realities suggest a more harmonious acceptance through cultural practices indigenous to each Pacific nation and these have somehow lessened the impact of any such lack of protections.

Hate incidents & discrimination

Mistrust of police is not unique to Australia and New Zealand. Following recent attacks in the urban area of Nasinu, Fiji, a human rights organisation based in the country encouraged LGBTIQ persons to speak up and report incidents of violence.

According to the organisation's director, victims of violence often choose not to report as they fear both reprisals from the community and discrimination and harassment from law

⁷² Semi Turaga, "'Condomising Hotspots Initiative' targets nightclubs and motels", *Fijivillage*, 14 August 2017.

⁷³ Seia Soloi, "Fa'afafine want fair and inclusive reporting" *Samoa Observer*, 31 March 2017.

⁷⁴ Adel Fruean, "Fa'afafine week campaign kicks off" *Samoa Observer*, 2 December 2018.

⁷⁵ Elizabeth Ah-Hi, "Nation bids farewell to So'oalo" *Samoa Observer*, 3 February 2018.

⁷⁶ "Remembering Samoan Fa'afafine Activist To'oto'oalii Roger Stanley" *OutRight Action International (website)*.

⁷⁷ Michael K. Lavers, "Cyclone seriously damages Tonga LGBTIQ center, shelter", *Washington Blade*, 21 February 2018.

⁷⁸ "Tonga campaign aims to empower transgender students", *Radio New Zealand Pacific*, 27 March 2017.

⁷⁹ "Tonga Leitis' Association", *Facebook webpage*, accessed 26 February 2019.

⁸⁰ "Fiji Prime Minister tells Gay Couples to Move to Iceland", *Huffington Post*, 1 June 2016.

⁸¹ *Constitution* of the Republic of Fiji.

⁸² "WHO - HIV & Sexually Transmitted Diseases in Papua New Guinea", *World Health Organisation Western Pacific Region*.

enforcement.⁸³ One of the most recent was a hate crime against a young Fijian transgender woman, Ms Akuila Salavuki who was attacked and murdered in July 2018.⁸⁴

However, there were signs that relations may improve: later that year, Fiji's Human Rights and Anti-Discrimination Commission commended the police force for taking swift action on two complaints of homophobic assaults.⁸⁵

Legal progress on gender identity issues

Gender Identity is a mixed bag with a checkered past as far as the Pacific is concerned. Preferred pronouns which are very much a core aspect of one's SOGIESC and LGBTIQ identity in Australia and New Zealand are not as pronounced in the Pacific.

There has always been some hesitancy amongst activists on the ground in pursuing gender identity reform because their lived experiences and realities on the ground have more prioritised struggles - education, gainful employment, and contributions to the myriad of communal and familial obligations - these rate a higher priority in the lives of Pacific LGBTIQ.

But there is hope - the Asia Pacific Transgender Network (APTN) appointed a Pacific Co-ordinator to work with three country partners - Fiji, Papua New Guinea and Samoa - to advance legal gender recognition in Fiji, and develop a peer research study drawn from Transgender Europe's TVT campaign and program with the purpose of using this peer research to develop a record that documents the lived experiences and realities of trans communities in these 3 countries. And there is no doubt that from that peer research, more work will be done and progress made on legal progress on gender recognition.

Religious exemptions

Religious exemptions legislation in the Pacific allowing discrimination against LGBTIQ citizens on the basis of their sexuality or gender identity are

non-existent. The extent though of religious persecution is another matter entirely and there are recent examples of this in the Pacific.⁸⁶

Most notable in the religious acceptance and non-acceptance of Pacific LGBTIQ is the indigenous cultural notion of what makes a family. Some Pacific church leaders have come out in support of Pacific LGBTIQ from a religious perspective and reject the notion of cultural positionality of these identities.⁸⁷

Intersex rights

For the first time in the history of the Pacific, Intersex became a focus of discussion / workshop during the ILGA Oceania Conference Apia Samoa August 2018.

The session "Intersex Awareness & Policy - The Untold Pacific Story" was well received and attended by health professionals and intersex activists - first time Intersex was discussed in a Pacific setting.

We are starting to see the documentation of Intersex in the Pacific as was the testimonials by National Health Service of Samoa's registered midwives who attended the session.

Health

The work of the Asia Pacific Transgender Network (APTN) is leading and paving the way for the development of relevant policies on Pacific Trans Health.

The Blueprint⁸⁸ not only maps the current human rights and trans communities health in the Asia Pacific region including best practice clinical advice about meeting the health needs of trans children, youth and adults but it is also a tool that can be tailored to each country's requirements to work in line with in-country activists strategic frameworks by enhancing their work in the improvement of

⁸³ "Fiji Victims Of Anti-Gay Violence Often Fear Community Repercussions If They Report Attacks To Police" *Pacific Islands Report*. 12 March 2017.

⁸⁴ "Murdered on International Day Against Homophobia, Transphobia and Biphobia", ABC Net, 23 July 2018.

⁸⁵ Vijay Narayan, "Human Rights Commission commends Police for prompt action in LGBTIQ assault case" *Fijivillage*. 19 July

⁸⁶ 2017.

⁸⁷ "Tonga Protests Pacific Human Rights Conference" *Institute for Human Security and Social Change Blog*, 16 June 2015.

"Samoan Church Leader Accepts Faafafine But Rejects Their Cultural Significance" *Pacific Islands Report - Pacific Islands*

⁸⁸ Development Program.

"APTN Trans Health Blueprint" Asia Pacific Transgender Network

health and human rights for trans people and trans communities.

Developed between APTN, UNDP, and USAID and the PEPFAR-funded Health Policy Project, the APTN Trans Health Blueprint has been rolled out successfully in Fiji in a regional implementation in 2018 covering 8 countries - Fiji, Vanuatu, Papua New Guinea, Samoa, Tonga, Kiribati, Cook Islands and Niue and has since then been tailored and implemented in Fiji, Tonga, Samoa, and picked up by ASHM (Australasian Society for HIV, Viral Hepatitis and Sexual Health Medicine) and OSSHHM (The Oceania Society for Sexual Health and HIV Medicine) as the basis for development of a training package to advance STI management in trans health including bringing together in-country Health Ministries staff and professionals. So far,

this training package has been delivered in Vanuatu, Kiribati and Federated States of Micronesia with more countries planned.

In other developments, budget cuts to the HIV treatment program in Papua New Guinea led to a critical shortage in stocks of anti-retroviral drugs.⁸⁹

"Conversion therapy"

Since the last *State-Sponsored Homophobia* report, there have not been any reported incidents of gay "conversion therapy" in the Pacific, nor have there been any plans to introduce any further bans.

⁸⁹ Yara Murray-Atfield, "Papua New Guinea's critical HIV drugs shortage sparks warning that people may die", ABC News. 21 April 2018.

GLOBAL OVERVIEW

STATE-SPONSORED HOMOPHOBIA 2019



GLOBAL OVERVIEW

CRIMINALISATION AND RESTRICTION

STATE-SPONSORED HOMOPHOBIA 2019



Global Trends on the Decriminalisation of Consensual Same-Sex Sexual Acts (1969 - 2019)

By Daryl Yang.¹

50 years after the 1969 Stonewall Riots in New York City, it is timely to look back into the past to evaluate the progress that we have achieved. As writer Rebecca Solnit wrote, “To know history is to be able to see beyond the present, to remember the past gives you capacity to look forward as well, it’s to see that everything changes and the most dramatic changes are often the most unforeseen.”² This section documents the dramatic decline in the global march towards decriminalisation that was probably unimaginable only five decades ago.

The progress made over the past 50 years could not have been possible without the tireless efforts of individual activists and advocacy organisations across local, national, regional and international levels. It is also the fruit of the courage and sacrifice of the countless individuals who stood up against these laws and risked their lives and careers, by organising advocacy groups and organisations, demonstrating on the streets, raising awareness, engaging with MPs, politicians and public officials, filing petitions and launching the judicial challenges whose decisions have become synonymous with the success of the international SOGIE rights movement. Through Dudgeon, Toonen, Lawrence, Pant, Orozco, Jones, and now Navtej Singh, among many others, millions of us are represented.

In the 2018 Indian Supreme Court decision of *Navtej Singh v Union of India* that decriminalise consensual same-sex sexual conduct, Indu Malhotra J cited ILGA’s 2017 *State Sponsored Homophobia Report* and observed that “the trend of

decriminalizing anti-sodomy laws world over has gained currency during the past few decades”.³

While earlier editions of this report have hinted at this trend by tracking the decrease in the number of countries with such laws, this section makes use of recent population data to conclusively demonstrate and illustrate the significant declining trend in terms of both the number of countries criminalising consensual same-sex sexual acts and the proportion of the world’s population living under such laws.

This section’s findings support the view that there is an increasingly clear international norm against the criminalisation of consensual same-sex sexual conduct.⁴ It highlights that countries that do so are in a shrinking minority and should join the rest of the global community in repealing such laws in compliance with international law.

While the trend of decriminalisation is encouraging and worth celebrating, decriminalisation as a formal legal change does not in and of itself lead necessarily to effective social change. Indeed, the removal of formal legal provisions does not always or immediately translate to improvements in the lived experiences of gender and sexual minorities.⁵ Decriminalisation is nevertheless a crucial step in the march towards full equality and freedom that, fuelled by the encouraging developments presented in this section, will and must continue.

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² Rebecca Solnit, “Protest and persist: why giving up hope is not an option”, *The Guardian*, 13 March 2017.

³ *Navtej Singh Johar & Ors. versus Union of India thr. Secretary Ministry of Law and Justice* W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016.

⁴ Elizabeth Baisley, ‘Reaching the Tipping Point?: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity’ 38(1) (2016) *Human Rights Quarterly* 134.

⁵ Rahul Rao, “The locations of homophobia” (2014) 2(2) *London Review of International Law* 169, 171.

Data Sources & Methodology

Global population data for the period 1969 to 2017 was taken from the data made available by the World Bank.⁶ To ensure reliability, only data of UN Member States are included in these charts. For Serbia, the data between 1960 and 1989 was derived from the United Nations' World Population Prospects: The 2017 Revision.⁷ The data for the various nations of the United Kingdom was taken from the UK Office for National Statistics.⁸ Data for the Australian territories is taken from the Australian Bureau of Statistics.⁹

These charts trace the historical trends in the decriminalisation of consensual same-sex sexual acts among UN Member States. For convenience, it traces the trends of the 193 UN Member States even though some of these Member States may not have gained UN membership prior to 1969.

Findings

The three charts below reveal the dramatic decline in both the number of UN Member States that criminalise consensual same-sex sexual acts and the global population living under such laws.

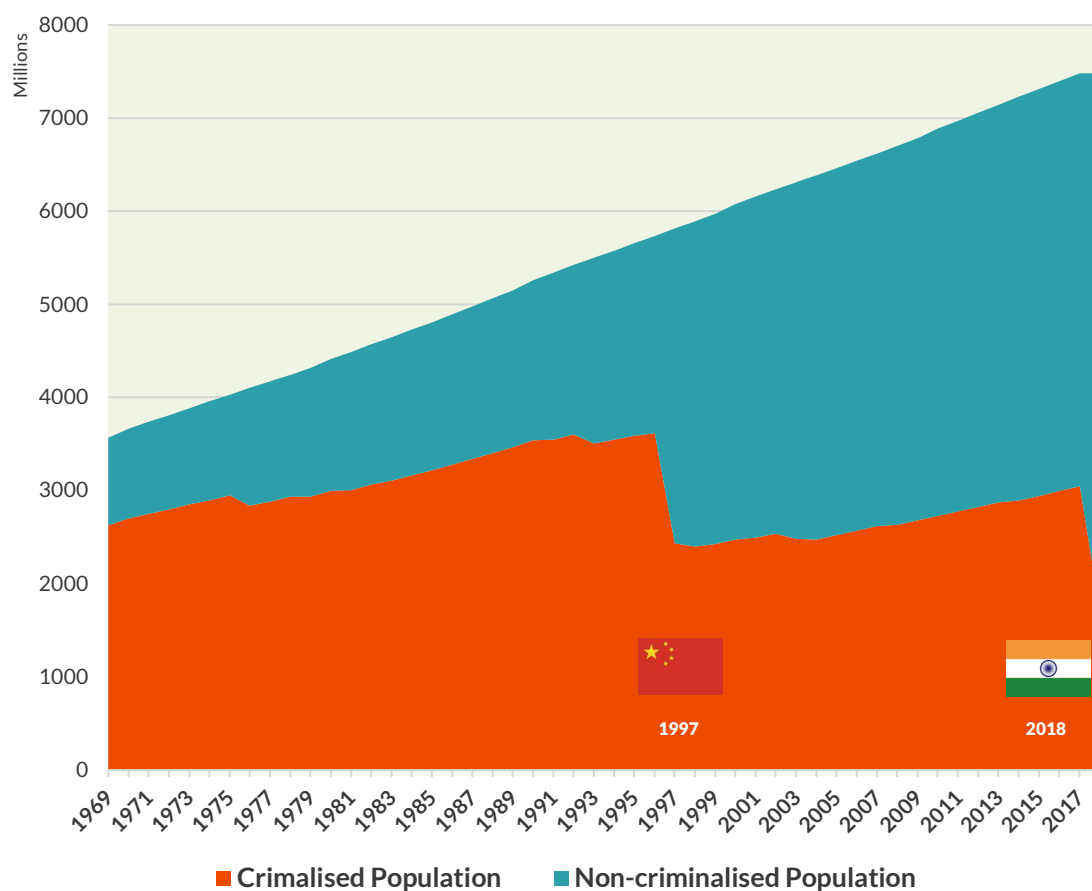


Chart 1 shows the increase in the global population from around 3.5 billion in 1969 to around 7.5 billion in 2018. It shows clearly that the proportion of the global population living in criminalising UN Member States has consistently fallen over the years in comparison. The two sharp drops in 1997 and 2018 are attributed to the decriminalisation by China and India respectively.

⁶ "Population, total", World Bank (website) accessed 15 March 2019. For convenience, 2018 data is extrapolated from 2017 data by assuming zero growth rate for all UN Member States.

⁷ "World Population Prospects 2017", United Nations Population Division (website) accessed 15 March 2019.

⁸ "Estimates of the population for the UK, England and Wales, Scotland and Northern Ireland", Office for National Statistics (website) accessed 15 March 2019.

⁹ "3101.0 – Australian Demographic Statistics, Jun 2018", Australian Bureau of Statistics (website) accessed 15 March 2019.

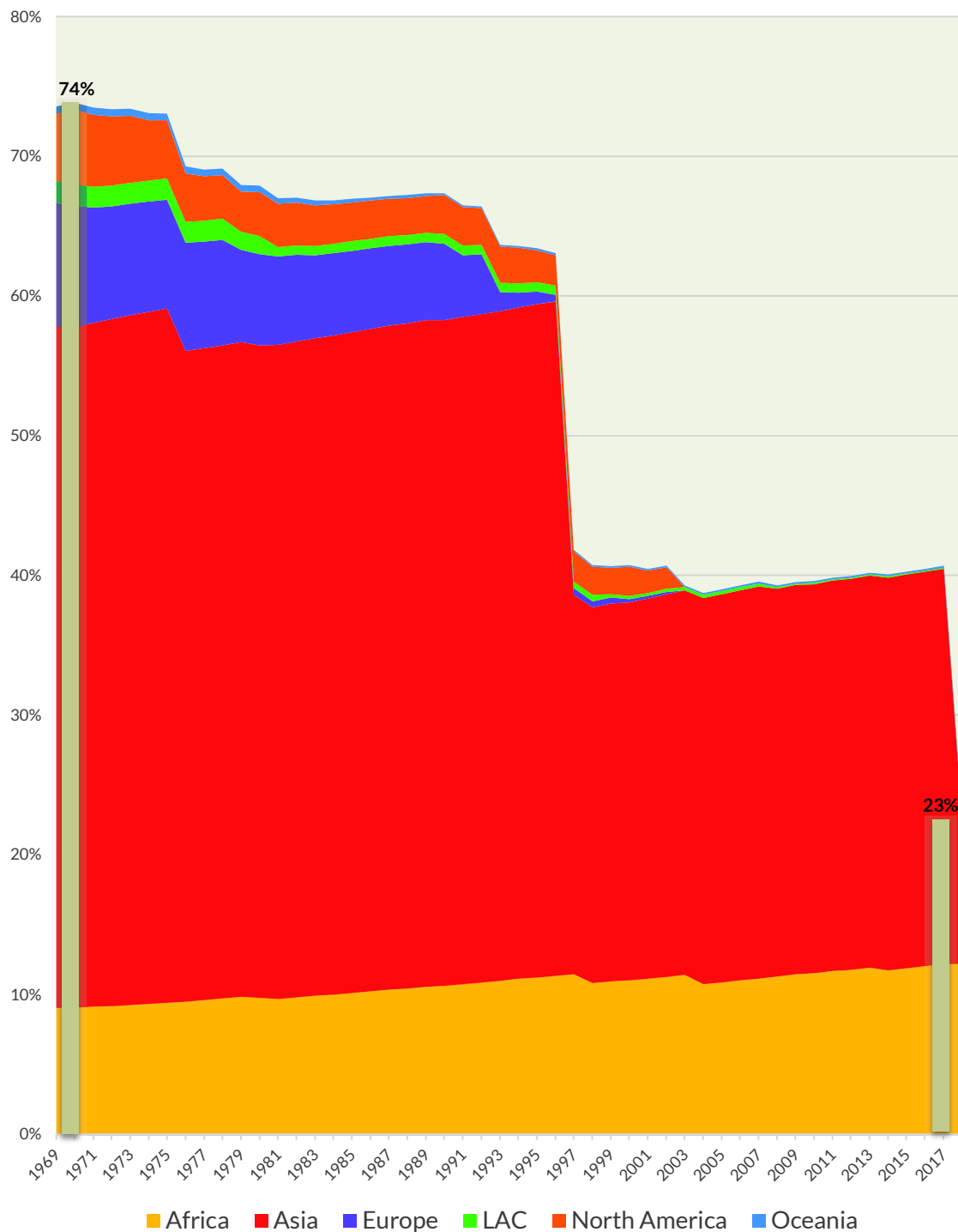


Chart 2. Proportion of global population governed by laws criminalising consensual same-sex sexual acts. This chart shows the population living in criminalising countries fell from around 74% in 1969 to around 23% in 2018, a 64% decrease in five decades. The proportion fell below 50% for the first time in 1997 after China decriminalised. Throughout the period, most of this population lived in Asia and Africa, with the majority in Asia. However, after India's decriminalisation in 2018, the proportion of this population is almost equally spread between the two continents as of 2018 with 12.2% living in Africa and 10.4% living in Asia.

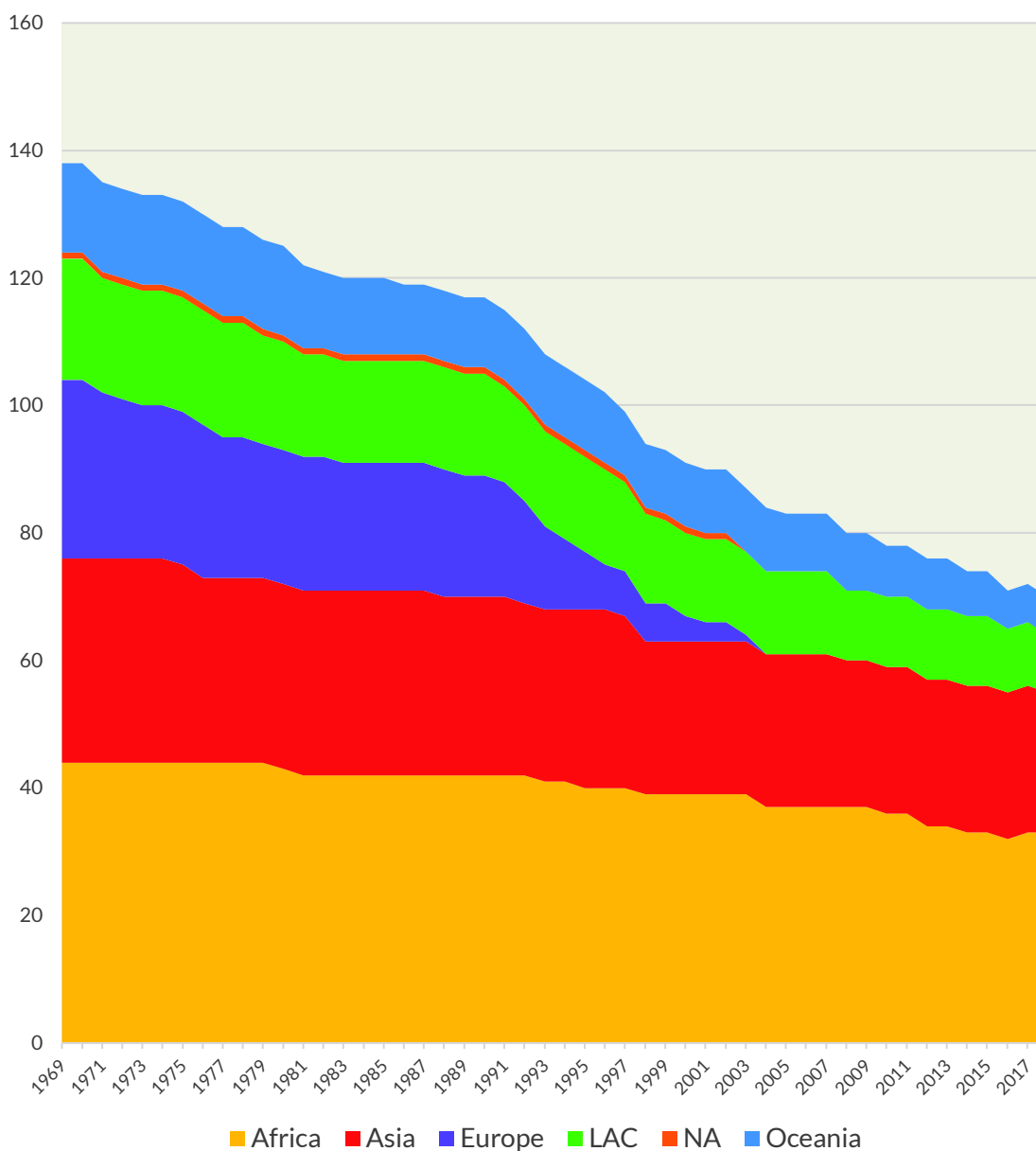
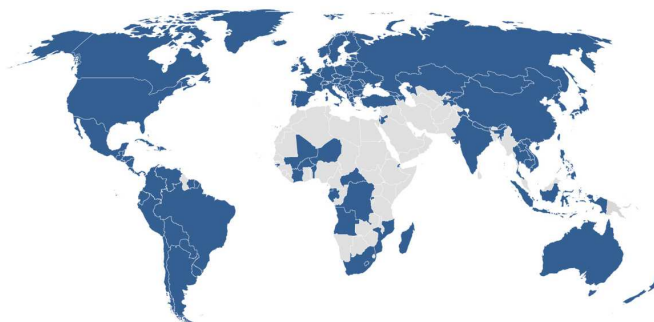
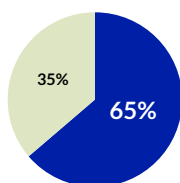


Chart 3. Number of Criminalising UN Member States. In 1969, 138 UN Member States were criminalising States. In 2018, the number almost halved with 70 remaining States. An average of 1.4 Member States decriminalised every year, with the highest being 5 in 1998. Most criminalising States were in Africa (44) and Asia (32) in 1969 and continue to be. By 2003 and 2004 respectively, both North Americas and Europe have completely repealed such laws. The percentage of criminalising States in Africa and Asia fell by 25% and 31% respectively between 1969 and 2018 to 33 and 22 respectively. The number of criminalising States in Latin America and the Caribbean and Oceania more than halved during that period, reducing from 19 to 9 (53%) for the former and from 14 to 6 for the latter (57%)

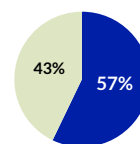
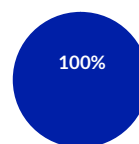
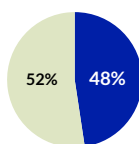
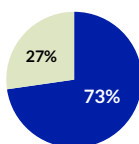
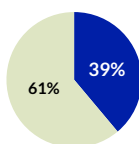
Consensual Same-Sex Sexual Acts: LEGAL

Highlights

123 UN Member States
65% UN Member States



AFRICA	LAC	NORTH AMERICA	ASIA	EUROPE	OCEANIA
21 / 54	24 / 33	2 / 2	20 / 42	48 / 48	8 / 14



Introduction

This section presents annotated entries on the **123 UN Member States** where consensual same-sex sexual acts are not criminalised. Information on several non-UN Member jurisdictions is also included.

Some of these States never contained a criminalising provision in their Penal Codes, while others consciously removed the relevant law, initiated within parliaments or by the imperatives set by courts of law.

NOTE Legality of same-sex sexual acts cannot be read as evidence of a safer living environment for people with diverse sexual orientations or gender identities or expressions. In many of the States listed below, social stigmatisation of people who are perceived as non-heterosexual or non-cisgender remains alarmingly high. In fact, in many of them, early decriminalisation dates can be explained by historical reasons completely unrelated to activism or lower hostility towards non-heterosexual forms of sexuality.

What does International Human Rights Law say?

Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person's actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

Yogyakarta Principle 33.

States shall repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent.

Yogyakarta Principles 2(b) and 6(b).

Africa (21)

1	 Angola	2019	In January 2019, Angola enacted a new Penal Code that does not criminalise same-sex sexual acts. Angola started the revision of its criminal law in 2004 through a presidential order that created the Commission for the Reform of Justice and Law. This commission mandated, among other things, the drafting of a new Penal Code for the country. ¹
2	 Benin	1877	The Penal Code of Benin does not criminalise consensual same-sex sexual acts between adults. A number of amendments trying to criminalise have failed to pass into law. Since 1947, article 331 of the Penal Code sets the age of consent for different-sex sexual activity at 13 but at 21 for same-sex consensual activity.
3	 Burkina Faso	1960	Prior to and since independence from France in 1960, Burkina Faso has no law outlawing consensual same-sex sexual acts for men or women in its Penal Code .
4	 Cape Verde	2004	The Penal Code does not criminalise consensual same-sex sexual acts between adults. However, before it came into force, Article 71 of the now-obsolete 1886 penal code provided for “security measures” for people who habitually practice “vice against the nature”.
5	 Central African Republic	1961	Since independence from France, the Penal Code of the CAR has not outlawed consensual same-sex sexual acts between adults in private. However, article 85 criminalises “acts <i>against nature</i> committed in public”, defining them as “attacks on public morals” and imposing harsher penalties compared to other attacks on morals. Local CSOs indicate that these provisions have been used to blackmail and arbitrarily arrest LGBT people. ²
6	 Congo	1940	In the Republic of Congo Brazzaville, the text of the Penal Code (as amended in 2006), only prohibits same-sex sexual behaviour with a person younger than 21 years, while the age of consent for different-sex is 18.
7	 Côte d'Ivoire	1960	Post-independence from France's rule in 1960, Côte d'Ivoire did not criminalise consensual same-sex sexual acts between adults in its Penal Code, yet the age of consent differs under sections 356 and 358: 15 for different-sex, and 18 for same-sex. Despite the fact that no law exists which criminalises consensual same-sex sexual relations among adults, at the end of 2016 a judge in the city of Sassandra used article 360 of the Penal Code to condemn 2 men to 18 months imprisonment. ³ They were caught in the act by the uncle of one of the men and, after having been reported to the authorities, they admitted before the judge that they were in a loving relationship. ⁴

¹ Presidential Order No. 124/12, 27 November 2004.

² Alternatives Centrafrique, *Rapport sur la situation des minorités sexuelles et de genre en Centrafrique* (2018).

³ Penal Code (Ivory Coast), article 360: “Whoever commits acts which constitute an affront to public modesty will be sentenced to imprisonment of between three months and two years, and with a fine of between 50,000 and 500,000 francs. If the affront to public modesty is considered an indecent act or against nature with a person of the same sex, the sentence will be imprisonment of between six months and two years, and a fine of 50,000 to 300,000 francs”.

⁴ See the following: “Justice : première condamnation pour pratique homosexuelle en Côte d'Ivoire”, *Abidjan Net*, 14 November 2016; “Pour la première fois, la Côte d'Ivoire condamne deux hommes pour homosexualité”, 18 November 2016; “Côte d'Ivoire : des homosexuels condamnés à 18 mois de prison”, *Afrique sur 7*, 16 November 2016; “Ivory Coast officials refuse to explain why two gay men were jailed”, *The Guardian*, 26 January 2017.

8		Democratic Republic of the Congo	1940	There are no provisions outlawing consensual same-sex sexual acts between adults in the 2004 Penal Code of the DRC. However, Article 176 of that code—which criminalises activities against public decency—has been used as the legal basis to criminalise LGBT persons.⁵ The Human Rights Committee expressed concern about this and recommended that the State ensure that no person is prosecuted under Article 176 of the Penal Code because of their sexual orientation or gender identity, as well as enact anti-discrimination legislation that expressly includes sexual orientation and gender identity.⁶
9		Djibouti	1995	The Penal Code contains no provisions prohibiting consensual same-sex sexual acts between adults.
10		Equatorial Guinea	1963	The Penal Code in force in Equatorial Guinea is a 1963 revision of the Spanish Criminal Code that dates back to the Francoist era. This Code does not contain specific provisions on same-sex sexual acts between adults.
11		Gabon	1960	Prior to and following its independence from France in 1960, the Penal Code does not criminalise consensual same-sex sexual acts between adults, yet the age of consent for different-sex sexual acts is 15, and for same-sex it is 21. However, as alluded to by the Committee on Economic, Social and Cultural Rights in 2013,⁷ Gabon remains a highly discriminatory environment for LGBT people, which may be why LGBT reporting of incidences is so low.⁸ In August 2016, the UN reiterated the need for non-discrimination legislation inclusive of SOGI.⁹
12		Guinea Bissau	1993	The Penal Code which remained in force after the independence from Portugal was repealed in 1993 with the enactment of a new Penal Code which contains no provisions criminalising consensual same-sex sexual acts between adults.
13		Lesotho	2012	In Article 52 of the Penal Code Act (into force in 2012), sodomy is not mentioned. This article erases the punitive enumeration of [male] sodomy indicated in Section 185(5) of the 1939 Criminal Procedure and Evidence Act.
14		Madagascar	1960	Prior to and following its independence from France in 1960, the Criminal Code does not prohibit consensual same-sex sexual acts between adults. However, since 1999, article 331 sets the age of consent at 14 for different-sex sexual acts and 21 for same-sex.
15		Mali	1961	Neither the 2001 Penal Code (nor its predecessor, the 1961 Penal Code) stipulates provisions targeting consensual same-sex sexual relations between adults.

⁵ **Penal Code** of the DRC, article 176: “A person who engages in activities against public decency will be liable to a term of imprisonment of eight days to three years and/or fined twenty-five to one thousand zaires”.

⁶ Human Rights Committee, *Concluding observations on the fourth periodic report of the Democratic Republic of the Congo*, CCPR/C/COD/CO/4, 30 November 2017, para. 14.

⁷ UN Committee on Economic, Social and Cultural Rights, *Concluding observations on the initial report of Gabon*, E/C.12/GAB/CO/1, 27 December 2013, para. 12.

⁸ US Department of State, *Gabon 2015 Human Rights Report* (2016), p. 19.

⁹ Committee on the Rights of the Child, *Concluding observations on the second periodic report of Gabon*, CRC/C/GAB/CO/2, 8 July 2016, para. 23.

16		Mozambique	2014	In July 2014, the Parliament approved Law 35/2014 repealing earlier criminalising provisions (articles 70 and 71 of the 1886 Penal Code had imposed penalties on people who “habitually practiced vices against nature”). This revised Penal Code came into force in June 2015.
17		Niger	1961	The Penal Code (with amendments up to 2003) does not specify provisions against consensual same-sex sexual relations, yet Sections 278 and 282 specify that the age of consent differs: 21 for same-sex sexual acts, and 13 for different-sex.
18		Rwanda	1980	The Rwanda Penal Code (1980) does not contain consensual same-sex acts criminalising provisions, yet articles 358 and 362 set the age of consent as unequal: 16 for different-sex and 18 for same-sex sexual activity. The legal and social situation of LGBT people in Rwanda is captured in a 2016 report, which points to severe stigmatisation. ¹⁰
19		São Tomé & Príncipe	2012	Sao Tomé and Príncipe’s Penal Code , adopted in 2012, contains no provision for criminalisation of consensual same-sex sexual activity between adults. This 2012 text drops former references to “acts against nature” that were contained in the earlier colonial-era Penal Code.
20		Seychelles	2016	In July 2016, Seychelles amended Sections 151(a and c) to the 1955 Penal Code came into force, thereby decriminalising “(a) ...carnal knowledge of any person against the order of nature” that is consensual and amongst adult persons.
21		South Africa	1998	Following a case decided by the Constitutional Court of South Africa, ¹¹ the State abrogated laws carried through from the 1955 Penal Code in which Article 600(1) and 601 criminalised consensual same-sex sexual conduct between adults, including the common-law crime of sodomy.

Latin America and the Caribbean (24)

1		Argentina	1887	Law No. 1,920 enacted Argentina’s first federal Penal Code, which entered into force in 1887 and made no reference to consensual sexual acts between adults. However, until very recently local regulations issued by provincial, municipal and local authorities targeted “homosexuality” and/or regulated morality, vice and mores. ¹² LGBT people were heavily persecuted under these regulations.
2		Bahamas	1991	Same-sex sexual acts in private were decriminalised by amendment to the Sexual Offences Act (1989) , and came into force in 1991. Under Section 16(1)(2) of the Sexual Offences and Domestic Violence Act (1991) the age of consent differs for same-sex (18) and different-sex (16) sexual acts.

¹⁰ Irwin Iradukunda and Roselyn Odoyo, *Agaciro: A landscape analysis of the human rights of sex workers and LGBT communities in Rwanda* (2016).

¹¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15.

¹² Federación Argentina LGBT, *Informe sobre códigos contravencionales y de faltas de las provincias de la República Argentina y la Ciudad Autónoma de Buenos Aires en relación con la discriminación y la represión a gays, lesbianas, bisexuales y trans* (2008).

3		Belize	2016	The country's colonial-era sodomy law was declared unconstitutional by the Belize Supreme Court. ¹³ The Court revised the language of Section 53 of the Criminal Code and ordered the insertion of a clause to exclude consensual sexual acts between adults in private. Interestingly, the court dismissed the National Evangelical Association of Belize (NEAB) to join the litigation, although the Catholic church appealed the decision. ¹⁴
4		Bolivia	1832	The first Criminal Code of Bolivia (1831) entered into force in 1832. This Code largely followed the Spanish Criminal Code of 1822 that contained no provision on sodomy. There are no criminalising provisions for same-sex sexual acts between consenting adults in private in the current (2010) Penal Code .
5		Brazil	1831	The first Criminal Code of Brazil contained no provision on sodomy. However, it has been indicated that other provisions of that Code were used to persecute persons who engaged in same-sex sexual acts. ¹⁵ In 2015 the Supreme Court of Brazil declared that the expressions "pederasty or not" and "homosexual or not" under article 235 of the 1969 Military Penal Code are not constitutional. ¹⁶ These provisions had been used to restrict same-sex activity. ¹⁷
6		Chile	1999	Article 10 of Law No. 19,617 amended Article 365 of the Penal Code by decriminalising consensual same-sex sexual acts between consenting adults. However, that same provision sets the age limit at 18 for "same-sex carnal access", and 14 for other sexual acts. Local organisations denounce that Article 373, which criminalises "acts against decency and good mores" is used as a tool to criminalise LGBT people. In its 2 nd cycle of the UPR, the Government of Chile committed to repealing this article in a forthcoming Penal Code revision. ¹⁸
7		Colombia	1981	Decriminalisation of "homosexual carnal knowledge" occurred through repeal of Article 323(2) in the 1980 Penal Code (effective January 1981). In 1999, the Constitutional Court Decision C-507/1999 repealed (or reinterpreted) certain provisions of Executive Order No. 85/1989 which established that "being homosexual" or "committing acts of homosexuality" were affronts against Military Honour.

¹³ *Caleb Orozco v AG of Belize* Supreme Court Claim No. 668 of 2010. For more information on the decision, see: "UNIBAM: And Justice For All", 7 News Belize, 10 August 2016; Ion Cacho, "Orozco vs AG 2016", YouTube (website), 11 August 2016; "About Orozco v AG", URAP Project (website), accessed 5 March 2019; IACHR Hails Unconstitutionality Decision on Criminalization of Consensual Sexual Relations between Same Sex Adults in Belize", OAS (website), 22 August 2016.

¹⁴ "Evangelical Application for Appeal Dismiss, They Must Pay Caleb's Costs", 7 News Belize, 4 October 2016.

¹⁵ James N Green, "Gay Rio", *Brazzil* (website), March 2000.

¹⁶ Supremo Tribunal Federal, *Arguição de descumprimento de preceito fundamental 291*, 28 October 2015.

¹⁷ Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the America* (2015), OAS/Ser.L/V/II.rev.1 Doc. 36, fn. 129.

¹⁸ Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review on Chile*, A/HRC/WG.6/18/L.3, 30 January 2014.

8		Costa Rica	1971	The 1941 Penal Code criminalized sodomy under article 233. With the enactment of the 1971 Penal Code consensual same-sex acts in private were decriminalised. However, “scandalous sodomy” remained a misdemeanour under article 378(15), until it was repealed by article 2 of Law No. 8,250 in 2002. In 2013, the last provisions which provided for security measures in cases of “homosexuality” were repealed by Resolution N° 010404 issued by the Constitutional Chamber. In 2008, the Committee against Torture noted that local provisions in Costa Rica on “public morals” granted the police and judges discretionary power to discriminate on the basis of sexual orientation.¹⁹
9		Cuba	1979	The Social Defence Code, which deemed “homosexual practices” as a “social threat” and imposed preventive measures to combat it, was repealed in 1979 by the New Criminal Code of Cuba. This Code did not criminalise homosexuality <i>per se</i>. However, Article 359(1) criminalised those who made “public display of their homosexual condition” (repealed by Article 303(1) of Law No. 62 of 1987) or bothered or solicited others with “homosexual requests” (amended by Executive Order-Law No. 175 in 1997 to refer only to “sexual” requests).
10		Dominican Republic	1822	The first Criminal Code in force in the Dominican Republic, imposed after the Haitian invasion in 1822, did not criminalise consensual same-sex sexual acts between adults in private. The new 2007 Criminal Code does not innovate in this regard. However, Article 210 of the 1966 Police Justice Code still outlaws sodomy (defined as a “sexual act between persons of the same-sex”) among members of police forces.
11		Ecuador	1997	Article 516(1) of the Penal Code imposed a penalty of 4-8 years in prison for “acts of homosexuality” which did not fall under the crime of rape. This provision was repealed by the 1997 Constitutional Court decision in Case No. 111-97-TC. In 2014, the new Organic Integral Penal Code entered into force. In 2016, the Inter-American Court of Human Rights issued its decision in the <i>Homero Flor Freire</i> case regarding the powers of dismissal encoded in the 1997 Rules of Military Discipline for consensual same-sex sexual acts between adults.²⁰
12		El Salvador	1822	The first Penal Code of El Salvador was enacted in 1826 following the Spanish Criminal Code of 1822 that contained no provisions on consensual same-sex sexual acts between adults. In 2003, the Human Right Committee noted that local provisions (“ordenanzas contravencionales”) were being used to discriminate against people on account of their sexual orientation.²¹

¹⁹ Committee against Torture, [Conclusions and recommendations of the Committee against Torture for Costa Rica](#), CAT/C/CRI/CO/2, 7 July 2008.

²⁰ I/A Court H.R., [Case of Flor Freire v. Ecuador](#). Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315.

²¹ Human Rights Committee, [Concluding observations of the Human Rights Committee for El Salvador](#), CCPR/CO/78/SLV, 22 August 2003.

13		Guatemala	1871	According to Guatemalan historian Manuel Fernandez, consensual same-sex sexual acts were decriminalized as a result of the 1871 Revolution “on the constitutional grounds that private sexual acts between consenting adults were not the concern of the state”. ²² The new Penal Code (updated version) entered into force in 1877.
14		Haiti	1804	When Haiti became independent from France in 1804, no law criminalising consensual same-sex sexual acts was introduced, and no such law has come into the Penal Code since. France repealed its sodomy laws in 1791 (see entry below).
15		Honduras	1899	Consensual same-sex sexual acts between adults have been legal since the entry into force of the 1899 Penal Code of Honduras.
16		Mexico	1872	The first federal Penal Code of Mexico was approved in 1871 and entered into force in 1872. ²³ This Code made no reference to consensual same-sex acts between adults.
17		Nicaragua	2008	In 2007, the New Penal Code repealed the 1974 Penal Code that had criminalised “sodomy” under article 204.
18		Panama	2008	Presidential Executive Order No. 332 of 31 July 2008 repealed section 12 of Executive Order No. 149 of 20 May 1949, which criminalised “sodomy”. The Executive Order states that “sodomy was the term by which homosexuality was referred to prior to 1973”.
19		Paraguay	1880	The first Penal Code of Paraguay of 1880 was adapted from the Penal Code of the Province of Buenos Aires (Argentina), in force there since 1877). This code made no reference to consensual same-sex acts between adults. However, Article 138 of the Penal Code currently in force specifies that the age of consent for “homosexual acts” is 16, while it is set at 14 for different-sex sexual acts.
20		Peru	1924	Article 272 of the 1863 Penal Code criminalized sodomy. Since the inception in the 1924 Penal Code, consensual same-sex sexual acts have been legal. However, civil society indicates that Article 183 of the Penal Code on “obscene exhibitions and publications”, provides the legal basis for State discrimination regarding issues such as public display of affection. ²⁴
21		Suriname	1975	When Suriname became fully independent from the Netherlands in 1975, no sodomy law was in force and no such law has been reintroduced since then. Sodomy was repealed in the Netherlands in 1811. However, Section 302 of the Criminal Code stipulates that the age of consent for same-sex acts is 18 (limit established at “minority age”), while it is 16 for different-sex sexual relations.

²² Manuel Fernandez, “[Guatemala](#)”, *GLBTQ Encyclopedia* (website), 2004.

²³ Kathryn A Sloan, “The Penal Code of 1871: From Religious to Civil Control of Everyday Life.” In *A Companion to Mexican History and Culture*, edited by William H Beezley, 302 – 315. Blackwell Publishing: 2011.

²⁴ Manuel Forno, Liurka Otsuka and Alberto Hidalgo, *Annual Report on Human Rights of LGBT People in Peru 2015-2016* (Peruvian Network TLGB and Promsex, 2016), p 31.

22		Trinidad & Tobago	2018	The 2018 High Court of Trinidad and Tobago ruling in <i>Jason Jones v AG of Trinidad and Tobago</i> ²⁵ established that buggery and serious indecency laws were unconstitutional in Trinidad and Tobago. This decision follows the line of <i>Caleb Orozco v The AG of Belize</i> .
23		Uruguay	1934	The 1934 amendment of the Penal Code repealed the crime of 'sodomy' in Uruguay. It bears mentioning that this provision was placed under the section on 'rape': this, together with other indicia in local case law , suggests that the crime of 'sodomy' repealed in 1934 referred to non-consensual same-sex acts. ²⁶
24		Venezuela	1836	Since 1836, when Venezuela produced its first Penal Code , consensual same-sex sexual activity has not been criminalised. As reported by the IACHR, in 1997, the Supreme Court of Venezuela declared the unconstitutionality of the Law on Vagrants and Crooks , which had been used to prosecute LGBT persons. ²⁷

North America (2)

1		Canada	1969	The enactment of the Criminal Law Amendment Act (Bill C-150) in 1969 introduced an exception that decriminalized "buggery" between spouses or two persons over 21 years of age who had consented to the commission of the act. In 1988, Section 159(2)(b) of the Criminal Code replaced that buggery law altogether, but retained a different age of consent: 18 for "acts of anal intercourse" and 16 for non-anal sex. This provision has been impugned by five provincial courts. In 2016, the Toronto police Chief apologized for the 1981 gay bathhouse raids.²⁸ In early 2017, the Canadian government announced that it intended to review many historical gay conviction cases.²⁹
2		United States of America	1962 2003	Under the USA federal system, all 50 states enact their own Criminal Codes.³⁰ "Sodomy" was criminalized throughout the USA until 1962, when Illinois became the first state to decriminalise consensual same-sex sexual acts between adults. In 2003 all remaining sodomy statutes —still in force in 14 States— were invalidated by the Supreme Court verdict in <i>Lawrence v. Texas</i> (2003). Age of consent laws also vary across the USA.³¹ Three states still keep laws establishing unequal laws of consent: Alabama, Kansas and Texas.

²⁵ Supreme Court of Trinidad and Tobago, *Jason Jones vs Attorney General of Trinidad & Tobago and others*, H.C.720/2017. CV.2017-00720, 4 April 2018.

²⁶ José Pedro Barrán, "Vision Social de la homosexualidad", *Relationships*, accessed 5 March 2019.

²⁷ Inter-American Commission on Human Rights, *Violence against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the America* (2015), OAS/Ser.L/V/II.rev.1 Doc. 36, fn 239.

²⁸ Will Campbell, "Toronto Police Chief Mark Saunders apologizes for 1981 bathhouse raids", *Global News*, 22 June 2016.

²⁹ John Ibbitson, "Trudeau to urge pardon for man deemed a dangerous sex offender for being gay in 1960s", *The Globe and Mail*, 27 February 2016.

³⁰ George Painter, "The Sensibilities of Our Forefathers: The History of Sodomy Laws in the United States", *GLAPN*, 2 February 2005.

³¹ Hannah Cartwright, *Legal Age of Consent for Marriage and Sex for the 50 United States* (Global Justice Initiative, 2011).

Asia (20) + Taiwan (China) + Palestine (West Bank only)

1	 Bahrain	1976	Repealing the colonial British code that had pervaded the Persian Gulf, Bahrain's current Penal Code was enacted in 1976. This code decriminalised consensual same-sex sexual acts between adults. However, it set the age of consent at 20 for different-sex and at 21 for same-sex sexual acts.
2	 Cambodia	1953	Following royal request, in 1867 Cambodia became a French Protectorate, thereby coming under French law, which had decriminalised same-sex sexual acts between consenting adults in 1791. Following 1946, and Independence in 1953, no criminalising provisions were added to the Penal Code in this regard.
3	 China	1997	China's current Penal Code (1997) contains no explicit prohibition of consensual sexual acts between persons of the same-sex. Explicit prohibitions of "consenting jijian" (sodomy) were abolished in China around 1912 (end of Qing Dynasty). However, a 'hooliganism' provision in the 1979 Penal Code was used to target male same-sex activity until the code was repealed in 1997. ³² Same-sex sexual acts were decriminalised in the territories of Hong Kong in 1991 and Macau in 1996 respectively.
4	 East Timor	1975	On Independence from Portuguese rule in 1975, the new Penal Code (2009 revision) made no mention of a prohibition on same-sex sexual acts between consenting adults in private.
5	 India	2018	On 6 September 2018, the Supreme Court of India declared that Section 377 of the Penal Code is unconstitutional. ► For more information on the Supreme Court decision, see: " Decriminalising the Right to Love: Navtej Singh Johar v. Union of India " by Arvind Narrain in the Global Perspectives section of this report.
6	 Indonesia	1976	Most parts. Having achieved independence from Dutch governance in 1945, the Indonesian Penal Code has no provisions outlawing same-sex sexual relations. The 2002 Law on Child Protection sets an unequal age of consent for same-sex (18) and different-sex (16) acts. ► Several jurisdictions in Indonesia criminalise consensual same-sex sexual acts between adults. See: entry for Indonesia in the "Criminalisation" chapter of this report.
7	 Israel	1988	Although the 1977 Penal Law contained a sodomy provision, at Section 347, the parliament repealed that provision in 1988.
8	 Japan	1882	According to some scholarship, consensual same-sex sexual activity was never criminalised in modern Japan (except a very short period 1873-1881). ³³

³² UNDP and USAID, *Being LGBT in Asia: China Country Report* (2014), p.23.

³³ Yuki Arai, "Is Japan Ready to Legalize Same-Sex Marriage?" (2014) Cornell Law School LL.M. Student Research Papers. Paper 4, 127.

9	 Jordan	1960	Jordan is one the few Middle Eastern countries where consensual same-sex sexual acts are not criminalised. See: Penal Code of 1960. However, levels of stigma and discrimination directed at LGBT people is significant. ³⁴
10	 Kazakhstan	1998	With recent autonomy from the USSR, Kazakhstan's Criminal Code of 1997 (in force 1998) removed earlier provisions that penalised consensual same-sex sexual acts.
11	 Kyrgyzstan	1998	With recent autonomy from the USSR, Kyrgyzstan's Criminal Code of 1997 (in force 1998) removed earlier provisions that penalised consensual same-sex sexual acts.
12	 Laos	1954	Following independence from France in 1954 (with subsequent non-criminalisation), the 1989 Penal Code made no provisions to criminalise consensual same-sex sexual acts.
13	 Mongolia	1961	In 1961, under the Mongolian People's Revolutionary Party, consensual same-sex sexual acts were decriminalised. This position remained through the 2002 Criminal Code .
14	 Nepal	2007	Article 1 of Chapter 16 of Part 4 of the Muluki Ain (National Code) enacted in 1963 criminalises “unnatural sexual intercourse”, a term which was undefined and open to different interpretations. ³⁵ The uncertainty however was clarified in <i>Sunil Babu Pant and Others v Nepal Government and Others</i> , where the Nepal Supreme Court ruled that same-sex sexual intercourse was not to be construed as “unnatural”. ³⁶ Though the new Criminal Codes Act which replaced the <i>Muluki Ain</i> appears to continue to criminalise “unnatural sex”, ³⁷ it should be read in light of this case.
15	 North Korea	1950	There appears to be no laws penalising consensual same-sex sexual activities between adults in the Criminal Code of 1950, which was updated in 2009.
	Palestine (West Bank)	1960	The West Bank (Palestine) aligns with the Jordanian Penal Code of 1960, where consensual same-sex sexual acts between adults are not penalised under the law. ³⁸
16	 Philippines	1932	The 1932 Revised Penal Code (RPC) does not criminalise consensual same-sex activities between adults. In line with the adoption of the Napoleonic Code, when the Philippines came under Spanish control in 1822, “sodomy” provisions were first repealed.

³⁴ Jacob Wirschafter, “In much of the Middle East, it's getting more dangerous to be gay”, *PRI*, 30 August 2016.

³⁵ Kyle Knight, *Bridges to Justice: Case Study of LGBTI Rights in Nepal* (Astraea Lesbian Foundation for Justice, 2015), p. 19.

³⁶ Kyle Knight, *Bridges to Justice: Case Study of LGBTI Rights in Nepal* (Astraea Lesbian Foundation for Justice, 2015), p. 23.

³⁷ UNDP and USAID, *Being LGBT in Asia: Nepal Country Report* (2014), p. 29; ICJ, *Serious Crimes in Nepal's Criminal Code Bill, 2014: A Briefing Paper* (2017), p. 20.

³⁸ Mohammed Daraghme, “Book with gay character confiscated in Palestine, writer might be arrested”, *LGBTQ Nation*, 11 February 2017.

17	 South Korea	1962	The 1962 Criminal Act (updated 2009) of South Korea contains no provisions criminalising consensual same-sex sexual acts between adults. Article 305 (amended 1995) indicates 13 as the age of consent (information verified by practitioners in South Korea, as there are English versions of the Criminal Act that state 15 as the age of consent). The fact that such equal age protection is not afforded to the crime of rape is highlighted in Rainbow Action against Sexual Minority Discrimination's Shadow Report to CAT in March 2017. ³⁹
	Taiwan (China)	1954	The Criminal Code of 1954 contains no provisions prohibiting consensual same-sex sexual activity between adults.
18	 Tajikistan	1998	There are no restrictions on adult, consensual same-sex sexual acts between adults in the 1998 Criminal Code of Tajikistan (amended to 2010).
19	 Thailand	1957	The Thai Penal Code of 1956 came into force in 1957 and has no criminalising provision on consensual same-sex sexual acts between adults.
20	 Vietnam	1945	Following independence from France in 1945 (with subsequent non-criminalisation), the 1999 Penal Code made no provisions to criminalise consensual same-sex sexual acts between adults.

Europe (48) + Kosovo

1	 Albania	1995	Prior to its repeal by Article 116 of the Criminal Code , the previous Article 137 penalised "homosexuality" amongst men with up to 10 years imprisonment.
2	 Andorra	1791	As a co-principality with France, Andorra was subject to the same Penal Code provisions that decriminalised "sodomy" in 1791.
3	 Armenia	2003	Armenia's former Soviet Union provision that punished consensual sex between adult men with five years imprisonment (under Article 116), was repealed in the 2003 Criminal Code .
4	 Austria	1971	The previous Penal Code of 1852 penalised (with five years imprisonment) "sodomy" between men, and unusually in Europe, amongst women. The 1971 Criminal Code lifted all such sanctions.
5	 Azerbaijan	2000	Prior to 1988, aligned to the Soviet Union provisions, Article 113 criminalised "anal intercourse between men". This was repealed by a new Criminal Code that came into force in 2000.
6	 Belarus	1994	'Homosexual acts' were criminalised with up to five years imprisonment under Article 119(1) in line with the Soviet Union code, and was repealed under the Belarus 1994 Criminal Code .

³⁹ Rainbow Action Against Sexual Minority Discrimination, *Human Rights Violations on the Basis of Sexual Orientation, Gender Identity, and HIV Status in the Republic of Korea* (2017).

7	 Belgium	1830	Neither the Napoleonic Code of 1810 (which Belgium operated under until independence in 1830) nor the Belgian Penal Code of 1867 conferred penal sanctions for consensual same-sex sexual activity between adults.
8	 Bosnia & Herzegovina	1998 2001	The three parts of Bosnia and Herzegovina decriminalised 'homosexuality' separately: Federation of Bosnia and Herzegovina (1998), Republika Srpska (2000), Brcko District (2001).
9	 Bulgaria	1968	The Criminal Code of 1968 repealed the sodomy provisions contained in Bulgaria's first Penal Code of 1896.
10	 Croatia	1977	The provisions of 1951 Yugoslavia Criminal Code regarding consensual same-sex relations were rescinded in the Croatian Penal Code of 1977, and the age of consent was equalised in 1998.
11	 Cyprus	1998	Under Section 171 of the 1959 Criminal Code , male/male sexual 'unnatural acts' could be punishable with five year's imprisonment. This clause was removed in the 1998 following the Modinas v Cyprus case. Northern Cyprus decriminalised in 2014, the last part of Europe to do so. ⁴⁰
12	 Czechia	1961	The current Criminal Code came into force in 1962, which removed sodomy provisions from previous ruling codes (that of Austria ruled Bohemia and Moravia, and Slovakia used the Hungarian penal code).
13	 Denmark	1933	Replacing a Criminal Code and a series of laws that criminalised sodomy, the 1933 Penal Code removed provisions on consensual adult same-sex sexual relations.
14	 Estonia	1992	On dissolution from the Soviet Union in 1991, Estonia created its own Penal Code that removed criminalising sanctions on same-sex sexual intimacy.
15	 Finland	1971	The 1889 Criminal Code was revised in 1971 to remove Chapter 20 'Unlawful sexual intercourse and other lewdness'.
16	 France	1791	The newly-formed constitutional monarchy of France adopted a Penal Code that removed sodomy provisions, thus becoming the world's first country to decriminalise same-sex sexual acts between consenting adults. Pursuant to Article 73 of the French Constitution , the law applies to the Overseas Departments of Martinique, Guadeloupe, Saint Barthélemy, French Guyana, Mayotte , and Réunion, and to the islands of Saint Pierre and Miquelon.
17	 Georgia	2000	The Criminal Code of Georgia removed the pre-existing sodomy provisions that were carried through from the Soviet Union period.
18	 Germany	1968 1969	Although East Germany and West Germany stopped applying its Criminal Code provisions (Paragraph 175 – "lewd and lascivious acts") among consenting adults in 1968 and 1969 respectively, the black letter law was not abolished until 1994. ⁴¹

⁴⁰ "Northern part of Cyprus decriminalises homosexuality", *EU Intergroup on LGBT rights* (website), 27 January 2014.

⁴¹ "Germany to pay convicted gays 30 million euros – media", *DW News*, 8 October 2016.

19	 Greece	1951	Prior to the post-war 1951 Penal Code , consensual male same-sex sexual acts were outlawed. Articles 339 and 347 stipulate the age of consent: 'contact against nature between males' is 17, while for different-sex that age is 15.
20	 Hungary	1962	The Criminal Code of Hungary removed the 1878 provisions that referred to 'crimes against nature'.
21	 Iceland	1940	The General Penal Code of 1940 removed the provisions of 1869 Penal Code, Clause 178 that stipulated, "unnatural forms of sexual intercourse are punishable by a term in prison".
22	 Ireland	1993	Section 2, Criminal Law (Sexual Offences) Act (1993) removed the 'buggery' provisions Ireland inherited from British rule.
23	 Italy	1890	The first Italian Penal Code in 1889 had no prohibition on consensual same-sex sexual acts between adults in private.
	Kosovo	1994	The Criminal Code of the Republic of Kosovo repealed the 1951 Yugoslav provisions regarding same-sex sexual acts. Kosovo is not a member State of the United Nations.
24	 Latvia	1992	Following dissolution of the Soviet Union, Latvia's Criminal Law removed its punitive provisions under Paragraph 124(1) regarding consensual same-sex sexual relations between adults.
25	 Liechtenstein	1989	The Criminal Code was revised in 1989 to remove Sections 129 and 130 "lewdness against the order of nature".
26	 Lithuania	1993	Following independence from the Soviet Union, Lithuania abolished Articles 121 and 122(1) of its Criminal Code , thereby decriminalising consensual same-sex sexual relations between adults.
27	 Luxembourg	1795	As Luxembourg came into the possession of France, any sodomy provisions from its Criminal Code were removed in 1795.
28	 Malta	1973	Malta removed the offence of "unnatural carnal connection" from Article 201 of the Criminal Code in 1973.
29	 Moldova	1995	The Criminal Code of Moldova removed the pre-existing sodomy provisions (at Article 106) that were carried through from the Soviet Union period.
30	 Monaco	1793	As Monaco was in the possession of France, it removed any sodomy provisions from its Penal Code in 1793.
31	 Montenegro	1977	The Criminal Code of 1977 repealed the 1951 Yugoslav provisions regarding same-sex sexual acts.
32	 Netherlands	1811	When the Kingdom of Holland became annexed to France in 1811, the Napoleonic Penal Code of 1810 came into operation containing no provision on sodomy, and that standard applies in the current Penal Code , as well as to the three Netherlands Associates (Aruba, Curaçao and St Maarten) and in the their Territories of Bonaire, Saba and St Eustatius.

33	 North Macedonia	1996	The Criminal Code of 1996 removed provisions regarding consensual [male] same-sex relations (penalised with one year in jail) that were previously encoded under Article 101.
34	 Norway	1972	“Indecent intercourse” between men was decriminalised by repeal of Paragraph 213 in Norway’s Penal Code of 1972.
35	 Poland	1932	After its independence in 1918, Poland returned to the Napoleonic tradition that it had enjoyed in the early 19 th century, and subsequently its 1932 Penal Code contains no criminalising provisions regarding consensual same-sex sexual relations amongst adults.
36	 Portugal	1983	Under the reign of Louis I from 1886 on, Portugal criminalised consensual same-sex sexual acts between men, but that law was repealed in the 1983 Penal Code .
37	 Romania	1996	Prior to 1996, Section 200 of the Penal Code had penalised “sexual relations between persons of the same-sex” with 1-5 years imprisonment. This was then repealed but replaced with a clause “committed in public or producing a public scandal”, which was itself removed in 2001.
38	 Russian Federation	1993	Article 121(1) of the 1934 Criminal Code of the Soviet Union had stated “sexual relations of a man with a man (pederasty)” was punishable with up to five years imprisonment. ⁴² This is the model language that was transposed into penal codes in States throughout the former Soviet Union. The 1993 Criminal Code removed such provisions from the Russian law.
39	 San Marino	2004	Although San Marino decriminalised “sodomy” in 1865, it was re-introduced at article 274 into the Penal Code in 1975, targeting those who “habitually” practice (not known to have been ever implemented). This was finally repealed in the 2004 Penal Code .
40	 Serbia	1994	In its modern history, and as part of the Kingdom of Yugoslavia in 1918, “lewdness against the order of nature” in Serbia was banned. The 1994 Criminal Code removed that prohibition.
41	 Slovakia	1962	The current Criminal Code came into force in 1962, and removed sodomy provisions from previous ruling codes (Slovakia relied on the Hungarian law that had previously referred to “crimes against nature”).
42	 Slovenia	1977	When Slovenia was still a part of Yugoslavia in 1976, work on the Criminal Code to remove provisions penalising consensual same-sex sexual acts commenced, and the resultant law came into force in 1977.
43	 Spain	1979	Following the re-establishment of constitutional democracy in Spain after Franco, consensual same-sex sexual intercourse amongst males was removed as an offence in the Penal Code .
44	 Sweden	1944	Sweden removed its ‘sodomy’ provisions from the Penal Code in 1944, specifying freedom for both men and women in the subsequent revision.

⁴² Adrian Chan-Wyles, “[The USSR and Homosexuality Part 1 \(Article 121\)](#)”, *The Sanghakommune*, 28 December 2016.

45	 Switzerland	1942	Although various cantons had remained with the Napoleonic Code since 1798 in not penalising same-sex sexual relations, the entire country became free from such criminalisation by way of the Penal Code that came into force in 1942.
46	 Turkey	1858	The Turkish Imperial Penal Code of 1858 (thought to be based on the 1810 French Penal Code) makes no mention of consensual same-sex sexual acts between adults, and neither does the current Penal Code .
47	 Ukraine	1991	“Homosexual acts” were criminalised with up to five years imprisonment in line with the Soviet Union code of 1934: this was repealed under the Ukraine Criminal Code of 1991.
48	 United Kingdom	1967	In 1861, the death penalty for “buggery” was abolished across the United Kingdom, but the offence was codified in Section 61 of the Offences Against the Person Act (1861) as life sentence, and the lesser misdemeanour of gross indecency was codified in Section 11 of the Criminal Law Amendment Act 1885, with a penalty of up to two years imprisonment, hard labour possible. These were the model laws that spread throughout the Commonwealth. England and Wales removed the provisions in 1967, Scotland in 1981, and Northern Ireland in 1982 (following the Dudgeon case at the European Court of Human Rights). Various entities attached to the UK similarly repealed: Akrotiri & Dhekelia (2000), Anguilla (2001), Bailiwick of Guernsey (1983), Bermuda (1994), British Virgin Islands (2001), Cayman Islands (2001), Falkland Islands (1989), Gibraltar (1993), Isle of Man (1992), Jersey (1990), Montserrat (2001), Pitcairn, South Georgia, St Helena, Turks & Caicos Islands, and all other territories (2001).

Oceania (8)

1	 Australia	1975 1997	Decriminalisation of consensual same-sex sexual acts took place variously across the eight provinces of Australia between 1975 and 1997.⁴³ In 1975, South Australia abolished the offences of “buggery”, “gross indecency” and “soliciting for immoral sexual purposes”, and 22 years later the last jurisdiction to decriminalise was Tasmania in 1997. Following the seminal UN Human Rights Committee’s finding of incompatibility in Toonen v. Australia in 1994 (primarily on the basis of privacy), the federal government introduced Section 4(1) of the Human Rights (Sexual Conduct) Act 1994 to uphold that principle in Australian law.
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⁴³ Graham Carbery, “Towards homosexual equality in Australian criminal law – A brief history” (Australian Lesbian and Gay Archives, 2014).

2	 Fiji	2010	In 2005, in its decision in <i>Dhirendra Nadan and Thomas McCosker v. The State</i> , the High Court of Fiji invalidated two convictions based on sections 175(a), 175(c) and 177 of the Penal Code which criminalised “carnal knowledge against the order of nature” and indecent practices. These provisions were finally repealed by the Crimes Decree 2009 , which came into force in February 2010.
3	 Marshall Islands	2005	The Criminal Code (Amendment) Act 2005 amended the Criminal Code to decriminalise consensual same-sex sexual activity between adults in private.
4	 Micronesia [Federated States of]	1982	The first 1982 legal code of the FSM (which included criminal provisions) did not contain any provision criminalising same-sex consensual sexual acts between adults and no such provision has been introduced since.
5	 Nauru	2016	In May 2016 the Crimes Act 2016 repealed the Criminal Code 1899 that itself was drawn from the 1899 Queensland Criminal Code. The Government of Nauru stated that this law – by far the most comprehensive new law in the country – removed homosexuality as an offence. ⁴⁴ Nauru had previously accepted three recommendations to decriminalise same-sex sexual activity in its 1 st cycle of the UPR in 2011. ⁴⁵
6	 New Zealand	1986 2007	The General Assembly passed the Homosexual Law Reform Act 1986 which decriminalised sexual acts between consenting men aged 16 and over. Same-sex sexual acts between consenting women were not illegal. In 2007 Niue (associated state) and Tokelau (dependent territory) decriminalised same-sex consensual relations as a result of the amendment of the Niue Act by the Niue Amendment Act 2007 . The act came into force on 20 September 2007. In February 2017, the government of New Zealand announced that it would introduce legislation to open an application process to quash historical convictions for consensual sex between men. ⁴⁶
7	 Palau	2014	Palau repealed its legal provisions that criminalised consensual same-sex sexual activity between gay men, introducing a new Penal Code with no such provisions, signed by the President in April 2014. ⁴⁷ Palau had previously accepted three recommendations to decriminalise same-sex sexual activity in its 1 st cycle of the UPR in 2011. ⁴⁸

⁴⁴ “Nauru decriminalises homosexuality”, *RadioNZ*, 27 May 2016.

⁴⁵ *Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review* (Nauru), A/HRC/17/3/Add.1, 30 May 2011.

⁴⁶ “New Zealand to quash historical gay sex convictions”, *BBC News*, 9 February 2017.

⁴⁷ “Palau decriminalises homosexuality”, *Human Dignity Trust*, 15 October 2014.

⁴⁸ Human Rights Council, *Draft report of the Working Group on the Universal Periodic Review: Palau*, A/HRC/WG.6/11/L.3, 6 May 2011.

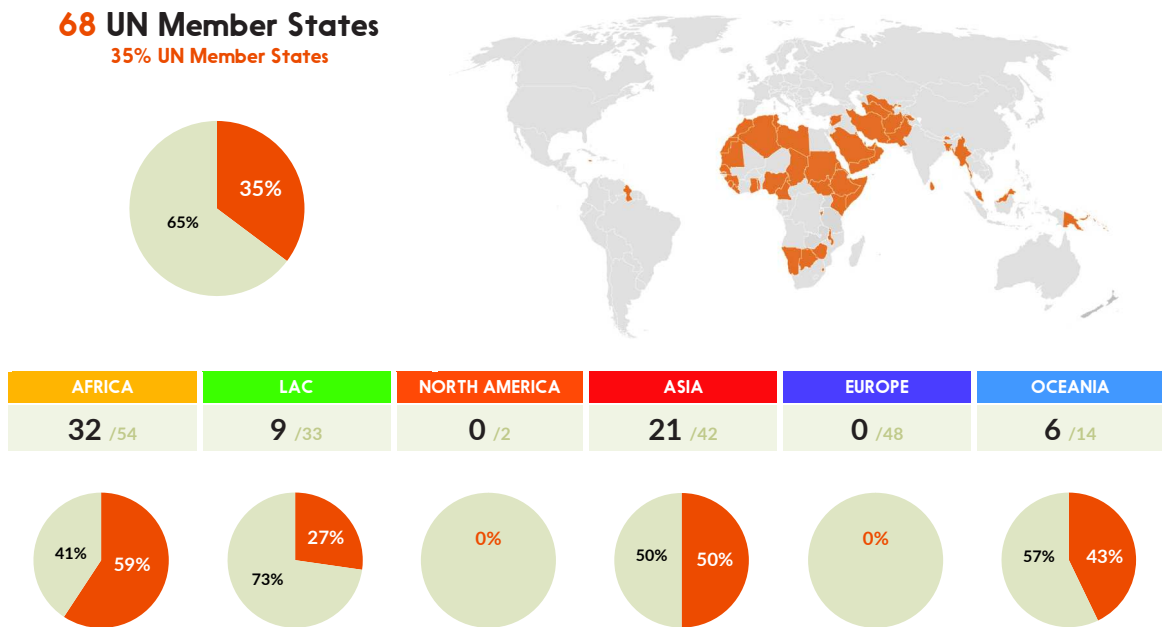
8 **Vanuatu****1981**

Soon after becoming an independent State in 1980, Vanuatu enacted its first Criminal Code (in force 1981), which **did not criminalise** (see page 122) same-sex activity between persons over 18 years of age.⁴⁹ The **2006 Consolidation of the Criminal Code** maintained the same provision under Section 99. In that same year, the **Penal Code (Amendment) Act 2006** (in force March 2007) repealed section 99 altogether, which had the effect of equalising ages of consent for same-sex and different-sex sexual acts at 15.

⁴⁹ D E Paterson, "[Vanuatu Penal Code](#)" (1986) 2(2) QIT Law Journal 119.

Consensual Same-Sex Sexual Acts: ILLEGAL

Highlights



Introduction

This section provides an overview of the countries that still criminalise consensual same-sex sexual acts between adults.

The chart specifies the specific terms used by the provisions in force to refer to such acts. In several cases, the law is very specific as to what conduct falls under the scope of the provision. In others, vague terms such as “acts against nature”, “indecentcy”, “immoral acts”, leave the door open to arbitrary interpretation, which frequently leads to the discretionary use of these norms to persecute LGBT people.

Singapore is the only country that does not criminalise sexual intercourse itself, but still keeps laws against “acts of gross indecency”. The rest of the countries have provisions that, one way or another, criminalise same-sex intercourse.

As recorded in the “Criminalisation” section of this report, instances of judicial prosecution and conviction for consensual same-sex sexual acts between adults in private still take place in several criminalising countries.

What does International Human Rights Law say?

Everyone has the right to be free from criminalisation and any form of sanction arising directly or indirectly from that person’s actual or perceived sexual orientation, gender identity, gender expression or sex characteristics.

Yogyakarta Principle 33.

States shall repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent.

Yogyakarta Principles 2(b) and 6(b).

N	CN	COUNTRY	SAME-SEX SEXUAL INTERCOURSE							SAME-SEX SEXUAL ACTS OTHER THAN INTERCOURSE					
			PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	DEATH PENALTY	FINE / OTHER	PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	FINE / OTHER
AFRICA															
1	1	Algeria	Penal Code, Article 338.	1966	Homosexual acts	ALL GENDERS	2 years	No	Yes	Penal Code, Article 333	1982	Indecent act against the order of nature	ALL GENDERS	3 years	Yes
2	2	Botswana	Penal Code, Article 164.	1964	Intercourse against the order of nature	ALL GENDERS	7 years	No	No	Penal Code, Article 167	-	Acts of gross indecency	ALL GENDERS	2 years	Yes
3	3	Burundi	Penal Code, Article 590.	2017	Sexual relations with a person of the same sex	ALL GENDERS	2 years	No	Yes	Penal Code, Article 572.	-	Acts of indecency contrary to Burundian morals	ALL GENDERS	2 years	Yes
4	4	Cameroon	Penal Code, Article 347-1.	2016	Sexual relations with a person of the same sex	ALL GENDERS	5 years	No	Yes						
5	5	Chad	Penal Code, Article 354.	2017	Sexual relations with a person of the same sex	ALL GENDERS	2 years	No	Yes						
6	6	Comoros	Penal Code, Article 318(3).	1981	Unnatural acts with a person of the same sex	ALL GENDERS	5 years	No	Yes						
7	7	Eritrea	Penal Code, Article 310(1).	2015	Homosexual acts/ Sexual act with person of same sex	ALL GENDERS	7 years	No	No						
8	8	Eswatini	Common law offence	1907	Sodomy	MALE	Not specified	No	No						
9	9	Ethiopia	Penal Code, Article 629.	2004	Homosexual acts	ALL GENDERS	5 years	No	No						
10	10	Gambia	Criminal Code, Article 144.	2005	Homosexual act; carnal knowledge through anus or mouth	ALL GENDERS	14 years	No	No						
11	11	Ghana	Criminal Code, Section 99.	2003	Unnatural carnal knowledge	MALE	3 years	No	No						
12	12	Guinea	Penal Code, Article 274.	2016	Act against nature	ALL GENDERS	3 years	No	Yes	Penal Code, Articles 274, 275, 276.	2016	Indecent acts	ALL GENDERS	2 years	Yes
13	13	Kenya	Penal Code, Section 162.	2003	Carnal knowledge against the order of nature	ALL GENDERS	14 years	No	No	Penal Code, Section 165.	2003	Gross indecency	MALE	5 years	No
14	14	Liberia	Penal Code, Article 14.74.	2008	Sodomy / Deviate sexual intercourse	ALL GENDERS	1 year	No	No						

N	CN	COUNTRY	SAME-SEX SEXUAL INTERCOURSE							SAME-SEX SEXUAL ACTS OTHER THAN INTERCOURSE					
			PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	DEATH PENALTY	FINE / OTHER	PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	FINE / OTHER
15	15	Libya	Penal Code, Article 407(4).	1976	Illicit sexual intercourse	ALL GENDERS	5 years	No	No	Penal Code, Article 408(4).	-	Disgrace the honour	UNCLEAR	<i>Not specified</i>	No
16	16	Malawi	Penal Code, Article 153.	2011	Carnal knowledge against order of nature	ALL GENDERS	14 years	No	<i>Corporal Punishment</i>	Penal Code, Arts. 137(a) and 156.	2011	Gross indecency	ALL GENDERS	5 years	Corporal Punishment
17	17	Mauritania	Penal Code, Article 308.	1984	Acts against nature	ALL GENDERS	2 years (female)	Yes (men)	Yes (female)						
18	18	Mauritius	Penal Code, Article 250	1838	Sodomy	MALE	5 years	No	No						
19	19	Morocco	Penal Code, Article 489	1962	Lewd or unnatural acts	ALL GENDERS	3 years	No	Yes						
20	20	Namibia	<i>Common law offence</i>	-	Unlawful sexual relations per annum between males	MALE	<i>Not specified</i>	No	No	Combating of Immoral Practices Act, Article 8.	-	Immoral act in public	ALL GENDERS	3 years	Yes
21	21	Nigeria	Criminal Code, Section 214.	1990	Carnal knowledge against order of nature	ALL GENDERS	14 years	Yes	No	Criminal Code Act, Section 217	-	Gross indecency	MALE	3 years	No
22	22	Senegal	Penal Code, Article 319(3).	1965	Unnatural acts	ALL GENDERS	5 years	No	Yes						
23	23	Sierra Leone	OAP Act, Section 61.	1861	Buggery	MALE	<i>No max</i>	No	No						
24	24	Somalia	Penal Code, Article 409.	1962	Homosexuality / Carnal intercourse with person of same sex	ALL GENDERS	3 years	Yes	No						
25	25	South Sudan	Penal Code, Article 248.	2009	Carnal intercourse against order of nature	ALL GENDERS	10 years	No	Yes	Penal Code, Section 249.	-	Gross indecency	ALL GENDERS	14 years	Yes
26	26	Sudan	Penal Code, Article 148.	1991	Sodomy	MALE	5 years	Yes	Flogging	Penal Code, Section 151.	-	Gross indecency	ALL GENDERS	1 year	Yes
27	27	Tanzania	Penal Code, Article 154.	1998	Carnal knowledge against order of nature	ALL GENDERS	Life	No	No	Penal Code, Sections 138a and 157.	1998	Gross indecency	ALL GENDERS	5 years	Yes
28	28	Togo	Penal Code, Article 392.	2015	Indecent or unnatural acts with a person of same sex	ALL GENDERS	3 years	No	Yes						
29	29	Tunisia	Penal Code, Article 230.	2012	Sodomy	ALL GENDERS	3 years	No	No						

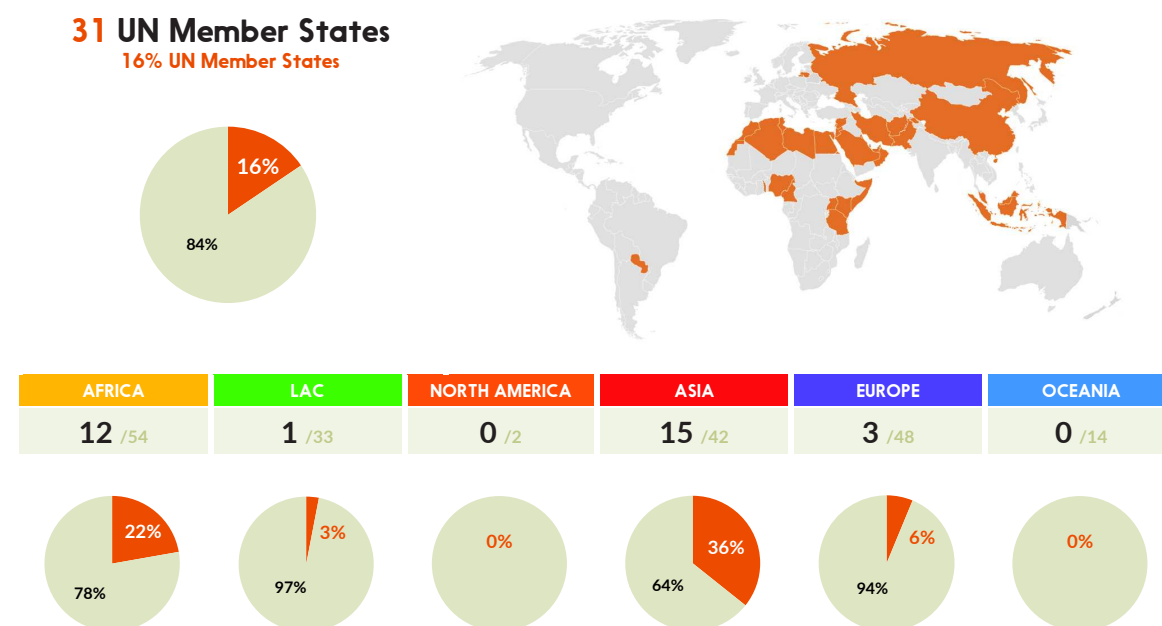
N	CN	COUNTRY	SAME-SEX SEXUAL INTERCOURSE							SAME-SEX SEXUAL ACTS OTHER THAN INTERCOURSE					
			PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	DEATH PENALTY	FINE / OTHER	PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	FINE / OTHER
30	30	Uganda	Penal Code, Article 145.	2000	Carnal knowledge against order of nature	ALL GENDERS	Life	No	No	Penal Code, Article 158	2000	Gross indecency	ALL GENDERS	7 years	No
31	31	Zambia	Penal Code, Article 155.	2005	Carnal knowledge against order of nature	ALL GENDERS	Life	No	No	Penal Code, Article 158	-	Gross indecency	ALL GENDERS	14 years	No
32	32	Zimbabwe	Penal Code, Article 73.	2006	Sodomy or any other act regarded by a reasonable person to be indecent	MALE	1 year	No	Yes						
THE CARIBBEAN															
33	1	Antigua & Barbuda	SO Act, Article 12.	1995	Buggery	MALE	15 years	No	No	SO Act, Section 15	1995	Act of serious indecency	ALL GENDERS	5 years	No
34	2	Barbados	SO Act, Section 9.	1992	Buggery	ALL GENDERS	Life	No	No	SO Act, Section 12	1992	Act of serious indecency	ALL GENDERS	10 years	No
35	3	Dominica	SO Act, Section 16.	1998	Buggery	MALE	10 years	No	Psych. Treat.	SO Act, Section 14.	1998	Act of gross indecency	ALL GENDERS	5 years	No
36	4	Grenada	Criminal Code, Article 431.	1897	Unnatural connexion	ALL GENDERS	10 years	No	No	Criminal Code, Articles 137(28), 430.	1897	Grossly indecent act	ALL GENDERS		Yes
37	5	Guyana	Criminal Law (Offences) Act, Section 354.	2010	Buggery	ALL GENDERS	Life	No	No	Criminal Law (Offences) Act, S. 352.	2010	Act of gross indecency	MALE	2 years	No
38	6	Jamaica	OAP Act, Article 76.	1969	Buggery	ALL GENDERS	10 years	No	Hard labour	OAP Act, Section 79	1864	Act of gross indecency	MALE	2 years	Hard labour
39	7	St. Kitts & Nevis	OAP Act, Article 56.	1873	Buggery	ALL GENDERS	10 years	No	Hard labour						
40	8	St. Lucia	Criminal Code, Section 133.	2004	Buggery	MALE	10 years	No	No	Criminal Code, S. 132.	2004	Act of gross indecency	ALL GENDERS	10 years	No
41	9	St. Vincent & Greds.	Criminal Code, Section 146.	1988	Buggery	ALL GENDERS	10 years	No	No	Criminal Code, S. 148	1988	Act of gross indecency	ALL GENDERS	5 years	No
ASIA															
42	1	Afghanistan	Penal Code Section 645 – 650.	2017	Lavat (anal penetration with male sexual organ),	MALE	2 years	No	No	Penal Code Section 645 / 649.	2017	Tafkhiz and Mosahegheh	ALL GENDERS	1 year	No
43	2	Bangladesh	Penal Code, Section 377.	-	Intercourse against the order of nature	ALL GENDERS	Life	No	Yes						

N	CN	COUNTRY	SAME-SEX SEXUAL INTERCOURSE							SAME-SEX SEXUAL ACTS OTHER THAN INTERCOURSE					
			PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	DEATH PENALTY	FINE / OTHER	PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	FINE / OTHER
44	3	Bhutan	Penal Code, Section 213.	-	Sodomy	ALL GENDERS	1 year	No	No						
45	4	Brunei	Penal Code, Section 377.	2001	Intercourse against the order of nature	ALL GENDERS	10 years	No	Yes						
46	5	Iran	Penal Code, Articles 233 – 234.	2013	Livat (penetration of man's penis into another male person's anus)	MALE	-	Yes	Caning	Islamic Penal Code Articles 235 - 240	2013	Tafkhiz, Musaheqeh and any other homosexual act	ALL GENDERS	100 lashes	No
		Certain Provs. in Indonesia	See entry for "Certain Provinces in Indonesia" in the "Criminalisation" section of this report.												
47	6	Kuwait	Penal Code, Article 193.	1976	Consensual intercourse between men	MALE	7 years	No	No	Penal Code Article 198	1976	Lewd signal or act in a public place	ALL GENDERS	1 year	Yes
48	7	Lebanon	Penal Code, Article 534.	-	Intercourse against nature	ALL GENDERS	1 year	No	No						
49	8	Malaysia	Penal Code, Sections 377A - 377B.	1989	Intercourse against the order of nature	ALL GENDERS	20 years	No	Whipping	Penal Code Section 377D	-	Act of gross indecency	ALL GENDERS	2 years	No
50	9	Maldives	Penal Code, Section 411.	-	Intercourse with a person of the same sex	ALL GENDERS	8 years	No	No	Penal Code Section 412	-	Indecent acts	ALL GENDERS	8 years	No
51	10	Myanmar	Penal Code, Section 377.	-	Intercourse against the order of nature	ALL GENDERS	10 years	No	Yes						
52	11	Oman	Penal Code, Article 223.	-	Erotic acts with a person of the same sex	ALL GENDERS	3 years	No	No						
53	12	Pakistan	Penal Code, Section 377.	-	Intercourse against the order of nature	ALL GENDERS	10 years	No	Yes	Penal Code Section 294	-	Obscene act in public	ALL GENDERS	3 months	Yes
		Palestine (Gaza)	Criminal Code Ordinance, Section 152(2).	-	Carnal knowledge against the order of nature	ALL GENDERS	10 years	No	No						
54	13	Qatar	Penal Code, Article 295.	-	Intercourse with a person of the same sex	MALE	Life	No	No						
55	14	Saudi Arabia	Sura 7:80/ 81	-	Reference to sexual intercourse between men	-	-	Yes	-						
56	15	Singapore								Penal Code Section 377A	2008	Act of gross indecency	Male	2 years	
57	16	Sri Lanka	Penal Code, Article 365,	1995	Intercourse against the order of nature	ALL GENDERS	10 years	No	No	Penal Code Article 365A	1995	Act of gross indecency	ALL GENDERS	2 years	Yes

N	CN	COUNTRY	SAME-SEX SEXUAL INTERCOURSE							SAME-SEX SEXUAL ACTS OTHER THAN INTERCOURSE					
			PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	DEATH PENALTY	FINE / OTHER	PROVISION IN FORCE	LAST AMEND	TERMS OF PROVISION	GENDER/S	MAX PRISON PENALTY	FINE / OTHER
58	17	Syria	Penal Code, Article 520.	-	Intercourse against the order of nature	ALL GENDERS	3 years	No	No	Penal Code Article 517	-	Crimes against public indecency	ALL GENDERS	3 years	
59	18	Turkmenistan	Criminal Code, Section 135.	-	Homosexual acts	ALL GENDERS	2 years	No	No						
60	19	UAE	Penal Code, Article 356.	-	Voluntary debasement	ALL GENDERS	15 years	Yes	No						
61	20	Uzbekistan	Criminal Code, Article 120.	-	<i>Besoqolbozlik</i> (male sexual intercourse).	MALE	3 years	No	No						
62	21	Yemen	Penal Code, Arts. 264 / 268.	-	Homosexuality and lesbianism.	ALL GENDERS	3 years	Yes	100 lashes						
OCEANIA															
63	1	Kiribati	Penal Code, Article 153.	1977	Buggery	ALL GENDERS	14 years	No	No	Penal Code Revised Edition 1977 Section 155	1977	Act of gross indecency	MALE	5 years	No
64	2	Papua New Guinea	Criminal Code. Section 210.	2016	Unnatural Offences against the order of nature	ALL GENDERS	14 years	No	No	Criminal Code 1974, Section 212	2016	Indecent practices between males	MALE	3 years	No
65	3	Samoa	Crimes Act 2031 Section 67		Sodomy	MALE	5 years	No	No						
66	4	Solomon Islands	Penal Code 1996 Section 160	2016	Buggery	ALL GENDERS	14 years	No	No	Penal Code 1996 Section 162	2016	Indecent practices between persons of the same sex	ALL GENDERS	5 years	No
67	5	Tonga	Criminal Offences Act Section 136	2015	Sodomy	MALE	10 years	No	Whipping						
68	6	Tuvalu	Penal Code Revised Edition 1978 Section 153	2016	Unnatural offences	ALL GENDERS	14 years	No	No	Penal Code Revised Edition 1978 Section 155	2015	Indecent practices between males	MALE	5 years	No
		Cook Islands	Crimes Act, Section 155.		Sodomy	MALE	14 years	No	No	Crimes Act, Section 154.		Indecency between males	MALE	5 years	No

Legal Barriers to Freedom of Expression on SOGIESC Issues

Highlights



Introduction

This section covers laws and regulations that have been enacted to restrict the right to freedom of expression in relation to sexual orientation issues.

This can take several forms: restrictions on expressions of same-sex intimacy and restrictions on expressions of support or positive portrayals of non-heterosexual identities and relationships. These restrictions can be imposed on individuals generally, as well as educators and the media.

Morality codes pertaining to public discussion have long been in force in some Arabic States. However, a new legal vehicle has been employed more recently to criminalise expressions of affirmation or support for homosexuality, known as “propaganda laws”.

Some countries have also recently introduced laws that criminalise communications between individuals on same-sex dating applications or websites and even aggravate penalties if that communication leads to sexual encounters.

What does International Human Rights Law say?

Everyone has the right to freedom of opinion and expression, regardless of sexual orientation, gender identity, gender expression or sex characteristics.

Yogyakarta Principle 19

States shall [...] take all necessary legislative, administrative and other measures to ensure full enjoyment of freedom of opinion and expression, [...] including the receipt and imparting of information and ideas concerning sexual orientation, gender identity, gender expression and sex characteristics [...].

Yogyakarta Principle 19.a

Africa (11)

1		Algeria	2014	Article 333 bis (<i>Reiterated</i>) of the Penal Code penalises the possession, dissemination or display of anything contrary to “decency” with imprisonment from 2 months to 2 years and a fine between 500 Da to 2000 Da. Under the second paragraph of article 333 (<i>Modified</i>) the “indecent exposure of an act against the order of nature” constitutes aggravated crime against good mores.
2		Cameroon	2010 2016	Article 83 of the Law on Cybersecurity and Cybercrime (Law No. 2010/12 of 2010) criminalises electronic communication between individuals of the same sex for the purpose of sexual proposition. Penalties are enhanced when the communication is actually followed by sexual intercourse. Sections 264 of the Penal Code (2016) criminalises the public utterance of any immoral speech and the drawing of the public’s attention to any occasion of immorality. In light of the criminalisation of same-sex intimacy, a legal scholar has suggested that a publicly uttered speech advocating “unnatural sexual indulgence” would be considered immoral. ¹
3		Egypt	1937 2018	Individuals have been prosecuted for publicly <i>expressing support</i> for LGBTQI communities under article 86bis of the Penal Code (1937). ² Article 25 of the Law on Cyber Crimes (Law No. 175/2018) states that “anyone who publishes online content that threatens society’s and family’s values shall be punished for at least six months of prison and a fine of at least fifty thousand pounds.” In 2017, the Supreme Council for Media Regulation (SCMR) released an order to ban all forms of support towards the LGBT community on media outlets. ³
4		Kenya	2009	Section 12 of the Film and Stage Plays Act restricts the exhibition of films according to the discretion of the Kenya Film Classification Board. According to the Board’s Classification Guidelines (2012) films with themes that “glamorise a homosexual lifestyle” are either age-restricted to those above 18 years old or banned. In April 2018, the Board issued a ban against the film “Rafiki” on the basis that it was intended to promote lesbianism in Kenya though this was temporarily lifted for seven days by a High Court judge after the film was nominated at the Academy Awards. ⁴ In 2014, the Board also banned another film, “Stories of Our Lives” similarly for “promoting homosexuality”.
5		Libya	1953	Article 421 of the Penal Code refers to distribution of “articles of an indecent nature”. As Article 410 criminalises <i>indecent</i> acts between persons of the same sex, content relating to same-sex intimacy would fall under the definition of “articles of an indecent nature”.

¹ Carlson Anyangwe, *Criminal Law in Cameroon: Specific Offences* (African Books Collective, 2011), 282.

² For more information see the essay “Rights of LGBTQ people in Egypt: Between State, Society, and de facto Criminalization” written by an anonymous group/collective working on LGBTQI issues in the MENA region in the entry for Egypt in the “Criminalisation” section of this report.

³ “All Forms of Support to the LGBT Community to be Banned on Media Outlets: SCMR”, *Egyptian Streets*, 1 October 2017.

⁴ “Kenya: Censorship by film classification board limiting free expression”, *Article 19*, 17 May 2018.

6	 Morocco	1962	Article 483 of the Penal Code criminalises acts or gestures of public obscenity and indecency. In 2015, two men were prosecuted under this law for kissing in public as an act of protest. ⁵
7	 Nigeria	2014	Section 5(2) of the Same-sex Marriage (Prohibition) Act (2014) provides that a person who “directly or indirectly makes public show of same-sex amorous relationships” may receive a penal sentence of up to 10 years imprisonment.
8	 Somalia	1964	Article 402 prohibits the commission of any obscene act while Article 403 of the Penal Code (1964) prohibits the sale, distribution and exhibition of any obscene object. Article 404 deems acts and objectives as obscene where they, in the general opinion, are <i>offensive to modesty</i> . Article 409, which criminalises same-sex intimacy, is part of the same chapter on offences against modesty in the legislation.
9	 Tanzania	1981	Article 175 of the Penal Code stipulates materials that are tending to “corrupt morals” may not be distributed, sold or exhibited. Article 154 which criminalises same-sex intimacy is located in Chapter XV, titled “Offences Against Morality”. In 2017, 12 people were arrested for “promoting homosexuality”. ⁶
10	 Togo	1980	Article 392 and 394 of the Penal Code penalise the publication and distribution of materials “contrary to public morals”, “decency”. Offences against morality include “unnatural acts” with a person of the same sex under Article 392.
11	 Tunisia	2004	Amended in 2004, Article 226bis of the Penal Code of 1913 criminalises any act that publicly draws attention to the opportunity to commit debauchery through any form of writing, audio or visual recording. This law is found in the same section titled “Section III: attacks on morals” where the law criminalising same-sex intimacy is located.
12	 Uganda	1995	Under Section 9 of the Press and Journalist Act 1995 , the Media Council is authorised to censor films, plays and other media content for public consumption. In 2017, the Media Council banned a Dutch film for “glorifying homosexuality”. ⁷ The Broadcasting Council, established under the Electronic Media Act , is similarly empowered to regulate radio content pursuant to the minimum broadcasting standards of First Schedule which prohibits programmes that are contrary to “public morality”; in 2004, it fined a radio station for hosting gay men during a live talk show on the basis that it was “contrary to public morality”. ⁸ The Ugandan government has also tried to explicitly prohibit the “promotion” of homosexuality under the defunct Anti-Homosexuality Act 2014 (struck down in August 2014) and The Prohibition of Promotion of Unnatural Sexual Practices Bill .

⁵ “Moroccan men ‘jailed for four months for kissing in public’”, *The Telegraph*, 19 June 2015.

⁶ Katherine Swindells, “12 arrested in Tanzania for ‘promoting homosexuality’”, *Pink News*, 18 October 2017.

⁷ “Uganda bans Dutch film for ‘glorifying homosexuality’”, *BBC News*, 16 May 2017.

⁸ “Fine for Uganda radio gay show”, *BBC News*, 3 October 2004.

Latin American and the Caribbean (1)

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| 1 |  Paraguay | 2017 | <p>The Ministry of Education and Sciences issued <i>Resolution No. 29,664/2017</i> prohibiting the dissemination and use of educational materials referring to “gender theory and/or ideology”.⁹</p> <p>The Inter-American Commission on Human Rights (IACHR) noted that this measure “represents a setback for the rights of women, people with diverse sexual orientations and gender identities, and children to receive an education free of stereotypes that are based on ideas of inferiority or subordination”.¹⁰</p> |
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Is there more in LAC?

Jamaica	In Jamaica, approval is required from the Cinematograph Authority under the <i>Cinematograph Act</i> to present a film. In 2013, a film about two lesbians who were murdered by their boyfriends was banned though no reason was given by the Cinematograph Authority. ¹¹ Though the Cinematograph Authority has the power to make rules to approve or ban films, those rules are not publicly available. ¹²
Haiti	In 2017, the Senate voted to ban marriage equality as well as “any public demonstration of support for homosexuality and proselytizing in favour of such acts.” ¹³

North America (0)

Is there more in North America?

United States of America	In the United States of America, seven states (that make up around 17.4% of the total population) have enacted local laws—informally referred to as ‘No Promo Homo Laws’—which prohibit educators from discussing same-sex intimacy in an affirming or positive manner.¹⁴ For example, in <i>Alabama</i> and <i>Texas</i>, educators must emphasise that “homosexuality is not a lifestyle acceptable to the general public”. In Arizona, educators cannot promote or portray homosexuality as a “positive alternative lifestyle”. In <i>South Carolina</i>, educators cannot discuss non-heterosexual relationships except in the context of sexually transmitted diseases. The other states with such laws are <i>Oklahoma</i>, <i>Louisiana</i> and <i>Mississippi</i>. In March 2017, the governor of Utah signed SB 196, revising the state law that prohibited the “advocacy of homosexuality” in schools. Because less than half of the country’s population is affected by these laws, the US is not included in the list.
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⁹ Ministerio de Educación y Ciencias (Paraguay), *Resolución No. 29.664/2017*, por la cual se prohíbe la difusión y la utilización de materiales impresos como digitales, referentes a la teoría y/o ideología de género, en instituciones educativas dependientes del ministerio de educación y ciencias, 5 de octubre de 2017; Teo Armus, “*Paraguay Bans Material on 'Gender Ideology'*” in Public Schools”, NBC News, October 18, 2017.

¹⁰ “*Press Release: IACHR Regrets Ban on Gender Education in Paraguay*”, *Organisation of American States (webpage)*, 15 December 2017.

¹¹ “*Jamaica bans movie with lesbian scenes featuring Dominican actress*”, *Dominica News Online*, 29 May 2013.

¹² Camille Royes, “*Rating a film — Jamaican-style*”, *Jamaica Observer*, 14 March 2012.

¹³ “*Haïti: le sénat interdit le mariage gay*”, *Tribune de Genève*, 3 August 2017.

¹⁴ “*No Promo Homo*” Laws (webpage), GLSEN (website), accessed 27 January 2019.

Asia (15)

1	 Afghanistan	1965 2006	Articles 32 and 33 of the Afghanistan Press Law (1965) prohibit the use of the press to incite others to commit an offense or to “seek depravity” (which includes the publication of articles which tend to debase public morals). Additionally, article 31(1) of the Law on Mass Media (2006) also prohibits the publication of matters “contrary to principles of Islam”. In 2014, the Afghan government threatened to prosecute a gay activist for using social media to advocate for LGBT issues.¹⁵ In 2009, it was reported that a memoir by a gay Afghan man could not be distributed in the country.¹⁶
2	 China	2015	Following the removal of a gay-themed web series, China issued the General Rules for Television Series Content Production banning content which “expresses or displays abnormal sexual relations or sexual behaviour, such as homosexuality”.¹⁷ In 2017, a directive was circulated that prohibits content relating to homosexuality as well.¹⁸ In 2018, China’s top social networking site, Weibo, announced a plan to censor gay-related content but reversed its decision after public backlash.¹⁹ In October 2018, a novelist whose work included homoerotic content was sentenced to 10 years’ imprisonment for making and selling “obscene material” for profit.²⁰
3	 Indonesia	2016	In February 2016, the Indonesian Broadcasting Commission (KPI) released the Circular to All Broadcasting Companies on Effeminate Men which prohibits all broadcasting companies from representing sexual and gender diversity in men. In the same month, it also released a statement banning TV and radio programmes that “promoted” the LGBT lifestyle on the basis that it was in violation of the Broadcasting Program Standards (2012) in the name of protecting children.²¹ In 2016, the Indonesian Ulema Council released a <i>fatwa</i> that rejected “all forms of propaganda, promotion and support towards lesbian, gay, bisexual and transgender (LGBT) in Indonesia”, with the Council’s chairman, Maruf Amin, declaring that “LGBT activities and campaign are forbidden in Islam and other Abrahamic religions.”²² Over the past few years, the Communications Ministry has been trying to ban same-sex dating applications on mobile phones albeit unsuccessfully.²³

¹⁵ Nemat Sadat, “Afghanistan’s ‘coming out’ for LGBT rights can pave the road to peace”, *Public Radio International*, 30 April 2014.

¹⁶ Tahir Qadiri, “Gay Afghan defies tradition to expose identity”, *BBC News*, 20 February 2013.

¹⁷ Josh Horwitz et al., “China’s new television rules ban homosexuality, drinking, and vengeance”, *Quartz*, 3 March 2016.

¹⁸ Steven Lee Myers and Amy Cheng, “66 things you cannot say on China’s internet”, *New York Times*, 24 September 2017.

¹⁹ Wang Yanan, “China’s Weibo site backtracks on gay censorship after outcry”, *AP News*, 17 April 2018.

²⁰ Alison Flood, “Chinese writer Tianyi sentenced to decade in prison for gay erotic novel”, *The Guardian*, 20 November 2018.

²¹ Fedina S Sundaryani, “Commission wants TV, radio free of LGBT”, *The Jakarta Post*, 14 February 2016.

²² “MUI Rejects All Forms of LGBT Promotion”, *Tempo.Co*, 18 February 2016.

²³ Adi Renaldi, “Indonesia Wants to Ban Gay Dating Apps, Again”, *Vice News*, 5 February 2018.

4	 Iran	1986 2009	The Press Law contains a variety of limitations on material that may be considered offensive to the public. The government has used this law and the Law on Computer Crimes (Law No. 71,063 of 2009) to shut down newspapers and websites with content related to sexual orientation. ²⁴
5	 Jordan	1988	Article 37 of the Press and Publication Law prohibits the publication of content that “encourages perversion or lead to moral corruption”. In July 2017, the Jordanian Audiovisual Commission blocked access to an LGBTQIA-inclusive online magazine on the basis that they had not applied for a license. ²⁵
6	 Kuwait	1960	Article 21 of the Press and Publications Law prohibits the publication of anything that would insult the public morals or instigate others to violate the public order or to violate the laws or to commit crimes, even if the crime did not occur. This law was extended to include online publications pursuant to the Law Regulating Electronic Media (Law No. 8 of 2016). In 2017, the Ministry of Information prohibited the screening of a Disney film (The Beauty and the Beast) that contained a same-sex kiss. ²⁶
7	 Lebanon	1943	Article 532 of the Penal Code prohibits the possession, making, or distributing of materials that may incite others to immorality. In May 2018, an organiser of Beirut Pride was detained for organising a demonstration that incite immorality. ²⁷ In January 2019, the Ministry of Telecom reportedly ordered a ban on Grindr (an online dating app mostly used by gay men). ²⁸
8	 Malaysia	2018	In 2010, the Film Censorship Board (LPF) relaxed its ban on “homosexual content” pursuant to the Film Censorship Act , provided that gay characters became straight at the end. ²⁹ In 2018, in a response to a parliamentary question and following a national controversy over a gay kiss in a Disney film, the deputy home minister reiterated that LGBT content will be banned from broadcast unless there were “lessons to be learnt”, pursuant to guidelines set by the LPF. ³⁰
9	 Oman	1984	Articles 25 and 28 of the Publications and Publishing Law (1984) prohibit the publication of anything that “disrupt the public order or call people to embrace or promote anything deemed in contravention of the principles of the Islamic religion” or “that might prejudice the public code of conduct, moral norms or divine religions”. Article 42 of the 2007 Executive Regulations promulgated under the Telecommunications Regulation Law prohibits a person from using telecommunication services that contain data or

²⁴ Iranian Queer Organization et al, “[The Violations of the Economic, Social, and Cultural Rights of Lesbian, Gay, Bisexual, and Transgender \(LGBT\) Persons in the Islamic Republic of Iran: A Shadow Report Submitted to the Committee on Economic, Social, and Cultural Rights 50th Session \(29 April – 17 May 2013\)](#)”, March 2013, 18 – 19.

²⁵ “[Jordan blocks access to LGBTQ online magazine](#)”, *Committee to Protect Journalists*, 8 August 2017.

²⁶ Kate Feldman, “[‘Beauty and the Beast’ pulled from theaters in Kuwait by censors](#)”, *New York Daily News*, 20 March 2017.

²⁷ Hugo Lautissier, “[Beirut Pride’s Hadi Damien Q&A: Lebanon’s LGBT movement is ‘growing’](#)”, *Middle East Eye*, 19 May 2018.

²⁸ Samuel Leighton-Dore, “[Grindr has reportedly been banned in Lebanon](#)”, *SBS News*, 23 January 2019.

²⁹ “[It’s OK to be gay in Malaysian movies - as long as you go straight](#)”, *Herald Sun*, 22 March 2010.

³⁰ “[Censorship board to snip LGBT elements, scenes from films, dramas](#)”, *FMT News*, 11 December 2018.

			information which are “contrary to the public ethic system, infringe the religious practice or upset others or promote any subject breaching the law”.
			In September 2013, the newspaper <i>The Week</i> was shut down for one week after printing an article about the country’s LGBT community. ³¹ In 2015, the Ministry of Information was purportedly taking legal action against a French radio station based in Oman that hosted a gay Omani activist who spoke about the challenges of being gay in the country. ³²
10	 Pakistan	2016	Section 34 of the Prevention of Electronic Crimes Act (2016) grants the Pakistan Telecommunication Authority the power to remove or block access to content if it considers it necessary in the interest of the glory of Islam, public order, decency, or morality. Prior to this law, the government has already been banning LGB-related content online and in the media. ³³
11	 Qatar	2004	Article 296 (3)-(4) of the Penal Code (2004) states, “One is convicted to no less than a year and no more than three years in prison in case of (3) Leading, instigating or seducing a male anyhow for sodomy or immorality and (4) Inducing or seducing a male or a female anyhow to commit illegal or immoral actions”. In 2018, it was reported that LGB-content were censored in international newspapers. ³⁴
12	 Saudi Arabia	2007	Article 6 of the Anti-Cyber Crime Law (2007) prohibits the production, publication and promotion of online content or webpages that the government deems to be pornographic or in violation of religious values or public morals or order. For instance, in January 2018, Saudi police arrested a group of men who had uploaded a video of a “gay wedding”. ³⁵
13	 Singapore	2016	The Info-communications Media Development Authority promulgated a series of Codes of Practices for broadcast media, radio, films and the internet , all of which prohibit the positive portrayal or advocacy of “homosexuality” and “lesbianism”. The authorities may also censor the media or impose age restrictions based on these regulations and have done so many times. ³⁶
14	 Syria	1948	Article 208 of the Syrian Penal Code prohibits offensive public utterances in writing, graphics, images, etc. Prior to the civil war, it was reported that films on LGBT content were censored. ³⁷

³¹ “Oman’s government sues newspaper over story about gays”, *Reuters*, 5 September 2013; “[Oman: Freedom of the Press 2014](#)”, *Freedom House Website*.

³² Fahad Al Mukrashi, “Interview with gay Omani lands radio station in hot water”, *Gulf News*, 29 October 2015.

³³ Zofeen T Ebrahim, “[Pakistan’s gay website ban reflects bigotry](#)”, *Index on Censorship*, 15 October 2013; “[The gay kiss that was censored in Pakistan](#)”, *GayTimes*, 1 February 2016.

³⁴ Nick Duffy, “[Qatar is censoring LGBT news coverage ahead of 2022 World Cup](#)”, *Pink News*, 21 July 2018.

³⁵ “[Saudi Arabia police arrest men over ‘gay wedding’ video](#)”, *BBC News*, 9 January 2018.

³⁶ Yip Wai Yee, “[Singapore cuts Obama’s LGBT comments on Ellen](#)”, *The Straits Times*, 25 February 2016; “[Singapore censor fines TV station for showing gay family](#)”, *The Sydney Morning Herald*, 25 April 2008.

³⁷ “[Syria: Ban on TV series and films about homosexuality](#)”, *Free Muse*, 23 May 2012.

15	 United Arab Emirates	2003	Article 3(5)(4) of Law on Combating Cybercrimes (Law No. 5 of 2012) criminalises the condoning, provoking or promoting of sin through the computer network or any information technology means or a website. The Telecommunications Regulatory Authority also blocks websites that “promote destructive principles such as homosexuality” as part of its Internet Access Management Regulatory Policy. In 2018, the Knowledge and Human Development Authority of the Dubai Government banned a textbook used in a private international school for “violating the religious and traditional norms in the UAE” because it featured a family with two mothers.³⁸
16	 Yemen	1990	Article 103 of the Law on the Press and Publications (Law No. 25 of 1990) prohibits the publication or dissemination of “anything which undermines public morals”. In 2004, a court sentenced three journalists to imprisonment for publicly discussing homosexuality and interviewing men jailed for homosexuality.³⁹ In 2012, a government-funded cultural magazine, <i>Al Thaqafiya</i>, was shut down for publishing a review of an Egyptian film that contained a scene depicting lesbian sex.⁴⁰

Is there more in Asia?

Kazakhstan

Kazakhstan’s Constitutional Council announced on May 26, 2015, that a proposed legislation on “propaganda of non-traditional sexual orientation” is unconstitutional.⁴¹

Kyrgyzstan

In 2014, the government of Kyrgyzstan had introduced a bill that copied Russia’s legislation against “gay propaganda”, with additional jail sentences for people who “promote homosexual relations” through the media.⁴² The bill had a second reading in June 2015 with little discussion, no questions asked of the 28 MPs who sponsored it, and 90 votes in favour. However, in May 2016, the Parliamentary Committee on Law, Order and Fighting Crime withdrew the draft legislation for further consideration, and to date, it has not been put back before the parliament.⁴³

³⁸ “Dubai Bans Private School Book on Homosexual Parents”, *Albawaba The Loop*, 9 October 2018.

³⁹ “Journalists convicted for gay report”, *Al Jazeera*, 19 May 2004.

⁴⁰ “Yemeni Magazine Dares Exploit a Fine Cinematic Work to Promote Radical Gay Agenda”, *Queerty*, 30 April 2010.

⁴¹ Joanna Lillis, “Kazakhstan Strikes Down ‘Gay Propaganda’ Law After Olympics Outcry”, *Eurasianet*, 27 May 2015.

⁴² Juliet Jacques, “Fear and loathing in Kyrgyzstan: how the LGBTQI community is fighting back against rising discrimination”, *Open Democracy*, 20 September 2018.

⁴³ Amnesty International, *Less Equal: LGBTI Human Rights Defenders in Armenia, Belarus, Kazakhstan, and Kyrgyzstan* (2017), 32.

Europe (3)

1	 Belarus	2017	The Bill on the Protection of Children from Information Harmful to their Health and Development was passed and came into effect in July 2017 as Law No. 362-ZZ. Similar to Russia's propaganda law, Article 37 prohibits the dissemination of information that "discredits the institution of family and marriage".⁴⁴
2	 Lithuania	2014	In January 2014, the Lithuanian Parliament introduced amendments to the Code of Administrative Violations of Law (at Section 214 and elsewhere) penalising activities or publication that violate so-called constitutionally-established family values. These amendments were enacted in the context of the Law on the Protection of Minors against the Detrimental Effect of Public Information that came into effect in March 2010.
3	 Russian Federation	2013	Federal Law No 135-FZ which prohibits the promotion of non-traditional sexual relations among minors has been used to prosecute a range of people since it was enacted, including activists,⁴⁵ websites and the media.⁴⁶ ► For more information on this law, read "<i>The Censorship 'Propaganda' Legislation in Russia</i>" by Alexander Kondakov below.

Is there more in Europe?

Armenia	In Armenia, an attempt was made in 2013 to introduce an amendment to the Administrative Offences Code to impose fines for "propaganda of non-traditional sexual relations" but subsequently withdrawn. ⁴⁷ In October 2018, a similar law was introduced in the legislature. ⁴⁸
Hungary	The Hungarian government issued a decree in 2018 to revoke accreditation and funding for gender studies programmes at the two universities that offer them in the country. This was because the Hungarian government believed that there are only two genders and did not wish to spend public funds in this area. ⁴⁹
Latvia	The Latvian parliament successfully passed amendments to the Education Law in 2015 which obliges education institutions to provide students with 'moral' education that mirrors constitutional values, especially regarding marriage and family. ⁵⁰ It had previously failed to enact an anti-gay propaganda law in 2013, which aimed to prohibit children as participants or spectators of events aimed at the promotion of LGBT relations. ⁵¹

⁴⁴ "Less Equal: LGBTI Human Rights Defenders in Armenia, Belarus, Kazakhstan, and Kyrgyzstan" (Amnesty International, December 2017), 24.

⁴⁵ "Russian Court Fines Children-404 Founder for Violating LGBT Propaganda Law", *Human Rights First*, 23 January 2015.

⁴⁶ Trudy Ring, "LGBT Website Gay.ru Blocked Within Russia", *The Advocate*, 2 April 2018.

⁴⁷ "Less Equal: LGBTI Human Rights Defenders in Armenia, Belarus, Kazakhstan, and Kyrgyzstan" (Amnesty International, December 2017), 20.

⁴⁸ Ani Meijumyan, "Ahead of elections, Armenia's opposition attacks LGBT right",

⁴⁹ "Hungary to stop financing gender studies courses: PM aide", *Reuters*, 14 August 2018.

⁵⁰ "Saeima approves lessons in 'constitutional morality' for schoolchildren", *Latvian Public Broadcasting*, June 18, 2015.

⁵¹ Anhelita Kamenska, "1705-LV-9 Attempts to ban homosexual propaganda", *European Network of Legal Experts in the Non-Discrimination Field*, 25 November 2014.

Moldova	In 2013, the Moldovan government first enacted then repealed an anti-gay propaganda law inspired by the Russian law in its bid to join the European Union. ⁵² Two bills were tabled in 2016 and 2017 to ban “propaganda of homosexual relations among minors” and censor public distribution of information about non-heterosexual relationships and identities and remain under legislative consideration. ⁵³
Poland	In March 2017, draft propaganda legislation was proposed in Poland to ban homosexual people from the teaching profession. ⁵⁴ The proposed bill was never voted on due to a change in the party compositions of the Polish parliament following new elections. In late 2018, the Polish president said that he would “seriously” consider a law banning “homosexual propaganda” in schools. ⁵⁵
Ukraine	Ukraine had tried to “protect” children from “propaganda” about homosexual relations with Draft Law 1155 and Draft Law 0945. However, after international pressure, they were removed from parliamentary consideration in April 2014. ⁵⁶

⁵² Joseph Patrick McCormick, “Moldova overturns anti-gay ‘propaganda’ law with hopes of joining EU”, *Pink News*, 14 October 2013.

⁵³ “Moldova’s LGBT Community Faces a Russia-Inspired Media Crackdown”, *World Politics Review*, 16 August 2017.

⁵⁴ “Expression Abridged: A Legal Analysis of Anti-LGBT Propaganda Laws”, *IGLYO*, April 2018, 13.

⁵⁵ Patrick Kelleher, “Polish president Andrzej Duda considering ‘gay propaganda’ ban”, *Pink News*, 11 November 2018.

⁵⁶ “Expression Abridged: A Legal Analysis of Anti-LGBT Propaganda Laws”, *IGLYO*, April 2018, 13.

The Censorship “Propaganda” Legislation in Russia

By Alexander Kondakov.⁵⁷

In June 2013, Russian Parliament (the State Duma) adopted the bill 135-FZ meant to “protect children from information that promotes denial of traditional family values.”⁵⁸ This piece of legislation amended several federal laws and the Code of Administrative Offences of the Russian Federation with the final purpose to ban from public access something called “propaganda of non-traditional sexual relations”.

Most importantly, the bill adds Article 6.21 to the Administrative Code that establishes responsibility for dissemination of information about “non-traditional sexual relations” punishable by fines (for citizens and officials), fines and suspension of organizational activities (for entities) or fines and deportation (for foreign nationals and stateless persons).⁵⁹

This law does not deliver on criminal liability; it is a misdemeanour that has a specific legal procedure and different legal consequences in comparison to criminal law. Substantially, the “propaganda” law is a censorship legislation that limits people’s freedom of expression. It simply prohibits certain information from being part of the commonly accessible domain.

First attempts to ban “homosexual” propaganda

Initially, the bill was introduced to the Duma in 2012 by regional parliamentarians from the Novosibirsk branch of the United Russia Party. Their proposition was more articulate as they sought to ban “propaganda of homosexuality” just like in a dozen other regions across Russia where similar legislation was already in place.⁶⁰ The first in

line was the Ryazan region, where the propaganda bill was introduced as early as 2006. In that period at the federal level, Member of Parliament Aleksandr Chuev had been trying to criminalise “propaganda of homosexual lifestyle” for some years after unsuccessful attempts to criminalise “sodomy” beforehand. Wording of his legislation drafts (also proved unsuccessful due to the criminal nature of his legal initiative) were mostly inspired by decisions of the Constitutional Court of the Russian Federation regarding national family values, as well as by the US evangelicals’ doctrine of “traditional family values”.⁶¹

This language was used in drafting the current law with the purpose of avoiding overtly mentioning “homosexuality” so that the text itself would not “promote” what it sought to prohibit. Thus, by summer 2013 despite protests from the Duma’s Law Department, the Duma’s Committee on Family, Women and Children headed by the Member of Parliament Yelena Mizulina drafted the ban of “non-traditional sexual relations” supported by all but one parliamentarian during voting.

Prohibited conduct

Despite common misconception, this piece of legislation is very straightforward and clear. The text of the law says that if someone promotes “non-traditional sexual relations” to minors, then they have to face legal consequences. The ways in which one may “promote” these relations are of two types:

- a) *personal presentation* (private conversation, teaching, public rally and campaigning) or

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⁵⁸ Federal’nyj zakon “O vnesenii izmenenij v stat’ju 5 Federal’nogo zakona ‘O zashhite detej ot informacii, prichinjajushhej vred ih zdorov’ju i razvitiju’ i ot del’nye zakonodatel’nye akty Rossijskoj Federacii v celjah zashhity detej ot informacii, propagandirujushhej otricanie tradicionnyh semejnyh cennostej” [Federal Law “On Amendment of Article 5 of the Federal Law ‘On Protection On Protecting Children from Information Harmful to Their Health and Development’ and Other Normative Acts of the Russian Federation for the Purpose of Protecting Children from Information Advocating for a Denial of Traditional Family Values”] 29 June 2013, No. 135-FZ.

⁵⁹ Fines are from 4-5,000 RUR for private citizens to 40-50,000 RUR for officials to 800,000-1,000,000 RUR for companies.

⁶⁰ The regions that adopted the ‘propaganda’ legislation include: Arkhangelsk, Vladimir, Irkutsk, Kaliningrad, Kostroma, Krasnodar, Magadan, Novosibirsk, Ryazan, Samara regions, the city of St Petersburg, and the Republic of Bashkortostan.

⁶¹ Christopher Stroop, “Russian Social Conservatism, the WCF and the Global Culture Wars in Historical Perspective”, *Political Research Associates*. 16 February 2016.

- b) *mediated presentation* (airing on the Internet or TV, in newspapers and magazines).

Moreover, an actual child must not be in fact exposed to the information in question: children in general should be able to access the information in order for it to be considered “propaganda”. This also uncovers the nature of “propaganda” in the text of the law: since a child is not required to be present at the event of alleged misdemeanour, then any consequences of the information to the child’s sexual orientation are of no legal relevance. In other words, although the law pretends to protect children from the “harm” of becoming gay, it does not matter if any particular child has been really converted to a gay person as a result of being exposed to a plaintiff’s political rally banner.

In the absurdist world of Russian legislators, this is a smart move because otherwise no case would stand trial. The legislators do mention that in result of children’s exposure to information about “non-traditional sexual relations” the following possibilities are projected: “formation of non-traditional sexual attitudes,” “attraction to non-traditional sexual relations,” “perverse impression of social equality between traditional and non-traditional sexual relations,” etc.

However, the practice of the law demonstrates that no proof of these effects on children is ever required in the courtroom. This law is about quality of information (its potential ability to convince someone that queer sexuality is a normal part of our society and even maybe an interesting practice to try), not about human capacity to experiment with one’s sexuality under external influence.

The law targets information: as a censorship law, it limits freedom of expression. Court experts are called upon to testify that a piece of information may potentially ignite children’s interest in homosexuality and therefore, it is a piece of “propaganda.” Hence, the “frightening” consequences of “gay propaganda” are nothing more than rhetorical ornaments that serve for the creation of moral panic.

The notion of “non-traditional sexual relations”

Furthermore, in the federal legislation, the formula “non-traditional sexual relations” does divert attention from a franker wording, such as St. Petersburg’s “propaganda of homosexuality, lesbianism, bisexuality and transgenderism”

(paraphrased “LGBT” acronym). Yet, the Supreme Court of the Russian Federation previously clarified that “traditional sexual relations” do not include lesbian experiences, male homosexuality, bisexuality and transgender issues, so these are considered “non-traditional”.

Besides, people rarely learn about law from legal books. Thus, while lawyers have the Supreme Court’s rulings to understand a correct interpretation of “non-traditional” sexuality, other people may rely on TV and newspaper articles, where this linguistic formula is heavily used in reference to LGBTQ questions. Therefore, no mistake shall be committed in interpretation of the law by legal professionals or lay people.

The effects and consequences of the law

This last point actually bares discussion of the effects of the law. First, as any censorship law and contrary to its said purpose, the bill 135-FZ generated a lot of interest to the object it censored. Studies show that there are more publications about queer sexualities in Russia after adoption of the law than before it.⁶² Certainly, some of them are meant to convince the public that it is in danger of “homosexuality”. This is especially so for materials aired on government-controlled media resources. Yet, other publications, on the contrary, try to convey a more LGBTQ-friendly approach and are published in “oppositional” or independent media. Some of these latter types of materials were subjected to administrative litigation, while others are freely available anyway. The thing is that in order to open an administrative case, state agencies have to show that a publication in question was meant for children. Hence, if a sign marked the said publication as intended for an “18+ age” audience, then a case cannot be built.

Secondly, the law also generated legal enforcement; it is not an inactive piece of legislation (see “The implementation of the law” below).

Finally, the law also has social effects beyond its legal implementation or censorship controversies. Most importantly, academic and activist studies registered growth of violence against LGBTQ populations in Russia after 2013.⁶³

The “propaganda” law is a symbolic articulation of the government’s hatred policy. The law officially established that some citizens of Russia are of less

⁶² Emil Edenborg, *Politics of Visibility and Belonging: From Russia’s “Homosexual Propaganda” Laws to the Ukraine War* (London: Routledge, 2017); Elena Sergeevna Pronkina, “Osobennosti LGBT-diskursa v rossiyskikh media, initsiirovannogo diskussiyami o regulirovani seksual’nosti” [Aspects of LGBT-Related Discourse in the Russian Media Today: The Case of Discussions Provoked by Regulations on Sexuality in Russia. *Journal of Social Policy Studies* 1 (2016), 71-86.

⁶³ Aleksandr Kondakov, *Prestupleniya na pochove nenavisti protiv LGBT v Rossii* [Hate Crime against LGBT People in Russia] (St. Petersburg: The Centre For Independent Social Research, 2017); Human Rights Watch (HRW), *License to Harm: Violence and Harassment against LGBT People and Activists in Russia* (2014).

value than others (its text refers to “social equality” between sexual groups as a “perverse impression” one must be protected from). Thus, the law and official political commentaries around it spread and reinforced the idea that queer sexualities are wrong. Judging from the growth of violence against LGBTQ people in Russia, some bigots acted violently upon this conclusion.

Russia’s legislation in limiting LGBTQ populations’ freedom of expression also has an international dimension. As the result of this official policy of bigotry, many queer people in Russia felt especially threatened and endangered, even experiencing actual violence and persecution because of their sexual or gender identities. Therefore, some of them had to flee the country and seek for international protection in safer places.

On the other hand, the law generated positive responses in some Post-Socialist countries. Similar “anti-propaganda” laws have been considered in Poland, Lithuania, Latvia, Hungary, Moldova, Belarus, Ukraine, Kyrgyzstan, Kazakhstan and Armenia. All attempts have proved unsuccessful so far, but the issue brings these states closer together despite political rivalry and mutual grievances and therefore, may have further developments.

Conclusion

In sum, the 135-FZ law banning “propaganda of non-traditional sexual relations” to minors is a censorship legislation that limits freedom of expression by making neutral and positive information about LGBTQ topics a misdemeanor subjected to penalties. The text of the law is clear, and the procedure of its implementation does not require an actual child to be harmed in any way. This is why it is relatively easily enforced, especially in cases against media outlets and activists’ publications.

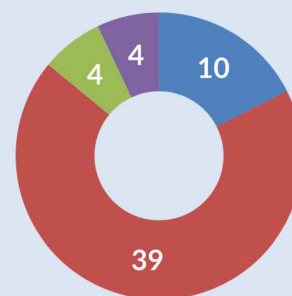
The legislation has a variety of other effects, beyond its implementation. One of the most important results of the spread of bigotry it generated is the growth of violence against queer populations in Russia. Since the law is in place, Russia is a less safe location for queer expressions than it has been before. Therefore, the law sends the country backwards on the line of progression to a more inclusive sexual citizenship.

The implementation of the law

Currently, for the years 2013-2018 there are at least 57 court rulings in the official state registrar of court decisions managed by the Ministry of Justice (unfortunately, not all court rulings appear in this database and not all of them are properly classified).

The graph shows the number of cases in which the law is cited in these rulings: the majority of court decisions are taken in respect to media publications.

These cases are most commonly brought to court by Russia’s censorship agency, *Roskomnadzor* (The Federal Service for Supervision of Communications, Information Technology and Mass Media). Cases regarding political rallies are initiated by LGBTQ activists who are denied the right to conduct a public rally by municipal authorities on the ground of the “propaganda” law and then challenge this decision in courts.

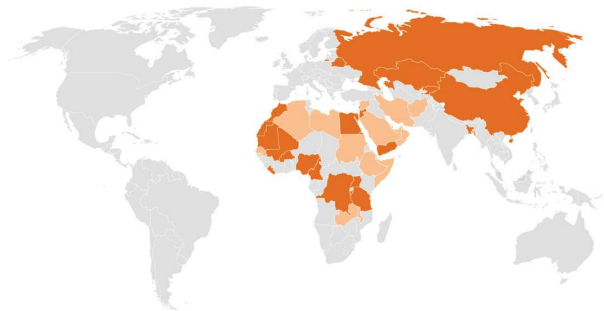
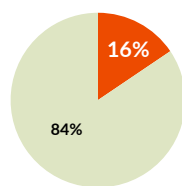


- Political rallies
- Media
- Political rallies (foreigners)
- Media (foreigners)

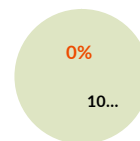
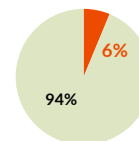
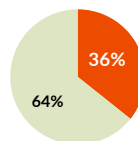
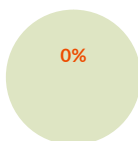
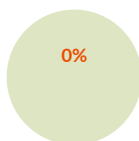
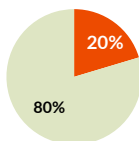
Legal Barriers to the Registration or Operation of Sexual Orientation-Related CSOs

Highlights

41 UN Member States
21% UN Member States



AFRICA	LAC	NORTH AMERICA	ASIA	EUROPE	OCEANIA
20 / 54	0 / 33	0 / 2	18 / 42	2 / 48	1 / 14



Introduction

The ability of sexual orientation-related (SOR) civil society organisations (CSOs) to formally register and operate in a country allows them to more effectively serve and advocate for SOR issues.

Registration refers to the ability of organised groups to be recognized as independent legal entities under the law, which would allow them to receive funding and conduct their activities formally. In this section, a SOR CSO is defined as one that is *explicitly* sexual orientation-related, whether in its name or registration documents. While some NGOs may achieve registration by using non-explicit names or descriptions (e.g. as “human rights” or “sexual health” groups), they would not be regarded as SOR CSOs for the purpose of ascertaining the existence of legal barriers to registration.

Additionally, even if SOR CSOs may be able to get formal registration, they may also be prevented from effectively conducting their activities and advocacy. In this section we also include States with laws that may seriously interfere or obstruct the work of SOR CSOs. This may include legal restrictions on funding or the types of activities that are permitted.

What does International Human Rights Law say?

Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation, gender identity, gender expression or sex characteristics.

Persons may form and have recognised, without discrimination, associations based on sexual orientation, gender identity, gender expression and sex characteristics, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations, gender identities and expressions and sex characteristics.

Yogyakarta Principle 20

Methodology Note

Mapping the legal barriers to the registration or operation of sexual orientation-related civil society organisations can be quite challenging. Unlike other laws, which may be more straightforward in their wording or in its effects, the barriers that usually prevent the registration or operation of organisations can be more difficult to trace in the abstract.

Therefore, in order to confirm the existence of a legal barrier, additional information needs to be gathered with regard to the official response or explanation given to a failed attempt to register an organisation. In this regard, this section does not pretend to be exhaustive. Other countries with legal barriers may be included if more information becomes available.

In this section ILGA lists States in two tiers:

- **TIER 1: confirmed legal barriers.**

ILGA has found that there may be an explicit prohibition against SOR activities or associations, where the law specifically forbids SOR NGOs from registering. Although this kind of prohibitions exist, they are quite rare.

Most cases include countries with NGO laws that prohibit the registration of groups that engage in illegal, immoral or “undesirable” activities or purposes. These provisions may be interpreted to prohibit SOR NGOs, what is often the case in countries where consensual same-sex sexual acts are criminalised. Tier 1 countries are those for which ILGA was able to corroborate that local groups have been actually denied registration of a SOR CSO based on a provision of law. Reference to the source in which the rejection was documented is always provided.

- **TIER 2: legal barriers very likely to exist.**

This tier includes countries for which ILGA was not able to find evidence of official rejection but where criminalisation of same-sex intimacy, restrictive NGO laws and generalised hostility (state-sponsored or otherwise) make it very unlikely that a request for registration will be accepted.

Lack of evidence of official rejection can be attributed to various reasons. First, in several countries no SOR CSO or civil society groups are known to exist on the ground. In others, for various reasons (exposure, governance, interference, cost, etc.), groups expressly choose not to pursue NGO status, and opt for other creative strategies to be able to operate at the policy level.

For example, in countries with the death penalty or harsh penalties for same-sex consensual acts, where activists may find it too dangerous even to organise or come out, it is highly likely that any attempt at registration will be denied. Additionally, when the legal terminology used to criminalise same-sex intimacy is the same or similar to that used in the provisions on CSO registration, the likelihood of a legal barrier increases.

Additionally, as most laws on NGOs and associations prohibit the registration of organisations with “illegal purposes”, the criminalisation of same-sex activity can be indicative of a legal barrier to register a SOR CSO. However, this cannot be taken as a hard and fast rule given that in many countries that still criminalise, local courts have argued that advocating for the rights of LGBT people cannot be equated with the sexual acts that fall under sodomy laws. Therefore, not every criminalising country is included in this second tier.

Africa (12)

TIER 1: CONFIRMED LEGAL BARRIERS				
1		Burkina Faso	2015	Article 16 of Law 064-2015/CNT on freedom of association allows authorities to reject the registration of groups that are based on a cause or object that is “illicit, or contrary to laws and good morals”. Repeated attempts by LGBT organizations to register with the Ministry of Territorial Administration, Decentralization, and Security were not approved though no explanation was provided for the refusals.¹
2		Burundi	1992	Decree-Act No. 1/11 of 18 April 1992² allows the authorities to deny registration when the object of the association is contrary to the law, public order or morality.³ Activists have reported being unable to register their groups except when they focus on HIV/AIDS issues.⁴
3		Cameroon	1999	Law no 99/014 of 22 of December 1999⁵ regulates NGOs in Cameroon, which are required to pursue aims that are in the “public interest”.⁶ Groups report that they face obstacles in the process of obtaining legal recognition and some groups have had to exclude any reference to LGBT people to become legally registered.⁷
4		Democratic Republic of Congo	2001	Article 3 of the Decree-Law No. 004 of 20 July 2001 requires organisations seeking registration to undergo a two-tiered process, with legal personality granted by the Minister of Justice after a favourable opinion is received from the ministry responsible for the sector in which the organization is engaged. According to a joint submission by 6 SOR NGOs to the 2017 UPR, most organisations have been denied registration when they make reference to LGBT persons in their constitutions.⁸
5		Egypt	1964 2017	Article 14(2) of The Law of Associations and Other Foundations Working in the Field of Civil Work (Law No. 70 of 2017) prohibits associations from any “activities that result in destabilizing the national unity, national security, public law and order, and public morals”. As a result of hostile state and social attitudes, groups have not been able to register their organisations officially and often have to work secretly and anonymously to avoid state persecution.⁹

¹ ISHR, *Briefing Paper for Universal Periodic Review: The Situation of Human Rights Defenders in Burkina Faso*, October 2017.

² No online text of law could be located.

³ [Report of the Special Rapporteur on the situation of human rights defenders on his mission to Burundi](#), A/HRC/31/55/Add.2, 30 December 2015, para 30.

⁴ MOLI et al., *The Status of Lesbian, Gay, Bisexual and Transgender Rights in Burundi: A Shadow Report* (2014), 20; Marc Epprecht, “Sexual Minorities, Human Rights, and Public Health Strategies in Africa” *African Affairs* 111, 443 (2012): 223–243.

⁵ No online text of law could be located.

⁶ “Country Reports: Sub-Saharan Africa” *The International Journal of Not-for-Profit Law* 2, no 3 (March 2000).

⁷ Acodevo et al, *The Violations of the Rights of Lesbian, Gay, Bisexual, and Transgender Individuals in Cameroon* (2017), 14.

⁸ MOPREDS et al, *Human Rights Violations Against LGBT People in the Democratic Republic of the Congo (DRC)* (2017), 16.

⁹ MS Mohamed, “Sexuality, Development and Non-conforming Desire in the Arab World: The Case of Lebanon and Egypt”, *Sexuality, Poverty, and Law Evidence Report No 158*, Institute of Development Studies, October 2015; “Underground LGBTQ Group Defies Rough Egyptian Reality” (webpage), *Arab Foundation for Freedoms and Equality* (website), March 29, 2016.

6	 Liberia	1977	Section 21(1) of the Associations Law of 1977 provides that a non-for-profit corporation may be formed for “any lawful purposes”. In November 2016, the Trans Network of Liberia (TNOL) sought registration as a legal entity with the Liberia Business Registry but was refused on the basis that its articles of incorporation include activity which is not allowed in Liberia.¹⁰
7	 Mali	2004	Article 4 of the Law on Associations (Law No. 04-038 of 5 August, 2004) prohibits the recognition of associations that are based on a purpose that is contrary to law and morality. In June 2005, the governor of the District of Bamako cited this law to refuse official recognition of a gay rights association.¹¹
8	 Mauritania	1964	Article 3 of Act No. 64-098 of 9 June 1964 on associations¹² limits the freedom to legally engage in activities unless prior authorisation has been granted from the Ministry of the Interior. A request for official recognition of the Nouakchott Solidarity Association, the country’s only LGBT group, has been denied by local authorities.¹³
9	 Morocco	1958 2005	Article 3 of the Decree Regulating the Right of Association (Decree 1-58-376 of 1958) prohibits associations from engaging in activities that, <i>inter alia</i>, “breach the laws or public morals” or “offend Islam”. Further amendments to the 1958 law were made in Decree 2-04-969 of 2005, which include prohibitive provisions, such as capacities of the association at start-up. Akaliyat, a Moroccan organization, attempted to register in 2016 but authorities refused even to take the application and hustled those applying out of the registration office.¹⁴
10	 Nigeria	2013	Article 4(1) of Nigeria’s Same-sex Marriage (Prohibition) Act prohibits “the registration of gay clubs, societies and organisations, their sustenance, processions and meetings”. Articles 5(2) and (3) impose a 10-year prison sentence on anyone who “registers, operates or participates in gay clubs, societies organization” or “supports” the activities of such organisations. In 2018, a group called “Lesbian Equality and Empowerment Initiatives” lost their appeal challenging the refusal of the Corporate Affairs Commission (CAC) to register them under the Companies and Allied Matters Act.¹⁵ The judge held that the group’s name was “in collision with an existing and operational law”, referring to the Same-sex Marriage (Prohibition) Act).

¹⁰ Stop AIDS in Liberia et al, “[Human Rights Violations Against Lesbian, Gay, Bisexual and Transgender \(LGBT\) People in Liberia](#)” (2018), 6.

¹¹ United States, Department of State, [Mali 2006 Human Rights Report](#) (2007).

¹² No online text of law could be located.

¹³ “[Germany keeps blocking activist training — this time for a Mauritanian](#)”, *Erasing 76 Crimes*, 20 February 2017.

¹⁴ “[Audacity in Adversity: LGBT Activism in the Middle East and North Africa](#)”, *Human Rights Watch (website)*, 1 May 2018.

¹⁵ Ikechukwu Nnochiri, “[Court throws out suit seeking registration of lesbian group](#)”, *Vanguard News (Nigeria)*, 18 November 2018.

11	 Uganda	2016	Section 30(1)(a) of the Non-Governmental Organizations Act states that an "organisation shall not be registered under this Act, where the objectives of the organisation as specified in its constitution are in contravention of the laws of Uganda". Sexual Minorities Uganda's (SMUG) application for registration was rejected on the ground that its name and objectives were unacceptable because same-sex sexual relations were criminalised in the country.¹⁶ They sued the Uganda Registration Services Bureau in 2016 and the judgment is pending.¹⁷
12	 Zambia	1958	Section 8 of the Societies Act 1958 empowers the Registrar of Societies to refuse to register any society that is prejudicial to or incompatible with the peace, welfare or good order in Zambia. In 1998, the Registrar of Societies refused to entertain activists who tried to register their group, Lesbians Gays and Transgender Association (LEGATRA), and said that he could not register the group "any more than I could a Satanic organisation".¹⁸ While there are several LGBTI human rights organisations, they operate underground and strategically negotiate the dangerous legal landscape.¹⁹ In 2016, several UN Special Procedures²⁰ expressed concern regarding undue delays, the subsequent refusal to register and arrests of civil society and defenders in the registration of the Engender Rights Centre for Justice on grounds of "soliciting for immoral purposes".²¹
TIER 2: LEGAL BARRIERS VERY LIKELY TO EXIST			
13	 Algeria	2012	The Law on Associations (Law 12-06 of 2012) affords the government broad discretion to refuse to register an association with an object that is contrary to "good mores" (<i>bonnes mœurs</i>). The title of the section of the Penal Code that criminalises "homosexual acts" uses the same terminology. The law also imposes heavy fines and criminal penalties for members or leaders of informal associations.²² Local LGBT groups have reported that gathering publicly or registering an organisation under this legal framework is impossible.²³ Human rights activists have also expressed the fear that supporting or advocating rights of LGBT people will "result in the immediate withdrawal of accreditation".²⁴

¹⁶ "SMUG v URSB Returns to High Court on 28 April 2017", *Sexual Minorities Uganda (webpage)*, 24 March 2017.

¹⁷ "Update on SMUG v URSB Court Case" *Sexual Minorities Uganda (webpage)*, 29 May 2017.

¹⁸ Scott Long et al, *More Than a Name: State-Sponsored Homophobia in Southern Africa* (Human Rights Watch, 2003), 46.

¹⁹ Lily Phiri, *Canaries in the coal mines: an analysis of spaces for LGBTI activism in Zambia* (The Other Foundation, 2017), 18.

²⁰ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; the Special Rapporteur on the rights to freedom of peaceful assembly and of association; and the Special Rapporteur on the situation of human rights defenders.

²¹ For more information, see [ZMB 4/2015](#).

²² The Law on Public Meetings and Gatherings (**Law 91-19 of 1990**), contributes to a repressive legal environment. Article 9 of this law 91-91 prohibits any gathering that opposes "good mores" (*bonnes mœurs*). The title of the section of the Penal Code that criminalises "homosexual acts" uses the same terminology.

²³ Alouen, *Préoccupations de l'Association Alouen concernant la Situation du Droit à la Non-Discrimination et à l'Égalité: Cas des LGBTI Algérien-ne-s* (2017); Sarah Jean-Jacques, "Gay and Lesbian Mobilisation in Algeria: the Emergence of a Movement", *Muftah*, 15 December 2014.

²⁴ *Summary of other stakeholders' submissions on Algeria*, A/HRC/WG.6/27/DZA/3, 20 February 2017, para. 15.

14	 Ethiopia	2009	In Ethiopia, Article 69 of the Charities and Societies Proclamation Law (Law No. 621/2009) prohibits the registration of any group that is contrary to “public morality” or is illegal. This has led activists in Ethiopia to believe that they cannot be legally registered though it has not been tested. ²⁵
15	 Libya	2016	Various articles within the Law of on associations and non-profit foundations of 21 April 1928 (amended 2016) could make the registration of a SOGI-based NGO virtually impossible.
16	 Malawi		In Malawi, organisations working on LGBT issues were able to receive legal status after they strategically chose to register as a human rights organisation and used non-descriptive names to avoid additional scrutiny. ²⁶ Even then, they have been faced with significant obstacles to operate: in April 2011, the Ministry of Information and Civic Education held a string of press conferences to “expose” a funding proposal for SOGI issues it had ‘unearthed’, which had been submitted to the Norwegian Embassy. The Council for Non-Government Organisations in Malawi (CONGOMA) publicly denounced LGBT activism in May 2011 after a meeting with the President. ²⁷
17	 Senegal		In Senegal, <i>Prudence</i> is the only SOR NGO to have obtained registration with explicit language on sexual minorities in their by-laws. However, they are hesitant to renew their registration, fearing it could be rescinded when the documents are resubmitted. ²⁸ Some activists have also faced police harassment though their charges for “establishing an illegal organization” were eventually overturned on appeal. ²⁹
18	 Somalia	2010	In Somalia, the danger of coming out makes it practically impossible to even attempt registration though it is highly unlikely that registration would be successful anyway. Article 10 of the Law on Welfare (or Charitable) Non-Governmental Organisations, (Law No. 43/2010) which imposes a duty on NGOs to “respect the culture and belief of the people” while Article 11 prohibits NGOs from engaging in any act that violates the country’s laws. A community group of Somali activists based in Ethiopia has not been able to attempt registration due to the dangerous climate in the country. ³⁰
19	 Sudan	2006	In Sudan, the threat of the death penalty coupled with a rigorous registration process mandated under Section 8(1) of the Voluntary and Humanitarian Work (Organization) Act, 2006 makes it highly unlikely that an SOR CSO would be registered.

²⁵ “Interview with Beki Abi of DANA Social Club, Ethiopia” (webpage), *Institute of Development Studies* (website), 24 June 2016.

²⁶ Ashley Currier and Tara McKay, “Pursuing Social Justice through Public Health: Gender and Sexual Diversity Activism in Malawi,” *Critical African Studies* 9, No. 1 (2017).

²⁷ Undule Mwakasungula, “The LGBT situation in Malawi: an activist perspective” in *Human Rights, Sexual Orientation and Gender Identity in The Commonwealth*, Corinne Lennox, Matthew Waites (eds.) (London: University of London, 2013).

²⁸ Mariam Armisen, “We Exist: Mapping LGBTQ Organizing in West Africa” (Foundation for a Just Society), 19.

²⁹ “Senegal: Nine Released, Charges Dropped”, *amfAR Website*, 29 April 2009; Robbie Corey-Boulet, “5 women arrested under Senegal’s anti-gay law”, *Yahoo News*, 13 November 2013.

³⁰ Faro, “Death hangs over Somali Queers”, *Behind The Mask* (website), 3 May 2004.

20	 Tanzania	2016	Though there are existing registered organizations working on issues related to sexual orientation, in August 2016, the justice minister announced controversial new plans to suspend the registration of any charity or non-governmental organisation that supports homosexuality.³¹ In the same year, the health ministry shut down community-based HIV programmes that served men who have sex with men.³² There has been continued threats of violence against LGBT people and a taskforce was set up in late 2018 to “hunt” LGBT people, which have forced activists to hide for their own safety.³³
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Is there more in Africa?

Mozambique	In In 2017, the Mozambique Constitutional Council ruled in favour of an LGBT advocacy group after it had been refused registration on the basis of Law on Associations (Law No. 8/91) and held that the government’s interpretation of the law violated the principle of non-discrimination under the Constitution. ³⁴
Tunisia	In May 2015, Shams became the first LGBT group to receive official authorisation from Tunisia’s interior ministry. ³⁵ In February 2016, Shams succeeded on appeal to the Administrative Court against a suspension order by the Tunisian government which accused the organisation of violating. ³⁶ The Government had argued on the basis that Shams’ aim to “defend homosexuals” was contrary to Article 3 of the NGO Law (Law No. 88/2011). Since this argument was rejected by the judiciary, it should mean that LGBT-related objectives are not any more a legal ground for refusing registration to SOR CSOs.

Latin American and the Caribbean (0)

Is there more in LAC?

Cuba	Even though the Cuban Law on Associations (Law No. 54) guarantees the constitutional right to freedom of association, the actual implementation of the law presents its nuances. The largest groups of LGBTI activism in the country, although without legal personality, work under the umbrella of the state-run National Center for Sex Education (CENESEX), and have relative autonomy to draw their bases and objectives, and even in some cases are already members of ILGA. The main limitation to the creation of new associations has to do with alignment with governmental directives. According to local sources, this is due to the attempts by the government of the United States to allocate resources to subvert the Cuban socio-political order through civil society organizations. This limitation, however, has not prevented the emergence of new associations according to local needs, such as the creation of the Information Technology Union of Cuba in 2016.
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³¹ “‘Seeds of hate’ sown as Tanzania starts LGBT crackdown”, *The Guardian*, 8 August 2016.

³² “Now Tanzania also ends vital HIV programmes targeting gay men”, *Mamba Online*, 4 November 2016.

³³ Nick Charity, “Tanzania taskforce to start ‘witch hunt’ to round up and imprison LGBT community”, *Evening Standard*, 1 November 2018.

³⁴ Constitutional Council, *Judgment No. 07/CC/2017*, 31 October 2017.

³⁵ Roua Khelifi, “Controversy in Tunisia over new gay association”, *The Arab Weekly*, 12 June 2015.

³⁶ Tunisian Coalition for the Rights of LGBTQI People, *Stakeholders Report to Universal Periodic Review of Tunisia* (2017), 8.

Haiti

A pending bill aims to prohibit public demonstrations of “support for homosexuality”, which would severely restrict the freedom of association and speech among LGBT activists.³⁷ In 2016, the Massimadi arts and film festival that celebrates Haiti’s Afro-Caribbean LGBT community was shut down by the commissioner of Port-au-Prince on the basis that he was protecting public morals.³⁸

Asia (18)**TIER 1: CONFIRMED LEGAL BARRIERS**

- | | | | |
|---|---|----------------------|---|
| 1 |  Bangladesh | 1860 | Only specific types of societies may be registered under the Societies Registration Act (1860) pursuant to Section 20 and activists have reported that registration of their groups have been rejected on the basis of the criminalisation of same-sex sexual conduct. ³⁹ In addition, due to threats to the safety of activists by state officials and citizens, activists have been unable to complete the registration process which requires them to meet with government officials. ⁴⁰ |
| 2 |  China | 1998
2016
2017 | <p>Article 11 of the Interim Regulations on the Registration and Administration of Private Non-enterprise Units confers a discretion on the relevant authorities to approve the registration of associations, of which one ground is violation of Article 4. Article 4 specifies that such groups shall not endanger the “social interest” as well as the lawful rights and interest of other organizations and citizens, and shall not breach “social ethics” and “morality”. While some NGOs have been successful in registering, others have reported being rejected because their names or activities explicitly referred to issues on sexual orientation.⁴¹</p> <p>Furthermore, under the Charities Law (2016) only charitable organisations certified by the government are permitted to conduct public fundraising and uncertified individuals may be severely penalised for doing so. Also, in January 2017 the Law on the Management of the Activities of Overseas NGOs within Mainland China came into force, severely impeding funding capabilities.</p> <p>These restrictions severely restrict the ability of CSOs, particularly those that have had their registration rejected, to raise funds and organise.⁴² In January 2019, the Municipal Affairs Bureau in the southern metropolis of Guangzhou shut down two organisations for “failure to register properly” by not explicitly declaring their objectives and activities related to sexual orientation.⁴³</p> |

³⁷ “In Haiti, Slight Progress for LGBT Rights Seen as Victory”, VOA, 14 August 2018.

³⁸ “Haiti LGBT festival cancelled due to threats”, BBC World, 28 September 2016.

³⁹ United States Department of State, *Bangladesh 2017 Human Rights Report* (2017).

⁴⁰ Roopbaan, *Submission to 30th Universal Periodic Review* (2018), 6.

⁴¹ Outright Action International, *The Global State of LGBTIQ Organising: The Right to Register* (2018), 31.

⁴² “China’s Complicated LGBT Movement”, *The Diplomat*, 1 June 2018.

⁴³ Rik Glauert, “China shuts down two LGBTI organizations”, *Gay Star News*, 11 January 2019.

3	 Jordan	2008	Article 3 of the Law of Societies (Law No. 51 of 2008 as amended by Law No. 22 of 2009) prohibits the registration of any society which has illegal goals or purposes. In 2009, a registration application was rejected and a ministry official explained to the media that if the government authorized such an organization, it “would violate ‘public morals’ and ‘decency’.”⁴⁴
4	 Kazakhstan	1996	Article 5 of the Law on Public Assembly (1996) states that the formation and operation of public association infringing the health or moral principles of the citizens, as well as the activity of unregistered public associations are not allowed. Feminita, a queer feminist collective, has been rejected multiple times since 2015 allegedly because of their focus on LGBT rights.⁴⁵ According to an Amnesty International report, there is no registered SOR CSO in operation as “obtaining registration for an NGO is a bureaucratically arduous process, and registration is often refused on spurious grounds.”⁴⁶
5	 Kyrgyzstan	1999	Article 12 of the Law on Non-commercial Organizations states that non-commercial organizations shall have the right to conduct “any type of activity which is not prohibited by Law”. While there are several registered groups,⁴⁷ the Ministry of Justice of the Kyrgyz Republic denied registration to the public association Alliance and Social Services of Gays and Lesbians Pathfinder in January 2011 because it deemed that the “designation of the words ‘gay and lesbian’ in a name of the legal entity promotes the destruction of moral norms and national traditions of the people of Kyrgyzstan”.⁴⁸
6	 Lebanon	1909	The Ottoman Law on Associations prohibits organisations that are founded on an “unlawful basis” and requires notification to the government upon the founding of an organisation, which will respond with a receipt that officially recognises the organisation. However, an LGBT group which applied for registration in 2004 never received any receipt though subsequent groups which did not describe themselves using any term related to sexual orientation or gender identity were successfully recognised.⁴⁹ In May 2018, Lebanese General Security officers attempted to shut down a conference on LGBT Rights organised by the Arab Foundation for Freedoms and Equality (AFE) on the basis that it “promoted homosexuality” and drug abuse.⁵⁰

⁴⁴ Aaron Magid, “Little protection for gays in Jordan”, *AL-Monitor*, 12 August 2014.

⁴⁵ “Kazakhstan’s Queer Feminist Uprising is Now”, *Queer Here*, 5 October 2015.

⁴⁶ Amnesty International, *Less Equal: LGBTI Human Rights Defenders in Armenia, Belarus, Kazakhstan, and Kyrgyzstan* (2017), 29.

⁴⁷ *Id.*, 33.

⁴⁸ Kyrgyz Indigo and Labrys, *Alternative Report on the Implementation of the Provisions of ICCPR Related to LGBT People in Kyrgyzstan*, (2014), 16.

⁴⁹ Outright Action International, *The Global State of LGBTIQ Organising: The Right to Register* (2018), 36.

⁵⁰ “Lebanon: Security Forces Try to Close LGBT Conference”, *Human Rights Watch (website)*, 4 October 2018.

7	 Malaysia	1966	Under Section 7(3)(a) of the Societies Act 1966, the Registrar of Societies shall refuse to register a local society where it appears that such a local society is unlawful or is likely to be used for “unlawful purposes”. In 2017, LGBTI group Pelangi Campaign’s application for registration was rejected without any reason and its appeal was also rejected in 2018, citing section 7 of the Act, which empowers the Registrar of Societies to reject applications without the need to provide any reasons.⁵¹
8	 Singapore	1966	Section 4(2)(b) of the Societies Act allows the Registrar of Societies to refuse to register a society that it considers to be “likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Singapore”. A gay advocacy group, People Like Us, was not allowed to register in 1997 and 2004, and the reason given in 2004 was on the basis of that provision.⁵²
TIER 2: LEGAL BARRIERS VERY LIKELY TO EXIST			
9	 Afghanistan	2005	Article 7 of the Law on Non-Governmental Organizations and article 5 of the Association Law prohibit groups from engaging in activities that are illegal or against the “national interest”. Reports suggest that LGBT advocates largely function underground out of fear of persecution due to the threat of severe punishment.⁵³
10	 Bahrain	1989	Article 3 of Law No. 21 of 1989 stipulates that a group that is deemed to “contradicts the public order or moral” or undermines the “social order” is considered illegal. There are many restrictions and conditions set and as decision-making on what construes these is dispersed across government agencies, it is highly likely a SOGI-based application would be instantly rejected.
11	 Kuwait	1962	Article 6(4) of the Law on Clubs and Public Welfare Societies (Law No. 24 of 1962) states that “societies and clubs are not allowed to seek achieving any purpose that is illegal or defies ethics or related to purposes stipulated in the statute”. NGO registration is mandatory under articles 2 and 3 and an implausible prospect for SOR CSOs groups.
12	 Iran	1979 2005	Article 8 of the Executive Regulations Concerning the Formation and Activities of Non-Governmental Organizations (2005) provides that the organisation’s constitution and activities must not be in violation of the Constitution. Article 26 of the Constitution of the Islamic Republic of Iran (1979) provides for the freedom of association provided that they do not violate “Islamic standards” and “the basis of the Islamic Republic”.

⁵¹ The Coalition for SOGIESC Human Rights in Malaysia, *Stakeholder Report on the Status of Human Rights of LGBTI Persons in Malaysia* (2018), 13.

⁵² Stephan Ortmann, *Politics and change in Singapore and Hong Kong: Containing contention* (Routledge, 2009), 154.

⁵³ “Afghanistan: Events of 2016”, *Human Rights Watch Website*; Frud Bezhan, “Fake Life: Being Gay In Afghanistan”, *RadioFreeEurope RadioLiberty*, 12 September 2017.

13	 Oman	2000	Law No. 14 of 2000 confers the Ministry of Social Affairs and Labour the power to deny registration when it considers that the services to be provided by the association “are not needed” (or for “any other reasons”). ⁵⁴ Though there are no SOR CSOs in operation in Oman, it is likely that even if there was one, it would be refused registration in light of the hostile environment in the country.
14	 Qatar	2004	Articles 1 and 35 of the Law on Private Associations and Foundations (Law No. 12 of 2004) disallow associations from being “involved in political issues”, as human rights advocacy is often framed as. This limited margin of action coupled with the harsh penalties imposed to consensual same-sex sexual acts makes it very unlikely that a SOR NGO will get formal registration.
15	 Saudi Arabia	2016	Article 8 of the Civil Society Associations and Organisations Law (Royal Decree No. M/8, 19.2.1437H) prohibits the establishment of an association if its charter conflicts with the provisions of Shariah, “public policy” or “public morality”.
16	 Syria	1958	Various articles of Law No. 19/1958 (amended 1969) allow the Ministry to appoint or remove board members, disallow political participation, foreign funding, and allow the registration to be rescinded at will. Further, article 35 allows any Board decision to be suspended “if it deems it to be against the law, the public order or morals”. This legal framework appears to pose severe barriers to the formal registration and the operation of a SOR NGO.
17	 United Arab Emirates	2008	Besides the possible imposition of the death penalty under Shariah Law, local Penal Codes impose harsh penalties to consensual same-sex sexual acts. ⁵⁵ Moreover, Federal Law No. 2 (2008) confers broad powers of supervision (including sending representatives to meetings) and heavily restricts the activities that organisations can carry out without receiving first permission from the Ministry of Social Affairs. This legal framework appears to pose severe barriers to the formal registration of a SOR NGO.
18	 Yemen	2001	Although Article 58 of the Constitution asserts the rights on citizens to form associations, the Penal Code in force imposes the death penalty for consensual same-sex sexual acts. Such provision coupled with the hostile situation on the ground makes it very unlikely that a request to formally register an organisation to advocate on issues of sexual orientation will be accepted.

Is there more in Asia?

Mongolia	The first LGBT NGO in Mongolia was denied registration in 2007 and was only granted legal status after domestic and international pressure in 2009. ⁵⁶
North Korea	Civil society human rights activity of the type that would produce a SOGI-based NGO does not appear to be possible in North Korea. However, the amended Penal Code of 2009 does not refer to “illegal societies” as did the 1950 Code.

⁵⁴ “Introduction: Civil Society and Development in the Arab World”, *Global Trends in NGO Law* 1, No 4 (2010).

⁵⁵ For more information, see the entry for the United Arab Emirates in the Criminalisation section of this report.

⁵⁶ Anne Leach, “Coming out for LGBT rights in outer Mongolia”, *Gay Star News*, 26 April 2013.

Europe (2)

TIER 1: CONFIRMED LEGAL BARRIERS			
1	 Belarus	1994	Article 7 of Law on Public Associations prohibits the operation of unregistered associations. Attempts to register LGBT groups have been unsuccessful.⁵⁷ Activists have also faced harassment by State officials after submitting their registration application.⁵⁸ The head of Gay Belarus, fearing for his personal safety, was forced to flee the country with his family in 2013.⁵⁹
2	 Russian Federation	2012	The “Foreign Agent” legislation has been employed to fine several LGBT organisations, which activists have criticised for discrediting the work that they carry out.⁶⁰ Being labelled as a “foreign agent” also imposes further restrictions on funding and introduces bureaucratic burdens like extensive audits. It also confers supervisory powers on the state to interfere in the organisation’s affairs.

Is there more in Europe?

Turkey

Reflecting increasing tensions, in 2013, a Turkish court rejected an application by the authorities to shut down an organisation on the basis that it included a clause stating that it “may work in the field of sexual orientation”.⁶¹

Oceania (1)

TIER 1: CONFIRMED LEGAL BARRIERS			
1	 Fiji	1978	LGBT groups cannot be registered under the Charitable Trusts Act due to the limited scope of what constitutes a “charitable purpose”. In 2014, several LGBT advocacy groups called on the government to revise the law to allow LGBT groups to register as legal entities.⁶²

⁵⁷ GayBelarus and Sexual Rights Initiative, *Joint Submission by GayBelarus and Sexual Rights Initiative for 22nd Session of Universal Periodic Review of Belarus* (2015), 5.

⁵⁸ “Attempt To Register A LGBT Organisation in Belarus Provokes Police Raids”, *Belarus Digest*, 6 February 2013.

⁵⁹ Vital Tsyhankou and Aleh Hruzdilovich, “Pressure Mounts on Belarusian LGBT Community,” *Radio Free Europe - Radio Liberty*, 10 December 2013.

⁶⁰ “Russian member organisation fined as ‘foreign agent’”, *LGL National LGBT Rights Organisation Website*, 9 March 2015.

⁶¹ “Ekogenç’s Closure Case Ends: Work in the area of sexual orientation is not “contrary to morality”, *LGBTI News Turkey*, December 19, 2014.

⁶² Oceania Pride et al, “UN Universal Periodic Review – Fiji National Civil Society Joint Submission” (2014), 2.

GLOBAL OVERVIEW

PROTECTION

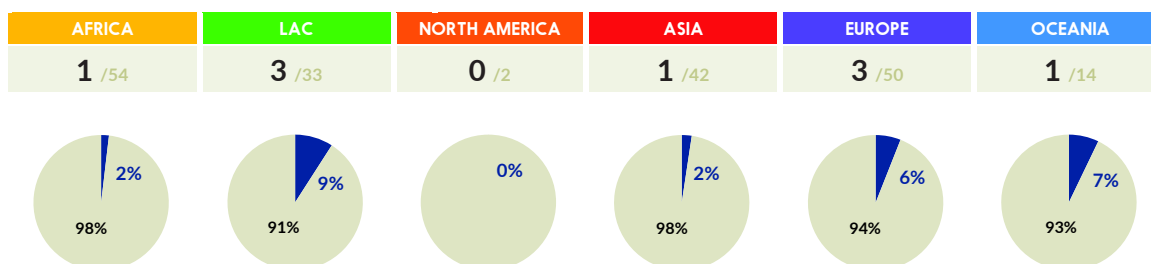
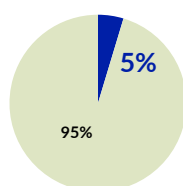
STATE-SPONSORED HOMOPHOBIA 2019



Constitutional Protection against Discrimination based on Sexual Orientation

Highlights

9 UN Member States
5% UN Member States



Introduction

Constitutions are the legal texts that collect the most fundamental legal principles of any given State. They usually set the organizational basis of the government and establish general rules that laws and regulations cannot contravene.

Additionally, most constitutions contain a list of fundamental rights and non-discrimination provisions. These provisions may be written in “broad” terms to apply to “all” people or may list a number of protected characteristics which cannot be the basis of discrimination in law (*de jure*) or in practice (*de facto*).

A few States have explicitly included the term “sexual orientation” in their non-discrimination clauses to protect people against discrimination based on that characteristic. This also means that the entire legal framework should abide by that legal principle. However, this is not always the case. Local courts can also read in “sexual orientation” into those general equality provisions, thus triggering inclusion of the term in State practice and in law.

In the following list, only those constitutions that spell out the term “sexual orientation” in an unambiguous way are listed.

What does International Human Rights Law say?

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination whether or not the enjoyment of another human right is also affected.

The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. [...]

Yogyakarta Principle 2

Africa (1)

1		South Africa	1994 1996	Prohibition of sexual orientation discrimination was first included at Section 8 of the Interim Constitution that came into force in April 1994, and was carried through Section 9(3) of the Constitution of South Africa, 1996 .
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Latin American and the Caribbean (3)

1		Bolivia	2009	Article 14 of the Constitution of Bolivia prohibits discrimination based on sexual orientation (among other grounds).
2		Ecuador	1998	Article 11(2) of the Constitution of Ecuador prohibits discrimination based on, <i>inter alia</i> , sexual orientation. Furthermore, the Constitution contains several other relevant provisions: Article 66(9) enshrines the right of every person to make free, informed, voluntary and responsible decisions with regard to their sexuality, life and sexual orientation; article 66(11) protects the rights of every person to the confidentiality of information on their sexual life; article 83(14) establishes as a “duty” and a “responsibility” of every Ecuadorian to respect and acknowledge diverse sexual orientations.
3		Mexico	2011	Article 1 of the Political Constitution of the United Mexican States (federal constitution) prohibits discrimination based on “sexual preferences”. Several State Constitutions also prohibit such discrimination: Campeche (Art. 7, 2015); Chihuahua (Art. 4, 2013); Coahuila (Art. 7, 2013) (Art. 4, 2013); Colima (Art. 1; 2012); Durango (Art. 5, 2013); Guanajuato (Art. 1, 2015); Michoacán (Art. 1, 2012); Morelos (Art. 1bis, 2016); Nuevo Leon (Art. 1, 2016); Oaxaca (Art. 4, 2016); Puebla (Art. 11, 2011); Querétaro (Art. 2, 2016); Quintana Roo (Art. 13, 2010); San Luis Potosí (Art. 8, 2014); Sinaloa (Art. 4bis, 2013); Sonora (Art. 1, 2013); Tlaxcala (Art. 14, 2012); Veracruz (Art. 4, 2016); Yucatan (Art. 2, 2014) and Zacatecas (Art. 21, 2012).

Is there more in Latin America and the Caribbean?

Argentina

The Constitution of **Argentina** does not contain an explicit prohibition of discrimination based on sexual orientation. However, such prohibition is contemplated in the Constitution of the **Autonomous City of Buenos Aires** (Art. 11, 1996).

Brazil

The Constitution of **Brazil** does not contain an explicit prohibition of discrimination based on sexual orientation. However, several jurisdictions within the country do. These include the Constitutions of the States of **Alagoas** (Art. 2.1; 2001), **Federal District** (Art. 2.5; 1993), **Mato Grosso** (Art. 10.3; 1989), **Pará** (Art. 3.4; 2007), **Santa Catarina** (Art. 4.4; 2002) and **Sergipe** (Art. 3.2; 1989).

North America (0)

Is there more in North America?

Canada

Constitutional protection against discrimination based on sexual orientation was introduced in paragraph 15(1) of the **Canadian Charter of Rights and Freedoms** by a 1995 decision issued by the Supreme Court of Canada in *Egan v. Canada*.

Asia (1)

1	 Nepal	2015	Section 18(3) of the Constitution of Nepal specifically explains that the State shall not discriminate against, <i>inter alia</i> , “sexual minorities”.
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Europe (3) + Kosovo

	Kosovo	2008	Article 24(2) of the Constitution of Kosovo establishes that no one shall be discriminated against on grounds of their sexual orientation, among other grounds.
1	 Malta	2014	Article 32 of the Constitution of Malta entitles the individual fundamental rights and freedoms regardless of sexual orientation, and Article 45(3) specifies such protection from discrimination.
2	 Portugal	2005	Article 13(2) of the Constitution of Portugal concerning principles of equality, states that no one shall be “privileged, favoured, prejudiced, deprived of any right or exempted from any duty” on the basis of sexual orientation.
3	 Sweden	2003	Article 2 of the Constitution of Sweden mandates all organs of the State to exercise and promote equality and non-discrimination in health, employment, housing, education, and social security on the basis of sexual orientation.

Is there more in Europe?

Switzerland

Article 8 of the Swiss Constitution includes the expression “way of life” as a prohibited ground of discrimination. This expression has been interpreted as encompassing “sexual orientation”.¹

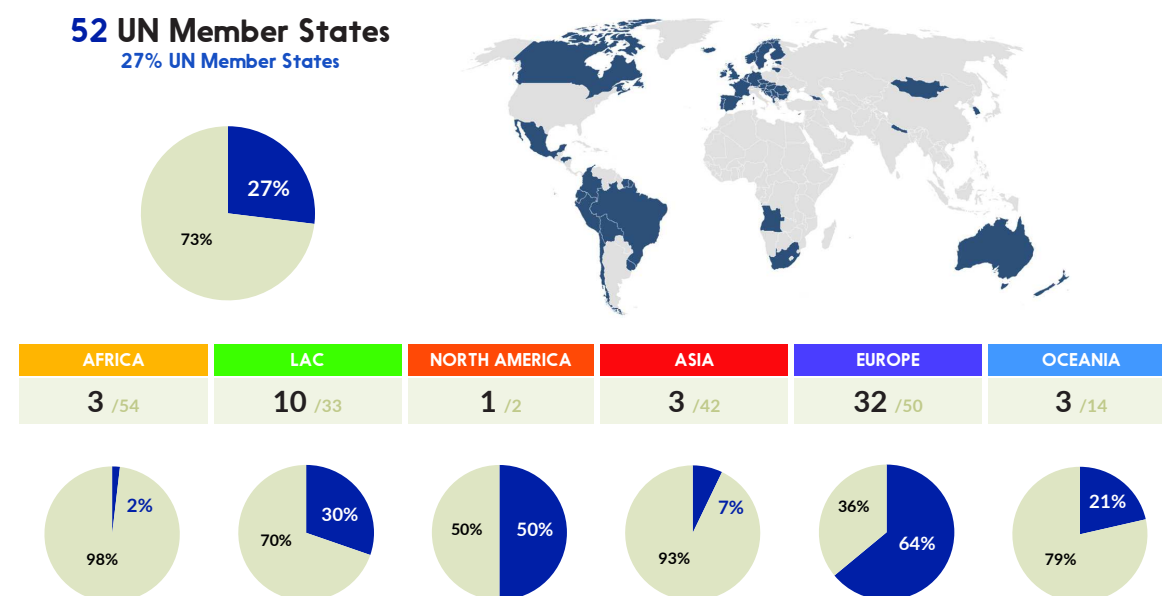
¹ Alecs Recher, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity Legal Report: Switzerland* (2010), 8.

Oceania (1)

1		Fiji	1997	Section 38(2) of the Constitution of Fiji (1997) prohibited discrimination based on a person’s “actual or supposed personal characteristics or circumstances” including sexual orientation (among other grounds). This Constitution was repealed in 2009. In 2013, the prohibition was kept under section 26(3)(a) of the Constitution of Fiji (2013).
			2013	

Broad Protections against Discrimination based on Sexual Orientation

Highlights



Introduction

Legal protections against discrimination are a key element in the human rights legal framework of every country. They serve to ensure that the principle of equality before the law is fully observed and provide remedies to victims of acts of discrimination.

Despite the fact that the 1948 Universal Declaration of Human Rights was categorical in that “every person” is born free and equal in dignity and in rights, international and domestic non-discrimination clauses have had to enumerate the grounds on which unfair distinctions cannot be made. These grounds usually reflect the reasons why people have been historically discriminated (i.e., race, religion, nationality, language, sex/gender, etc.). As these grounds can vary greatly and can be difficult to enumerate exhaustively, equality laws generally contain “open clauses” (generally phrased “or any other ground”) into which other grounds can be read.

However, in many contexts, there is strong resistance against including “sexual orientation” in those open clauses. Therefore, explicit protection on ground of sexual orientation becomes of key importance to effectively protect people from discrimination.

What does International Human Rights Law say?

Everyone is entitled to enjoy all human rights without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

Everyone is entitled to equality before the law and the equal protection of the law without any such discrimination. [...]

The law shall prohibit any such discrimination and guarantee to all persons equal and effective protection against any such discrimination. [...]

States shall adopt appropriate legislative and other measures to prohibit and eliminate discrimination in the public and private spheres on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

Yogyakarta Principle 2

Africa (3)

1		Angola	2019	Section 197 of the Penal Code criminalises acts of discrimination based on sexual orientation with regard to the provision of goods and services, employment and obstructing economic activities. ¹
2		Mauritius	2008	Sections 5, 6, 7 and 8 of the Equal Opportunities Act 2008 establish general rules on discrimination based on the “status” of the aggrieved person. Section 2 includes “sexual orientation” in the definition of “status” and defines it as “homosexuality (including lesbianism), bisexuality or heterosexuality”. Section 3(2) establishes that the Act applies to employment, education, qualifications for a profession, trade or occupation, the provision of goods and services, facilities or accommodation, among others.
3		South Africa	2000	Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 includes sexual orientation as one of the prohibited grounds of discrimination.

Latin American and the Caribbean (10)

1		Bolivia	2010	Article 5 of the Law against Racism and All Forms of Discrimination (Law No. 45 of 2010) prohibits discrimination on the ground of sexual orientation (among others). Furthermore, article 281sexies of the Criminal Code (as amended by said Act) criminalises any act of discrimination based on, <i>inter alia</i> , sexual orientation and aggravates the penalty if it is committed by public servants or by private individuals providing public services.
2		Brazil	1998 2015	At the federal level, there is no law prohibiting discrimination on the basis of sexual orientation in broad terms. However, around 70% of the population resides in jurisdictions where local laws provide for such protection. Several jurisdictions have enacted laws banning discrimination based on sexual orientation with varying levels of protection: Amazonas (2006); Distrito Federal (2000); Espirito Santo (2014); Maranhão (2006); Mato Grosso do Sul (2006); Minas Gerais (2002); Pará (2007); Paraíba (2003); Piauí (2004); Rio de Janeiro (2015); Rio Grande do Norte (2007); Rio Grande do Sul (2002); Santa Catarina (2003); São Paulo (2001); as well as a number of cities such as Fortaleza (1998), Recife (2002) and Vitoria (2014).
3		Chile	2012	Law No. 20,609 (on the adoption of measures against discrimination) ² affords protection against discrimination based on sexual orientation (among other grounds) with regard to any constitutional right.

¹ The final version of the 2019 Penal Code has not yet been published. The number of the section may differ in the final version. The draft that was approved can be accessed [here](#).

² This law is informally referred to as “Zamudio Law” in honour of Daniel Zamudio, a young gay man, who was brutally tortured and murdered because of his [sexual](#) orientation in Santiago de Chile in 2012.

4		Colombia	2011	Article 134A of the Criminal Code (as amended by Act No. 1.482 of 2011) criminalises acts of discrimination based on sexual orientation (among other grounds). Articles 136C(3) and 136C(4) aggravate the penalty if such are committed by public servants or while providing public services.
5		Ecuador	1998	Even though there is no national law against discrimination based on sexual orientation, the constitutional prohibition of such discrimination applies to all rights and therefore offers broad legal protections.
6		Honduras	2013	Article 321 of the Criminal Code (as amended by Act No. 23 of 2013) criminalises acts of discrimination based on sexual orientation (among other grounds) and aggravates the penalty if they are committed by public servants.
7		Mexico	2003	Besides the constitutional prohibition of discrimination based on sexual orientation, article 1(3) of the Federal Act to Prevent and Eliminate Discrimination includes “sexual preferences” as one of the prohibited grounds of discrimination. This law applies to employment, goods and services, health, and education, among others.
8		Peru	2004 2017	Article 37(1) of the Constitutional Procedural Code establishes that the writ of <i>amparo</i> is the adequate remedy in cases of discrimination based on sexual orientation. Article 323 of the Criminal Code (as amended by Executive Order No. 1,323 of 2017) criminalises acts of discrimination on the basis of, <i>inter alia</i> , sexual orientation and aggravates the penalty if such acts are committed by public servants.
9		Suriname	2015	Article 175 of the Criminal Code (as amended by S.B. No. 44 of 2015) criminalises discrimination based on sexual orientation (among other grounds).
10		Uruguay	2004	Article 2 of the Law to combat Racism, Xenophobia and Discrimination (Law No. 17,817) includes “sexual orientation” among the prohibited grounds of discrimination. As per article 2, this law applies to all human rights and to all spheres of public life.

Is there more in Latin America and the Caribbean?

Argentina

At the federal level, there is no law against discrimination on the basis of sexual orientation in broad terms in Argentina. However, the **Autonomous City of Buenos Aires** (2015), the **Province of Río Negro** (2008) and the **City of Rosario** (1996) grant such protection.

North America (1)

1		Canada	1996	Section 3(1) of the Canadian Human Rights Act (as amended in 1996) includes “sexual orientation” as a prohibited ground of discrimination. This law applies to goods and services, employment and health, among others.
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*Is there more in North America?***United States of America**

There is no federal law proscribing discrimination based on sexual orientation in broad terms. Protections against such discrimination vary according to state³ but less than 50% of the population lives in states where such protection is offered in broad terms.

Asia (3)

1	 Mongolia	2017	Section 14(1)(1) of the Penal Code criminalises acts of discrimination based on sexual orientation. Section 14(1)(2)(3) aggravates penalties when such acts are committed by public officials.
2	 Nepal		Even though there is no law expressly prohibiting discrimination based on sexual orientation, the constitutional prohibition enshrined in Section 18(3) of the Constitution of Nepal (proscribing discrimination against “sexual minorities”) offers broad protection against discrimination.
3	 South Korea	2001	Article 30(2) of the National Human Rights Commission Act (2001) defines “unreasonable discrimination” based on sexual orientation (among other grounds) as a violation of the right to equality. This law applies to employment, provision of goods and services, education and more.

*Is there more in Asia?***Japan**

In 2018, the Tokyo Metropolitan Government enacted a law that prohibits discrimination on the basis of sexual orientation.⁴

Europe (32) + Kosovo

1	 Albania	2010	Article 5 of the Protection from Discrimination Act (Law No. 10,221) prohibits discrimination on the basis of, <i>inter alia</i> , sexual orientation, both in the public and private sectors (Article 7.1). The scope of this protection includes employment (Chapter II), education (Chapter III) and goods and services (Chapter IV), among other contexts.
2	 Andorra	2005	Article 338 of the Penal Code criminalises acts of discrimination based on sexual orientation (among other grounds) with regard to goods and services and employment, among others.

³ See “[Non-Discrimination Laws](#)”, Movement Advancement Project (MAP) Website.

⁴ “[Tokyo: New Law Bars LGBT Discrimination](#)”, Human Rights Watch (website), 8 October 2018.

3	 Austria		Each province (Burgenland, Carinthia, Salzburg, Styria, Tyrol, Upper Austria, Lower Austria, Vienna and Vorarlberg) have provisions prohibiting discrimination on grounds of sexual orientation with regard to goods and services offered by the provinces and communities, including social protection, social advantages, education and self-employment.
4	 Belgium	2003 2007	Article 4 of the Anti-Discrimination Law (2003) proscribed discrimination in the provision of goods and services, employment, economic, social, cultural and political activities and other matters, and Article 2 included sexual orientation as one of the protected categories. This law was substituted by Anti-Discrimination Law (2007). Articles 2 and 4 of the Anti-Discrimination Law (2007) ban discrimination based on, <i>inter alia</i>, sexual orientation. Article 5 determines that the prohibition applies, among other settings, to goods and services, including social protection (education) employment in the public and private spheres.
5	 Bosnia and Herzegovina	2003 2009	Article 2 of the Gender Equality Act (2003) prohibits sexual orientation discrimination, both in the public and private sectors (article 1), with regard to education (chapter IV), employment (chapter V), health (chapter VII) and other matters. Article 2 of the Act on Prohibition of Discrimination (2009) proscribes discrimination on the basis of, <i>inter alia</i>, sexual expression or sexual orientation within the private and public spheres concerning employment, education, health and goods and services, among other matters (article 6 also refers to the scope of application of the law).
6	 Bulgaria	2005	Section 4(1) of the Law on Protection Against Discrimination (supplemented by SG No. 70 of 2004) bans direct and indirect discrimination based on sexual orientation (among other grounds) in employment (Section I), education (Section II), the field of goods and services (Article 37) and more.
7	 Croatia	2009	Articles 1, 2 and 9 of the Anti-Discrimination Act prohibit direct and indirect discrimination because of sexual orientation (among other grounds) regarding employment, education, health, goods and services and other matters in the public and private sectors.
8	 Cyprus	2004	Article 6(1) of the Combating Racism and Other Forms of Discrimination (Commissioner) Act proscribes direct and indirect discrimination in the public and private spheres based on, <i>inter alia</i> , sexual orientation in matters such as employment, education, health and goods and services.
9	 Czechia	2009	Sections 2 and 3 of the Anti-Discrimination Act proscribe discrimination on the basis of sexual orientation (among other grounds). As per Section 1, the law applies to employment, health, education and goods and services.

10	 Estonia	1999 2006 2009	Article 19(2)(12) of the Chancellor of Justice Act includes sexual orientation among the protected grounds for which claims on discrimination in the public and private spheres can be brought before the Chancellor of Justice. Article 152(1) of the Penal Code (as amended in 2006) proscribes the unlawful restriction of any right on the basis of, <i>inter alia</i>, sexual orientation. Sections 1 and 3 of the Equal Treatment Act (2009) prohibit direct and indirect discrimination based on sexual orientation (among other grounds). Section 2 determines that the law applies to employment, education, health, goods and services and others.
11	 Finland	2004	Section 8 of the Non-Discrimination Act prohibits any discriminatory act on the basis of sexual orientation (section 8) within public and private activities. The law applies to education and employment and allows victims of discrimination to receive compensation from the authorities, education providers or suppliers of goods or services who discriminated against them.
12	 France	2001	Articles 225-1 and 225-2 of the Penal Code (as amended by Act No. 1066 of 2001) prohibit discrimination based on, <i>inter alia</i>, sexual orientation with regard to goods and services and employment, among other fields. Article 432-7 aggravates the penalty when committed by public authority or public service.
13	 Georgia	2014	Articles 1 and 2(1) of the Act on the Elimination of All Forms of Discrimination prohibits every form of discrimination, including that based on sexual orientation. As per Article 3, the scope of this protection comprises all public and private fields of action.
14	 Germany	2006	Sections 1 and 2 of the General Act on Equal Treatment prohibit discrimination based on, <i>inter alia</i>, sexual orientation and determine that the protection applies to employment, social protection (including health), education and the access to and supply of goods and services.
15	 Hungary		Articles 7(1), 8(m) and 9 of the Equal Treatment and Promotion of Equal Opportunities Act (No. CXXV of 2003) prohibit discrimination on the basis of sexual orientation. Under articles 4 and 5 the law applies to both public and private relationships in employment (articles 21-23), health (articles 24-25) and education (articles 27-30), among others.
16	 Iceland	1998 2006 2018	Article 180 of the Penal Code prohibits discrimination based on sexual orientation in the provision of goods and services. This is complemented by several provisions of the Law amending several legal provisions relating to the legal status of homosexuals and by article 7 of the Act on Equal Treatment in the Workplace (2018) prohibits sexual orientation discrimination in employment.
17	 Ireland	2000	Section 3(2)(d) of the Equal Status Act defines sexual orientation as a prohibited ground of discrimination. Chapter II lists the activities to which the ban on discriminatory acts applies: the disposal of goods and the provision of services (Section 5), education (Section 7) and others.

		Kosovo	2004	Articles 1 and 2 of the Anti-Discrimination Act prohibit discrimination based on sexual orientation. As per article 4, the protection applies to employment, health, education, access to and supply of goods and services and more.
18		Liechtenstein	2016	Article 283(4) of the Penal Code proscribes acts of discrimination based on sexual orientation in broad terms. Article 283(6) refers to the denial of services based on sexual orientation.
19		Lithuania	2000 2005	Article 169 of the Criminal Code penalises discrimination on the ground of, <i>inter alia</i> , sexual orientation in political, economic, social, cultural, labour and other activities. Articles 1 and 2 of the Equal Treatment Act (2005) ban direct and indirect discrimination because of sexual orientation (among other grounds). The law applies to education (articles 4 and 8), employment (articles 5 and 7), consumer protection (articles 6 and 9) and other spheres.
20		Luxembourg	2006	Article 1 of the Equality Act (No. 28 of 2006) prohibits discrimination based on sexual orientation (among other grounds). Article 2 states that the protection applies to the public and private sectors with regard to, <i>inter alia</i> , employment, health, education and the access to and provision of goods and services.
21		Malta	2012	The broad protection afforded by article 13(2) of the Constitution is complemented by the Equality for Men and Women Act which prohibits discrimination based on sexual orientation in employment and education, among others.
22		Montenegro	2010	Article 2 of the Act on Prohibition of Discrimination proscribes discrimination based on, <i>inter alia</i> , sexual orientation. The law applies to public service delivery, education and labour, among others. Article 19 states that everyone has the right to express their sexual orientation as well as the right not to declare it.
23		Netherlands	1994	Section 1 of the Equal Treatment Act includes sexual orientation as a prohibited ground of direct and indirect discrimination (among others). Such protection concerns, <i>inter alia</i> , employment (5-6a) and goods and services (Section 7). Section 137(f) of the Penal Code proscribes taking part or supporting activities aimed at discrimination against persons because of "their hetero or homosexual orientation".
24		Norway	2013 2018	The Sexual Orientation Anti-Discrimination Act (2013) prohibited direct and indirect discrimination based on sexual orientation under Chapter 2 in all sectors and fields of action (Section 2). This law was repealed by the Equality and Anti-Discrimination Act (2018), which now proscribes any type of discriminatory act based on, <i>inter alia</i> , sexual orientation under Section 6. As per Section 2, the law applies to all sectors of society.
25		Portugal	2005	Even though there is no national law prohibiting discrimination in broad terms, the protection afforded by article 13(2) the Constitution applies to all rights and duties.

26	 Romania	2000	Article 2(1) of the Ordinance on the Prevention and Punishment of All Forms of Discrimination (Law No. 137/2000) bans discrimination on the basis of sexual orientation (among other grounds). As per Article 1, such protection applies, <i>inter alia</i> , to employment, education and health.
27	 Serbia	2010	Articles 1 and 2 of the Prohibition of Discrimination Act ban any discriminatory act, direct or indirect, on the basis of sexual orientation (among other grounds). Article 21 states that while “no one may be called to publicly declare his/her sexual orientation”. The law applies to employment, public services, and education, among others.
28	 Slovakia	2008	Section 2.1 of the Act on Equal Treatment in Certain Areas and Protection against Discrimination (as amended by Act No. 85 of 2008) prohibits sexual orientation discrimination. Section 3.1 determines that the law applies to everyone in the field of employment and similar legal relations, health, goods and services and education, among others.
29	 Slovenia	2016	Article 1 of the Protection against Discrimination Act (2016) prohibits discrimination on the basis of sexual orientation (among other grounds) in the public and private spheres concerning all activities in the political, economic, social, cultural, civil and other fields. As per Article 2, some of these are: employment, health, education and good and services.
30	 Spain		Article 511 and 512 of the Penal Code penalises the discriminatory denial of services on the basis of sexual orientation. Furthermore, article 314 criminalises acts of discrimination in employment. Even though there is no national law against discrimination based on sexual orientation, more than 85% of the Spanish population lives in autonomous communities and regions that offer broad protection against such discrimination, including: Andalucía (2014/2018), Aragón (2018), Islas Baleares (2007), Cataluña (2014), Canarias (2014), Madrid (2016), Navarra (2017), Valencia (2018), Extremadura (2015), Galicia (2016), País Vasco (2012), and Murcia (2016).
31	 Sweden	2003 2009	Sections 1 and 3 of the Prohibition of Discrimination Act (2003) included sexual orientation as one of the protected categories against discrimination in employment, provision of goods and services and health, among other contexts. That law was repealed by the Discrimination Act (2009), which also prohibits direct and indirect discrimination based on, <i>inter alia</i>, sexual orientation. This law applies to employment (sections 1-4 and 9), education (sections 5-8), provision of goods and services (section 12-12c), health (sections 13-13b), among others.

32	 United Kingdom	2007 2010	The Equality Act (Sexual Orientation) Regulations 2007 (No. 1263) and the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (No. 439), laid under Part 3 of the Equality Act 2006, protected against discrimination on the basis of sexual orientation with regard to goods, facilities and services and education, among other fields. This law was revoked by Equality Act 2010. The Equality Act 2010 lists sexual orientation as a protected category (Section 4) and prohibits direct (Section 13) and indirect (Section 19) discrimination. Section 25(9) defines sexual orientation discrimination. Such protection applies to services and public functions, employment and education.
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Is there more in Europe?

Faeroe Islands (Denmark)	Ordinance no. 182 (2007) prohibits discrimination based on sexual orientation in the autonomous country of the Faeroe Islands.
Switzerland	Even though there is no federal law explicitly proscribing discrimination based on sexual orientation, article 28 of the Swiss Civil Code provides the legal basis for the protection of “personality”. Civil suits against acts of discrimination based on sexual orientation can be brought under this article. ⁵

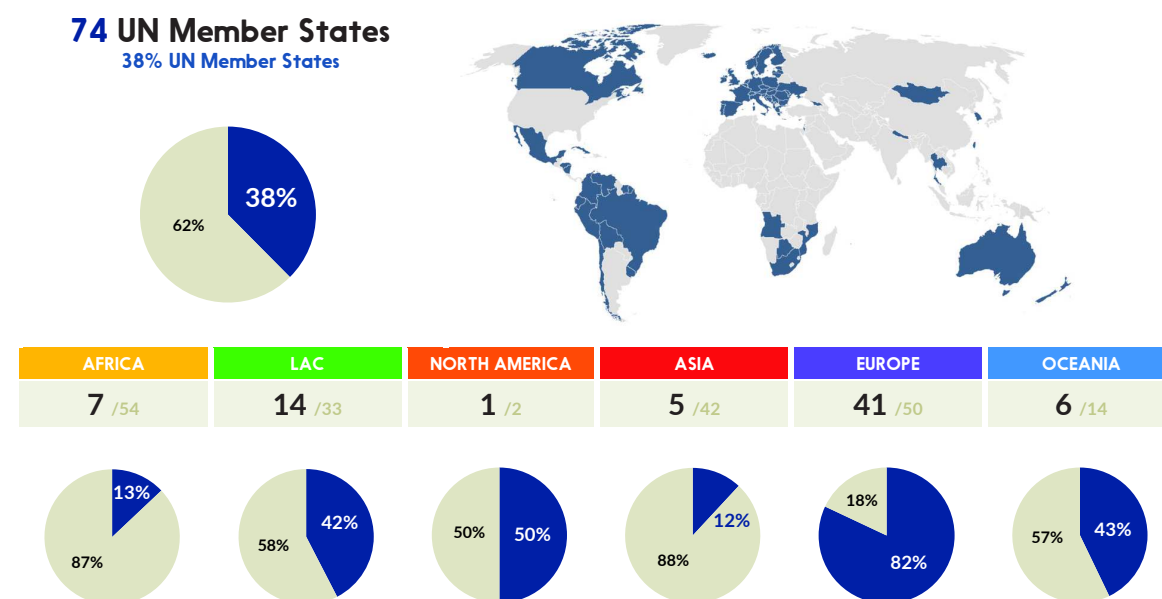
Oceania (3)

1	 Australia		There is no piece of legislation prohibiting discrimination on the basis of sexual orientation in broad terms at the federal level. Several jurisdictions have enacted laws in this regard: Australian Capital Territory (1992), New South Wales (1983), Northern Territory (1993), Queensland (1992/2016), South Australia (1984), Tasmania (1999), Victoria (1996/2010), Western Australia (2002).
2	 Fiji	1997 2013	Even though there is no law expressly prohibiting discrimination based on sexual orientation, the constitutional prohibition of discrimination based on sexual orientation enshrined in section 26(3)(a) of the Constitution of Fiji (2013) offers broad protection against discrimination.
3	 New Zealand	1993	Section 21(1)(m) of the Human Rights Act 1993 includes sexual orientation (“heterosexual, homosexual, lesbian or bisexual”) among the prohibited grounds of discrimination. This law applies to employment, goods and services and education, among others.

⁵ Alecs Recher, *Study on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity Legal Report: Switzerland* (2010), 8.

Protection against Discrimination based on Sexual Orientation in Employment

Highlights



Introduction

A person's ability to earn a living, and the opportunity to flourish in one's work life without discrimination based on a personal characteristic (sexual orientation), has increasingly been recognised as a fundamental right in States across the globe.

Notably, legal protections against unfair dismissal motivated by one's sexual orientation (as well as other employment related protections) have been enacted even in countries where consensual same-sex sexual acts are still criminalised.

We also note where significant parts of a country have provincial ordinances that offer similar or partial protections, but where the law is not in force at the national or federal level.

Even though, progressive case law may have extended employment protections based on open equality clauses, in the following list, only those laws that spell out the term "sexual orientation" in an unambiguous way are listed.

What does International Human Rights Law say?

Everyone has the right to decent and productive work, to just and favourable conditions of work and to protection against unemployment, without discrimination on the basis of sexual orientation, gender identity, gender expression or sex characteristics.

States shall take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;

Yogyakarta Principle 12.

Africa (7)

1	 Angola	2019	Section 197 of the Penal Code criminalises acts of discrimination based on sexual orientation, including with regard to employment. ¹
2	 Botswana	2010	Section 23(d) of the Employment Act (2010) prevents employers from terminating contracts of employment on the basis of sexual orientation (among other grounds).
3	 Cape Verde	2008	Article 45(2) of the Labour Code forbids an employer from requesting information about the employee's "sexual life". Article 406(3) imposes sanctions on employers who dismiss employees based on their sexual orientation.
4	 Mauritius	2008	Part III of the Equal Opportunities Act (2008) prohibits discrimination in employment and Section 2 refers to sexual orientation as one of the protected classes.
5	 Mozambique	2007	Articles 4(1) and 108(3) of the Labour Act No. 23 of 2007 prohibit discrimination based on, <i>inter alia</i> , sexual orientation. Moreover, Article 5 establishes the employer's obligation to respect the employee's privacy, including their "sexual life".
6	 Seychelles	2006	Sections 2, 46(A)(1) and 46(B) of the Employment Act 1995 (as amended by Act No. 4 of 2006) prohibit discrimination based on sexual orientation (among other grounds).
7	 South Africa	1996 1998	Section 187(1)(f) of the Labour Relations Act (1995) establishes a dismissal is "automatically unfair" when based on the employee's sexual orientation (among other grounds). Section 6(1) of the Employment Equity Act (1998) prohibits direct and indirect discrimination on the basis of, <i>inter alia</i> , sexual orientation.

Latin American and the Caribbean (14)

1	 Bolivia	2010	Article 5 of the Law against Racism and All Forms of Discrimination (Law No. 45 of 2010) prohibits discrimination on the ground of sexual orientation (among others). Furthermore, article 281sexies of the Criminal Code (as amended by said Act) criminalises any act of discrimination based on, <i>inter alia</i> , sexual orientation. These laws ban sexual orientation discrimination in broad terms and therefore apply to employment.
2	 Brazil		At the federal level, there is no piece of legislation prohibiting employment discrimination on the basis of sexual orientation. However, around 70% of the population reside in jurisdictions where local laws provide such protection. Several jurisdictions have enacted laws banning discrimination based on sexual orientation with varying levels of protection that explicitly specify they apply to employment: Amazonas (2006);

¹ The final version of the 2019 Penal Code has not yet been published. The number of the section may differ in the final version. The draft that was approved can be accessed [here](#).

			Distrito Federal (2000); Espírito Santo (2014); Maranhão (2006); Mato Grosso do Sul (2006); Minas Gerais (2002); Para (2011); Paraíba (2003); Piauí (2004); Rio de Janeiro (2015); Rio Grande do Norte (2007); Rio Grande do Sul (2002); Santa Catarina (2003); São Paulo (2001): as well cities such as Fortaleza (1998) and Recife (2002). Article 8 of the Regulation (Portaria) No. 41/2007 issued by the Ministry of Labour and Employment prohibits employers to request documents or information related to the employee's sexuality.
3	 Chile	2017	Article 2 of the Labour Code (as amended by the Modernization of Labour Relations Act No. 20.940 of 2016) includes sexual orientation among the prohibited grounds of discrimination.
4	 Colombia	2011	Article 134A of the Criminal Code (as amended by Act No. 1.482 of 2011) criminalises acts of discrimination based on sexual orientation (among other grounds) while Article 136C(3) and (4) aggravates the penalty if such are committed by public servants or while providing public services. These provisions ban sexual orientation discrimination in broad terms and therefore apply to employment. Article 136C(6) also includes the motive of denying or restricting labour rights as an aggravating factor.
5	 Cuba	2014	Article 2(b) of the Labour Code (Act No. 116) establishes the right of every person to have a job, either in the private or the public sector, according to the needs of the economy and their personal choice without discrimination based on sexual orientation (among other grounds).
6	 Ecuador	2005	Article 79 of the Labour Code establishes the right to equal remuneration without discrimination based on sexual orientation (among other grounds). Article 195(3) (introduced by the Labour Justice and Recognition of Domestic Work Organic Act No. 483 of 2015) provides for special compensation in cases of discriminatory dismissal based on, <i>inter alia</i> , sexual orientation.
7	 Honduras	2013	Article 321 of the Criminal Code (as amended by Act No. 23 of 2013) criminalises acts of discrimination based on sexual orientation (among other grounds) and aggravates the penalty if they are committed by public servants. This provision bans sexual orientation discrimination in broad terms and therefore applies to employment.
8	 Mexico	2003	The Federal Act to Prevent and Eliminate Discrimination prohibits employment discrimination in Article 9(IV) and lists "sexual preferences" as a protected class in Article 1(III). Article 149ter(II) of the Federal Criminal Code criminalises employment discrimination based on sexual orientation and aggravates penalties for employers and public servants.
9	 Nicaragua	2008	Article 315 of the Criminal Code (Title 10, Crimes against Labour Rights) criminalises employment discrimination based on "sexual option".

10	 Peru	2004 2017	Article 37(1) of the Constitutional Procedural Code establishes that the writ of <i>amparo</i> is the adequate remedy in cases of discrimination based on sexual orientation (among other grounds). This law provides a remedy for sexual orientation discrimination in broad terms and therefore applies to employment. Article 323 of the Criminal Code (as amended by Executive Order No. 1323 of 2017) criminalises discrimination on the basis of, <i>inter alia</i>, sexual orientation and aggravates the penalty if such acts are committed by public servants. This applies to employment.
11	 Saint Lucia	2006	Section 131(1)(a) of the Labour Code prohibits unfair dismissal based on an employee's sexual orientation (among other grounds).
12	 Suriname	2015	Article 175 of the Criminal Code (as amended by S.B. 2015 No. 44) criminalises discrimination based on sexual orientation (among other grounds). This provision bans sexual orientation discrimination in broad terms and therefore applies to employment.
13	 Uruguay	2004 2013	Article 2 of the Act to combat Racism, Xenophobia and Discrimination (Law No. 17,817) includes "sexual orientation and identity" among the prohibited grounds of discrimination. This provision bans sexual orientation discrimination in broad terms and therefore applies to employment. Article 2(A) of the Promotion of Youth Employment Act (Law No. 19,133) bans discrimination on the basis of sexual orientation (among other grounds) in employment.
14	 Venezuela	2012	Article 21 of the Organic Labour Act prohibits employment discrimination based on sexual orientation (among other grounds).

Is there more in Latin America and the Caribbean?

Argentina

Articles 34(o) and 35(j), 37(h) and 121 of the **Executive Order No. 214** (2006) which is applicable only within the National Administration Service, prohibit discrimination in employment on the basis of sexual orientation (limited scope ban). At the federal level, there is no piece of legislation prohibiting discrimination on the basis of sexual orientation in broad terms. The **Autonomous City of Buenos Aires** (2015), the **Province of Río Negro** (2008) and the **City of Rosario** (1996) have enacted norms providing such protection, which applies to employment (among other contexts).

Costa Rica

Article 10 of the General Law on HIV/AIDS (**Law No. 7.771 of 1998**) deals with employment discrimination against people living with HIV/AIDS and article 48 incorporates "sexual option" as one of the prohibited grounds of discrimination.²

El Salvador

However, Article 1 of the **Executive Order No. 56 of 2010** prohibits discrimination based on sexual orientation within the Public Administration Service only (limited scope ban).³

² In our 2017 edition, Costa Rica was erroneously listed in this section as having full protection against discrimination based on sexual orientation in employment.

³ In our 2017 edition, El Salvador was erroneously listed in this section as having full protection against discrimination based on sexual orientation in employment.

North America (1)

1		Canada	1996	Section 7 of the Canadian Human Rights Act proscribes direct and indirect discrimination in employment and Section 3(1) protects sexual orientation.
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Is there more in North America?

United States of America

At the federal level, there is no piece of legislation prohibiting employment discrimination on the basis of sexual orientation. Several states have enacted laws that do so with varying levels of protection.⁴ Barely under 50% of the population of the USA lives in States which grant protection against discrimination in employment.

Furthermore, **Executive Order No. 13087 of 1998** prohibits discrimination in employment by the federal government on the basis of sexual orientation (limited scope ban).

In March 2017, the US Court of Appeals for the 7th Circuit became the first federal appeals court to determine that the **Civil Rights Act 1964** protects workers from discrimination based on sexual orientation.⁵ In February 2018, the US Court of Appeals for the 2nd Circuit followed suit.⁶

Asia (5) + Taiwan and Macau

1		Israel	1992	Section 2(a) of the Law on Employment (Equal Opportunities) (Law No. 5748-1988) as amended in 1992 provides that “an employer shall not discriminate among his employees or among persons seeking employment on account of their [...] sexual tendencies”.
		Macau (China)	2008	Article 6(2) of Law No. 7/2008 prohibits discrimination based on sexual orientation in employment.
2		Mongolia	2017	Section 14(1)(1) of the Penal Code criminalises acts of discrimination based on sexual orientation. Section 14(1)(2)(3) aggravates penalties when such acts are committed by public officials. This provision bans sexual orientation discrimination in broad terms and therefore applies to employment.
3		Nepal	2015	Even though there is no law expressly prohibiting discrimination based on sexual orientation in employment, the constitutional prohibition enshrined in Section 18(3) of the Constitution of Nepal (proscribing discrimination against “sexual minorities”) necessarily applies to employment.
4		South Korea	2001	Article 30(2) of the National Human Rights Commission Act (2001) mandates the Commission to investigate acts of discrimination based on sexual orientation in employment.

⁴ “State Employment Non-Discrimination Laws”, Movement Advancement Project (MAP) Website.

⁵ United States Court of Appeals for the Seventh Circuit, *Kimberly Hively v. Ivy Tech Community College of Indiana*, 4 April 2017.

⁶ United States Court of Appeals for The Second Circuit, *Zarda v. Altitude Express, Inc.*, 26 February 2018.

Taiwan (China)	2004	Article 12 of the Gender Equity Education Act (2004) specifies that both private and public schools of all levels shall respect faculty and staff's sexual orientation.
	2007	
	2008	
		Article 5 of the Employment Service Act (as amended by Presidential Order No. 09600064151 of 2007) and Chapter 2 of the Gender Equality in Employment Act (as amended by Presidential Order No. 09700003951 of 2008) prohibit employment discrimination on the basis of sexual orientation.
5  Thailand	2007	The Ministry of Labour's Regulation on Thai Labour Standards and Social Responsibility of Thai Businesses B.E. 2547 (discussed here) prohibits discrimination against workers on numerous grounds, including "personal sexual attitude". ⁷

Europe (41) + Kosovo

1  Albania	2010	Articles 12-16 of the Law on Protection from Discrimination (Law No. 10,221) provide for protection from discrimination in employment. Article 5 includes "sexual orientation" as one of the prohibited grounds of discrimination. Additionally, Article 16 of the Labour Code prohibits discrimination in employment.
2  Andorra	2003	Section 3 of the Employment Contract Act (No. 8/2003) lists sexual orientation as one of the protected classes within labour relations. Sections 75 and 76 deal with the termination of the employment contract due to an act of discrimination on the basis of, <i>inter alia</i> , sexual orientation and establish particular consequences in terms of reparation. Article 95 considers any act of discrimination based on sexual orientation (among other grounds) by an employer a serious breach of the law that carries the most severe penalty.
3  Austria	2004	The Equal Treatment Act (as amended by Act No. 65 of 2004) bans sexual orientation discrimination in employment (Chapter 2).
4  Belgium	2003 2007	Article 4 of the Anti-Discrimination Law (2003) proscribed discrimination and Article 2 included sexual orientation as one of the protected categories. This law was substituted by Anti-Discrimination Law (2007). Articles 2 and 4 of the Anti-Discrimination Law (2007) ban discrimination based on "sexual orientation". Articles 5(1)(5) and 5(2) refer to labour relations.
5  Bosnia and Herzegovina	2003 2009	Article 2 of the Gender Equality Act prohibits sexual orientation discrimination. Chapter V deals with discrimination in employment. Article 2 of the Act on Prohibition of Discrimination (2009) proscribes discrimination on the basis of "sexual expression or sexual orientation" within the private and public spheres. Article 6(1)(a) states that such prohibition applies to employment.

⁷ Busakorn Suriyasarn, *Promoting Rights, Diversity and Equality in the World of Work (PRIDE): Gender identity and sexual orientation in Thailand* (Bangkok: ILO Country Office for Thailand, Cambodia and Lao People's Democratic Republic, 2014), 22.

6	 Bulgaria	2005	Section 4(1) of the Law on Protection Against Discrimination (supplemented by SG No. 70 of 2004) bans direct and indirect discrimination based on sexual orientation (among others). Section I of Chapter II deals with such protection while exercising the right to work.
7	 Croatia	2003 2009	Article 2 of the Labour Act (as amended by Act No. 1574 of 2003) names sexual orientation as a protected ground of discrimination in employment. Article 9 of the Anti-Discrimination Act (2009) prohibits discrimination based on sexual orientation. Article 8(1) establishes that such prohibition applies to employment.
8	 Cyprus	2004 2009	Article 6(1) of the Combating Racism and Other Forms of Discrimination (Commissioner) Act proscribes direct and indirect discrimination based on sexual orientation. The Equal Treatment in Employment and Occupation Act 2004 (as amended by Act No. 86(I) of 2009) protects sexual orientation against discrimination in employment (Articles 3 and 4).
9	 Czechia	1999 2004 2009	Section 316(4)(c) of the Labour Code (as amended in 1999) prevents employers from requiring employees information about their sexual orientation, Section 4 of the Employment Act prohibits sexual orientation discrimination in employment. Section 12 reinforces such protection by stating that employers cannot request information about their employees' sexual orientation. Sections 2 and 3 of the Anti-Discrimination Act (2009) proscribe all types of sexual orientation discrimination.
10	 Denmark	1996 2007	The Act on prohibition against discrimination in respect of employment (1996) bans both direct and indirect employment discrimination on the basis of, <i>inter alia</i> , sexual orientation. Ordinance No. 182 (2007) prohibits discrimination based on sexual orientation in the autonomous country of the Faeroe Islands. No such protection is available in Greenland.
11	 Estonia	2004 2009 2011	Article 19(2)(12) of the Chancellor of Justice Act includes "sexual orientation" among the protected grounds for which claims on discrimination can be brought before the Chancellor of Justice. Articles 1(1) and 2 of the Equal Treatment Act prohibit employment discrimination based on sexual orientation. Article 152(1) of the Penal Code proscribes the unlawful restriction of any right on the basis of sexual orientation.
12	 Finland	1995 2004	Section 9 (Chapter 11) of the Criminal Code (as amended by Act No. 578 of 1995) protects, <i>inter alia</i> , "sexual preference" against discrimination in trade or profession. Section 3 (Chapter 47, on labour offences), criminalises work discrimination based on sexual orientation (among other grounds). Section 8 of the Non-Discrimination Act (2004) prohibits any discriminatory act on the basis of sexual orientation (among other grounds) and Section 7 sets out a range of employment contexts to which such ban applies.

13	 France	1985 2001 2008	Protection against discrimination based on sexual orientation was first codified in 1985. Today, article L1132-1 of the Labour Code (introduced by Act No. 67 of 2008 ratifying Ordinance No. 329 of 2007), prohibits discrimination based on sexual orientation in employment. This provision replaced article L122-45 (amended by Act No. 1066 of 2001).
14	 Georgia	2014	Articles 1 and 2(1) of the Act on the Elimination of All Forms of Discrimination prohibits discrimination based on sexual orientation. These provisions ban sexual orientation discrimination in broad terms and therefore apply to employment.
15	 Germany	2006	Sections 1 and 2 of the General Act on Equal Treatment prohibit discrimination based on sexual orientation (among other grounds). Part 2 (Chapters 1-4) describes a range of employment contexts in which such ban applies.
16	 Greece	2005	Articles 1, 4 and 8 of the Act Against Discrimination (Law No. 3304 of 2005) prohibit discrimination based on sexual orientation in employment.
17	 Hungary	2004	Articles 7(1), 8(m) and 9 of the Equal Treatment and Promotion of Equal Opportunities Act (No. CXXV of 2003) define direct and indirect discrimination on the basis of sexual orientation as a violation of the equal treatment principle. Articles 21-23 deal with employment.
18	 Iceland	2018	Article 7 of the Act on Equal Treatment in the Workplace prohibits discrimination in the labour market on the basis of, <i>inter alia</i> , sexual orientation (Article 1). Articles 8 and 9 specify what constitutes discrimination in employment.
19	 Ireland	1999	Section 6(1) and (2)(d) Employment Equality Act (1998) ensures non-discrimination in the workplace on the basis of sexual orientation (among other grounds).
20	 Italy	2003	Legislative Decree No. 216 of 2003 instituted sexual orientation as a protected ground of discrimination (among others) within employment.
	Kosovo	2004	Article 2 of the Anti-Discrimination Act prohibits direct and indirect discrimination based on sexual orientation (among other grounds). Article 2(1-4) defines employment in the public and private sectors as a sphere covered by such protection.
21	 Latvia	2006 2013	Article 7(1-2) of the Labour Act (as amended in 2006) establishes the right to work, to a fair, safe and healthy working environment and to a fair wage without any direct or indirect discrimination based on, <i>inter alia</i> , sexual orientation. Article 2 of the Act on Prohibition of Discrimination of Natural Persons Engaged in Economic Activity (2013) specifies sexual orientation as a protected ground of discrimination in economic activities.
22	 Liechtenstein	2016	Article 283(4) of the Penal Code proscribes acts of discrimination based on sexual orientation in broad terms and, therefore, applies to employment.

23	 Lithuania	2000 2005	Article 169 of the Criminal Code penalises discrimination on the ground of, <i>inter alia</i>, sexual orientation. This provision bans sexual orientation discrimination in broad terms and therefore applies to employment. Articles 1 and 2 of the Equal Treatment Act (2005) ban discrimination because of sexual orientation (among other grounds) in employment.
24	 Luxembourg	1997 2006	Articles 454 and 455(5-6) of the Criminal Code (as amended by Act No. 19 of 1997) criminalise sexual orientation discrimination within the exercise of an economic activity and employment. Article 456 aggravates the penalty if the acts are committed by public servants or individuals carrying out public functions. Article 1 of the Equality Act (No. 28 of 2006) bans discrimination based on sexual orientation (among other grounds). Article 2(1)(a-d) applies to employment. Title IV of the Labour Code also proscribes discrimination on the basis of, <i>inter alia</i>, sexual orientation.
25	 Malta	2004	The Equal Treatment in Employment Regulations (Legal Notice 461 of 2004) prohibit discriminatory treatment based on, <i>inter alia</i> , sexual orientation in relation to employment (Sections 1(3), 2(a), 3), both within the public and private sectors.
26	 Moldova	2013	Article 7 of the Law on Equality (Act No. 121) specifies that discrimination on the basis of sexual orientation is banned in the employment sphere only.
27	 Montenegro	2010	Article 16 of the Act on Prohibition of Discrimination refers to discrimination in employment, having set out in Articles 2 and 19 that sexual orientation is protected against it.
28	 Netherlands	1994	While Section 1 of the Equal Treatment Act bans sexual orientation discrimination, Sections 5(1), 6 and 6a deal with discrimination in employment. Section 8(1) renders invalid a termination of employment if based on a prohibited ground.
29	 North Macedonia	2005	Article 6 of the Law on Labour Relations (2005) prohibits discrimination based on sexual orientation in employment. It also affords protection to job seekers.
30	 Norway	1998 2006 2013 2018	Section 55(A) of the Act relating to Worker Protection and Working Environment (No. 4 of 1977) (as amended in 1998) protected employees from discrimination based on sexual orientation. This law was repealed by the Working Environment Act (2005), which prohibits sexual orientation discrimination in employment under Sections 13-1(7) and 13-4(3). The Sexual Orientation Anti-Discrimination Act, which aims to promote equality irrespective of sexual orientation, bans discrimination in employment in Chapter 4. This law was repealed by Equality and Anti-Discrimination Act. Section 6 of the Equality and Anti-Discrimination Act proscribes sexual orientation discrimination. Sections 25, 26 and 26a deal with employers' and employer and employee organizations' duties to promote equality. Chapter 5 contains provisions relating to employment relationships.

31	 Poland	1999 2010	Articles 11(3) and 18(3)(a) of the Labour Code prohibit direct or indirect discrimination on the basis of sexual orientation in employment. Article 94(2b) establishes the employer's duty to act against such discrimination. According to Article 8(a), the prohibition on sexual orientation discrimination contained in the Act on Equal Treatment 2010 applies only to employment.
32	 Portugal	2009	Article 24 (on the right to equal access to employment and work), and Article 16 (on the right to privacy) of the Labour Code explicitly protect the status of sexual orientation (among others).
33	 Romania	2000	Article 2(1) of the Ordinance on the Prevention and Punishment of All Forms of Discrimination (No. 137/2000) bans discrimination on the basis of sexual orientation (among other grounds). Articles 5-9 refer to discrimination in employment.
34	 Serbia	2010	Articles 1, 2, 13, and 21 of the Prohibition of Discrimination Act ban any discriminatory act, direct or indirect, on the basis of sexual orientation. Articles 16 and 51 deal with employment discrimination.
35	 Slovakia	2008	Section 2.1 of the Act on Equal Treatment in Certain Areas and Protection against Discrimination (as amended by Act No. 85/2008) prohibits sexual orientation discrimination. Sections 6 and 13 deal with discrimination within labour relations.
36	 Slovenia	2016	Articles 1 and 2(1) of the Protection against Discrimination Act 2016 set out sexual orientation protection from discrimination in employment.
37	 Spain	1996 2004	Article 314 of the Criminal Code criminalises employment discrimination in the public and private spheres. Articles 27 and 28 of the Law No. 62 of 2003 deal with the principle of equal treatment and the prohibition of discrimination on the ground of sexual orientation (among others). Article 34 establishes that such protection applies to employment.
38	 Sweden	1987 1999 2003 2009	Chapter 16, Section 9 of the Criminal Code (as amended in 1987) criminalises sexual orientation discrimination in employment. The Prohibition of Discrimination in Working Life because of Sexual Orientation Act combated direct and indirect discrimination due to sexual orientation in employment. This law was repealed by the Discrimination Act. Sections 1 and 3 of the Prohibition of Discrimination Act included sexual orientation (defined in Section 4 as "homosexual, bisexual or heterosexual") as one of the categories protected against discrimination. This law was repealed by the Discrimination Act. Chapter 1, Sections 1 and 4 of the Discrimination Act include sexual orientation (defined in Section 5 as "homosexual, bisexual or heterosexual") as a protected ground of discrimination (among others). Chapter 2, Sections 1-4 prohibit discrimination in employment.

39	 Switzerland		Since registered partnerships became a possibility, there are various employment protections based on sexual orientation in the amendments to the 1911 Code of Obligations . It is understood that sexual orientation has been read into numerous laws because of the protections afforded to that status in the country's Constitution , where the words "way of life" at Article 8 have been interpreted to include SOGI.
40	 Ukraine	2015	Article 2(1) of the Labour Code (as amended by Act No. 785-VIII of 2015) includes sexual orientation as one of the prohibited grounds for employment discrimination.
41	 United Kingdom	2003 2007 2010	The Employment Equality (Sexual Orientation) Regulations 2003 (No. 1661) and The Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003 (No. 497), were introduced to protect against sexual orientation discrimination in the sphere of employment. Revoked by Equality Act 2010. Equality Act (Sexual Orientation) Regulations 2007 (No. 1263) and Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 (No. 439), laid under Part 3 of the Equality Act 2006, protected against discrimination on the basis of sexual orientation. Revoked by Equality Act 2010. These regulations banned sexual orientation discrimination in broad terms and therefore applied to employment. Part 5 of the Equality Act 2010 deals with employment discrimination. Sections 4, 13, 19, 25(9) and 26 define sexual orientation as one of the prohibited grounds. In Gibraltar, Part III of the Equal Opportunities Act 2006 refers to discrimination in employment. Sections 3 and 10 protect sexual orientation against any act of discrimination.

Oceania (6) + Cook Islands

1	 Australia	1996 2009	Section 3(m) of the Workplace Relations Act 1996 includes "sexual preference" among the grounds of discrimination that the law intends to prevent and eliminate. Furthermore, Section 659(f) prohibits termination of employment based on the employee's sexual orientation (among other grounds). Section 351 of the Fair Work Act 2009 bans any act of discrimination against an employee on the basis of sexual orientation (among other grounds). Several jurisdictions have enacted laws in this regard: Australian Capital Territory (1992), New South Wales (1983), Northern Territory (1993), Queensland (1992/2016), South Australia (1984), Tasmania (1999), Victoria (1996/2010), Western Australia (2002).
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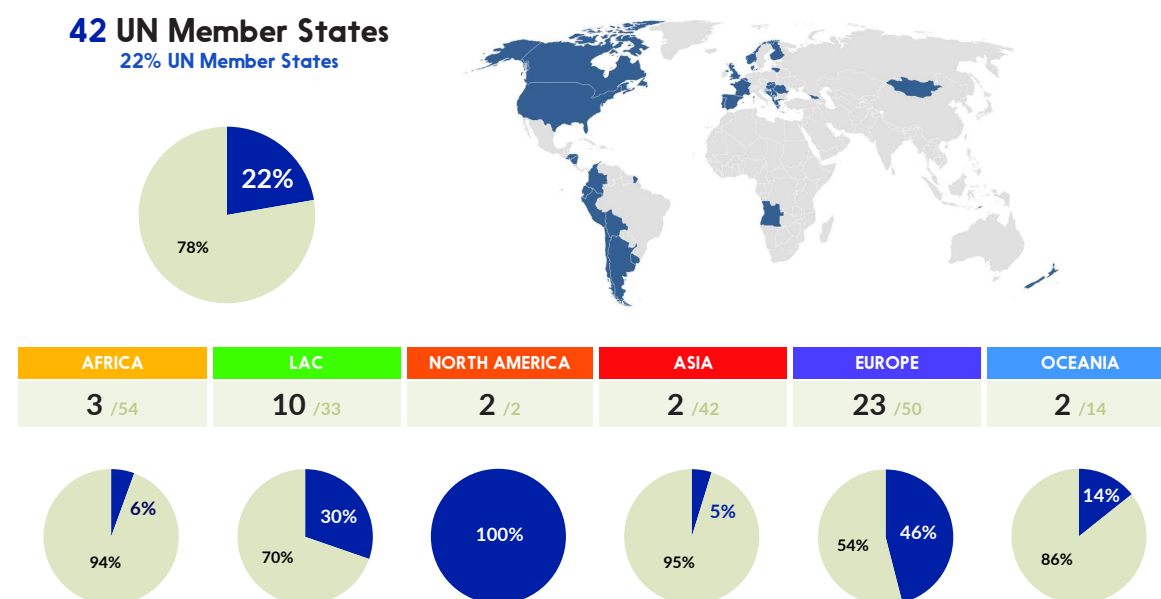
2	 Fiji	2007 2011	Section 6(2) of the Employment Relations Promulgation 2007 (Promulgation No. 36 of 2007) proscribes discrimination based on sexual orientation (among other grounds) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment relationship. Section 75 also includes sexual orientation as a prohibited ground (among others) for discrimination in employment. Articles 10(b)(2) and 10(c) of the Public Service (Amendment) Decree 2011 (Decree No. 36 of 2011) prohibit discrimination based on sexual orientation (among other grounds) within public service
3	 Kiribati	2015	Article 107(2)(b) of the Employment and Industrial Relations Code 2015 bans discrimination based on sexual orientation (among other grounds) in employment.
4	 New Zealand	1993 2000	Section 21(1)(m) of the Human Rights Act (1993) includes sexual orientation (“heterosexual, homosexual, lesbian or bisexual”) among the prohibited grounds of discrimination. Article 105(1)(m) of the Employment Relations Act (2000) bans employment discrimination based on sexual orientation (among other grounds).
	Cook Islands	2012	Article 55(e) of the Employment Relations Act (2012) prohibits employment discrimination based on “sexual preference” (among other grounds).
5	 Samoa	2013	Section 20(2) of the Labour and Employment Relations Act (2013) proscribes discrimination against an employee or an applicant for employment in any employment policies, procedures or practices based on sexual orientation (among other grounds).
6	 Tuvalu	2017	Section 5 of the Labour and Employment Relations Act (2017) ⁸ prohibits discrimination at the workplace, including on the basis of sexual orientation. ⁹

⁸ The online version of the text could not be located.

⁹ *Tuvalu National Report for third cycle of UPR*, A/HRC/WG.6/30/TUV/1, 28 March 2018, para. 54.

Criminal Liability for Offences Committed on the Basis of Sexual Orientation

Highlights



Introduction

Popularly known as “hate crimes”, some states have introduced two legal vehicles to address the violence motivated by sexual orientation.

The first is the enactment of a stand-alone criminal offence that criminalises the infliction of violence or harm on a victim motivated by their sexual orientation (real or perceived).

The second is the introduction of a legal provision that confers on the judiciary the power to enhance the criminal punishment where the offence was committed motivated by the victim’s sexual orientation. These legal provisions are often referred to as “aggravating circumstances”. The scope of these provisions can extend to specific types of crimes, such as murder and assault, or apply generally to all criminal offences.

The UN Human Rights Committee has recommended States to specifically criminalise acts of violence that are based on sexual orientation or gender identity, for example, by enacting hate crimes legislation concerning sexual orientation and gender identity.¹

What does International Human Rights Law say?

Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to security of the person and to protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual or group.

States shall: [...] Take all necessary legislative measures to impose appropriate criminal penalties for violence, threats of violence, incitement to violence and related harassment, based on the sexual orientation, gender identity, gender expression or sex characteristics.

Yogyakarta Principle 5

¹ *Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding observations of the Human Rights Committee: Poland*, CCPR/C/POL/CO/6, 15 November 2010, para. 8.

Africa (3)

1		Angola	2019	Section 71(1)(c) of the Penal Code includes “discrimination based on sexual orientation” among the aggravating circumstances for all crimes established in the code. ²
2		Cape Verde	2015	Article 123 of the Penal Code aggravates the penalty for homicides committed on the basis of the victim’s sexual orientation.
3		Sao Tomé e Príncipe	2012	Article 130(2)(d) of the Penal Code aggravates the crime of homicide when motivated by hatred towards the sexual orientation of the victim.

Latin American and the Caribbean (10)³

1		Argentina	2012	Article 80(4) of the Penal Code establishes aggravated penalties only for homicides motivated by “hate towards the sexual orientation of the victim” (among other grounds).
2		Bolivia	2010	Articles 40 Bis of the Penal Code aggravates the penalties of crimes motivated by any of the discriminatory grounds included in Article 281 <i>quinquies</i> and <i>sexies</i> (the latter includes sexual orientation).
3		Chile	2012	Article 12(21) of the Penal Code (as amended by Article 17 of Law No. 20,609) includes “sexual orientation” among the aggravating circumstances that trigger harsher penalties.
4		Colombia	2000	Article 58(3) of the Penal Code states that motivation based on the victim’s sexual orientation constitutes an aggravating circumstance. Furthermore, Article 134A (introduced by Law 1,482 of 30 November 2011) criminalises acts of racism and discrimination, including those based on sexual orientation.
5		Ecuador	2009	Article 177 of the Penal Code criminalises acts of hate, whether physical or psychological, based on sexual orientation. This provision also establishes aggravated penalties for physical harm and death caused by acts of hate based on sexual orientation (among other grounds).
6		El Salvador	2015	Article 129(11) of the Penal Code (as amended by D.L. No. 106/2015) aggravates the crime of homicide when it is perpetrated based on the victim’s sexual orientation.
7		Honduras	2013	Article 27(27) of the Penal Code (as amended by Decree No. 23-2013) establishes that motivation based on the victim’s sexual orientation (among other grounds) operates as an aggravating circumstance.

² The final version of the 2019 Penal Code has not yet been published. The number of the section may differ in the final version. The draft that was approved can be accessed [here](#).

³ In our 2017 edition, Brazil was included in this section with regard to various local laws supposedly establishing criminal liability for acts of violence based on sexual orientation. As criminal liability is a matter reserved for federal law, such laws only establish administrative/civil responsibilities for, *inter alia*, acts of discrimination and, therefore, do not strictly fit in this category.

8		Nicaragua	2008	Article 36(5) of the Penal Code establishes aggravated penalties for crimes motivated by the victim's sexual orientation.
9		Peru	2017	Article 46(d) of the Penal Code (as amended by Legislative Order No. 1,323) aggravates penalties for crimes motivated by the victim's sexual orientation.
10		Uruguay	2003	Article 149ter of the Penal Code (as amended by Law 17.677 of 2003) provides for enhanced penalties for crimes motivated by "sexual orientation" or "sexual identity".

Is there more in Latin America and the Caribbean?

Mexico

There are no provisions aggravating penalties for crimes motivated by the victim's sexual orientation at the federal level. However, some jurisdictions have included such provisions in their local Penal Codes, such as **Coahuila** (Art. 103(A)(5), 2005), **Colima** [*homicide only*] (Art. 123bis, 2015); **Federal District** (Art. 138(8), 2009); **Michoacán** [*homicide only*] (Art. 121, 2014); **Puebla** (Art. 330bis, 2012); and **Querétaro** (Art. 131(4), 2015).

North America (2)

1		Canada	1996	Article 718.2(a)(i) of the Canadian Criminal Code establishes that a sentence should be increased if there is evidence that the offence was motivated by bias, prejudice or hate based on sexual orientation (among other grounds).
2		United States of America	2008	Section 249(a)(2) of the United States Code provides for enhanced penalties for crimes motivated by perceived or actual sexual orientation (also known as the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act). Numerous States have enacted hate crimes laws that include sexual orientation (see full list here by MAP).

Asia (2)

1		Mongolia	2017	Section 10(1)(2)(14) of the Penal Code aggravates penalties for homicides motivated by hate towards the victim's sexual orientation.
2		East Timor	2009	Article 52(2)(e) of the Penal Code 2009 includes motivation on discriminatory sentiment on grounds of, <i>inter alia</i> , sexual orientation as a general aggravating circumstance for all crimes.

Europe (24)⁴ + Kosovo

1	 Albania	2013	Article 50(j) of the Criminal Code establishes that motivation related to sexual orientation is an aggravating circumstance for all crimes.
2	 Andorra	2005	Article 30 of the Criminal Code considers sexual orientation an aggravating circumstance for crimes motivated by hate or bias.
3	 Belgium	2007	Various offences in the Criminal Code were amended by L 2007-05-10/35, art. 33, 064 and now provide for enhanced punishments where the motive of the crime is hatred against, contempt for or hostility to a person on the grounds of his so-called <i>inter alia</i> sexual orientation. This includes indecent assault and rape (article 377bis) and manslaughter and intentional injury (article 405 quarter).
4	 Bosnia and Herzegovina	2006 2013 2016	All three constituent units of Bosnia and Herzegovina have enacted hate crime legislation that is inclusive of sexual orientation: Federation of Bosnia and Herzegovina (2016), Republika Srpska (2013), Brcko District (2006). The has no such legislation.
5	 Croatia	2006	Article 151(a) of the Penal Code specifies a criminal offence (act motivated by hatred) based on, <i>inter alia</i> , “sexual preference”.
6	 Denmark	2004	Section 81(6) of the Criminal Code recognises as an aggravating circumstance the situation where the offence stems from the victim’s sexual orientation.
7	 Finland	2011	Chapter 6, Section 5(1)(4) of the Criminal Code includes sexual orientation as an aggravating circumstance in sentencing.
8	 France	2001	Article 222-12 of the Criminal Code criminalises violence specifically on the grounds of sexual orientation. Article 132-77 makes discrimination on the grounds of sexual orientation an aggravating circumstance.
9	 Georgia	2012	Article 53(3) of the Penal Code provides that the commission of a crime on the grounds of, <i>inter alia</i> , sexual orientation constitutes an aggravating circumstance for all crimes under the Code.
10	 Greece	2013	Article 79 of the Penal Code includes “sexual orientation” as an aggravating circumstance of an “act of hatred”, with up to three years imprisonment.
11	 Hungary	2013	The Criminal Code of Hungary was amended to include Section 216 (“Violence Against a Member of the Community”), which explicitly lists sexual orientation. This law criminalises the display of apparently anti-social behaviour as well as assault.
	Kosovo	2012	Article 74(2)(12) and Article 333(4) of the Criminal Code penalise crimes motivated by animus towards, <i>inter alia</i> , sexual orientation, with up to one year in prison.

⁴ In 2017 we erroneously listed The Netherlands in this list.

12	 Lithuania	2009	Article 60(12) of the Criminal Code provides that where an act was committed in order to express hatred towards a group of persons or a person belonging thereto on grounds of sex or sexual orientation, it would be considered an aggravating circumstance.
13	 Luxembourg	1997 2007	Article 457(1)(1) of the Criminal Code penalises acts of hatred or violence motivated by, <i>inter alia</i> , sexual orientation with five to ten year's imprisonment.
14	 Malta	2012	Articles 83B, 222A, 215D and 325A(1) of the Criminal Code of Malta (amended by Act No. VIII of 2012) set out the circumstances and penalties for hate crimes based on, <i>inter alia</i> , sexual orientation.
15	 Montenegro	2013	Article 42(a) of the Criminal Code provides that where a criminal offence is committed from hate on the basis of a person's sexual orientation (among other grounds), the court shall consider such circumstance as aggravating.
16	 Norway	1994	Article 117(a) Penal Code defines torture as the infliction of harm or severe physical or mental pain on another person by a public official or another person at the instigation of or with the expressed or implied consent of a public official because of the victim's "homosexual inclination, lifestyle or orientation".
17	 Portugal	2007	The Penal Code considers sexual orientation as an aggravating factor at article 132 (homicide) and articles 143, 144 and 145(1)(a), which concern assault.
18	 Romania	2006	Article 77 of the Penal Code recognises a homophobic motive as an aggravating factor in the commission of a criminal offence of violence or hatred.
19	 San Marino	2008	Law no. 66 introduced Article 179bis to the Penal Code of San Marino, which recognises circumstances of discrimination on the basis of sexual orientation as an aggravating factor in criminal sentencing.
20	 Serbia	2012	Article 54a of the Criminal Code recognises the commission of an offence on the basis sexual orientation and gender identity, <i>inter alia</i> , as aggravating circumstances in relation to hate crimes.
21	 Slovakia	2013	Article 140(f) of the 2006 Criminal Code was updated in 2013 to include the commission of an offence on the basis of sexual orientation as an aggravating factor.
22	 Spain		Article 22(4) of the Penal Code establishes that "sexual orientation or identity" is an aggravating circumstance of criminal responsibility.
23	 United Kingdom	2004 2010	In England and Wales, Section 146 of the Criminal Justice Act 2003 empowers courts to impose enhanced sentences for offences motivated or aggravated by the victim's sexual orientation. Section 2 of the Scottish Offences (Aggravation by Prejudice) (Scotland) Act 2009 (in force 2010) incorporates sexual orientation to the reasons that aggravates penalties.

*Is there more in Europe?***Sweden**

Due to the constitutional protections afforded to sexual orientation in 2003, section 2(7) of chapter 29 of the **Penal Code** the open clause “other similar circumstance” is construed as including “sexual orientation”.

Oceania (2)

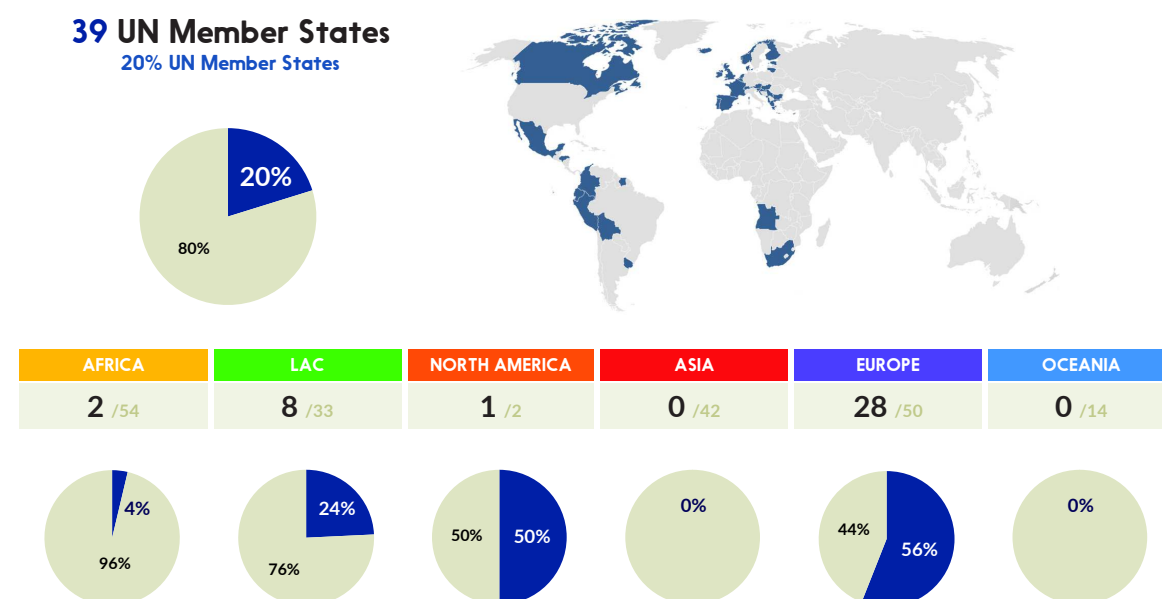
1	 New Zealand	1993	Article 9 of the Sentencing Act 2002 provides that it is an aggravating factor where the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as sexual orientation (among other grounds).
2	 Samoa	2016	Section 7(1)(h) of the Sentencing Act 2016 increases the penalties for crimes committed partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as sexual orientation (among other grounds).

*Is there more in Oceania?***Australia**

There is no federal law establishing that motivation based on sexual orientation is an aggravating circumstance. **New South Wales** (Art. 21A(2)(h), 2002) appears to be the sole state with such provisions in force.

Prohibition of Incitement to Hatred, Violence or Discrimination Based on Sexual Orientation

Highlights



Introduction

In some states, it is an offence to incite to hatred, violence or discrimination on the basis of sexual orientation. In restricting the freedom of such forms of speech, these laws recognise the paramount importance of securing the safety and protection of marginalised communities.

The wording and scope of these laws vary greatly. Some statutes aim to prohibit “hate speech” or speech with the ability to directly incite people to commit “violence”, while others include a wide array of terms such as “hatred”, “harassment”, “discrimination”, “intolerance” or “segregation”.

A few states have enacted laws that proscribe debasing or humiliating a specific social group, either in broad terms or in statutes regulating broadcasting services.

As with many other laws, judicial interpretations may have widened the enumerated groups of people protected by statutes, especially when they have an open clause to that effect. However, the following list includes States that have enacted laws explicitly including sexual orientation among protected grounds.

What does International Human Rights Law say?

Everyone, regardless of sexual orientation, gender identity, gender expression or sex characteristics, has the right to State protection from violence, discrimination and other harm, whether by government officials or by any individual or group.

Yogyakarta Principle 30

States shall: [...] Take appropriate and effective measures to eradicate all forms of violence, discrimination and other harm, including any advocacy of hatred that constitutes incitement to discrimination, hostility, or violence on grounds of sexual orientation, gender identity, gender expression or sex characteristics, whether by public or private actors [...].

Yogyakarta Principle 30(b)

Africa (2)

1		Angola	2019	Incitement to discrimination based on sexual orientation is criminalised under article 382 of the new Penal Code. ¹
2		South Africa	2000	The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 , prohibits unfair discrimination, hate speech and harassment. Section 1(22) includes “sexual orientation” within the definition of “prohibited grounds”.

Latin American and the Caribbean (8)

1		Bolivia	2010	Article 281 <i>septies</i> of the Penal Code of Bolivia criminalises any act of dissemination or incitement to hatred based on sexual orientation (among other grounds). Sexual orientation is included by reference to Article 281 <i>quinquies</i> .
2		Colombia	2011	Article 134B of the Penal Code (as amended by Law 1,482 of 30 November 2011) criminalises any incitement to acts of harassment aimed at causing harm based on sexual orientation.
3		Ecuador	2009	Article 176 of the Penal Code criminalises the incitement to discrimination based on sexual orientation.
4		Honduras	2013	Article 321-A of the Penal Code (as amended by Decree No. 23-2013) criminalises incitement to hatred or discrimination based on sexual orientation.
5		Mexico	2014	Article 9(27) of the Federal Law to Prevent and Eliminate Discrimination was amended to outlaw incitement to hatred and violence. Article 1(3) of this law includes “sexual preferences” as one of the prohibited grounds.
6		Peru	2017	Article 323 of the Penal Code (as amended by Legislative Order No. 1,323) criminalises acts of discrimination based on sexual orientation either by the perpetrator or through another person.
7		Suriname	2015	Articles 175(a) and 176 of the Criminal Code (as amended by S.B. 2015 No. 44) criminalise incitement to hatred based on sexual orientation (by reference to Article 175 which includes the list of prohibited grounds).
8		Uruguay	2003 2015	Article 149bis of the Penal Code (as amended by Law 17.677 of 2003) criminalises the incitement to hatred or any form of violence based on sexual orientation. Since 2015, article 28 of the Law on Audio Visual Communication Services (Law No. 19,307) prohibits the dissemination of content which promotes or incites to violence based on sexual orientation (among other grounds).

¹ The final version of the 2019 Penal Code has not yet been published. The number of the section may differ in the final version. The draft that was approved can be accessed [here](#).

*Is there more in Latin America and the Caribbean?***Brazil**

Although there is no specific provision in the Penal Code of Brazil criminalizing incitement to hatred or violence based on sexual orientation, several jurisdictions have enacted local administrative (non-criminal) provisions that proscribe such conduct. These include: **Amazonas** (2006); **Mato Grosso do Sul** (2005); **Pará** (2011); **Paraíba** (2003); **Rio de Janeiro** (2015); and the city of **Recife** (Pernambuco).

North America (1)

1		Canada	1996	Section 319 of the Penal Code proscribes public incitement of hatred. By reference to section 318(4), section 319(7) includes “sexual orientation” among the “identifiable group” against which this crime can be committed. Under Section 320, publications deemed to be hate propaganda can be confiscated.
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Europe (28)

1		Albania	2013	Section 265 of the Criminal Code (as amended by Law No. 44 of 2013) penalises those who incite hate or disputes on grounds of sexual orientation, as well as those who intentionally prepare, disseminate or preserve writings with such content for purposes of distributing by any means or forms.
2		Austria	2011	Section 283(1) of Criminal Code (as amended in 2011) lists “sexual orientation” as a protected ground against incitement to violence.
3		Belgium	2013	Article 22 of the Anti-Discrimination Law (as amended in 2013) prohibits the incitement to discrimination, hate, segregation or violence on the basis of a protected criteria. Article 4(4) includes “sexual orientation” among the list of protected criteria.
4		Bulgaria	2004	The Protection Against Discrimination Act states that “harassment” (which includes hate speech and incitement) applies to sexual orientation, according to Articles 1(1) and 5.
5		Croatia	2006	Article 151(a) of the Penal Code (amended 2006) criminalises incitement to hatred based on, <i>inter alia</i> , “sexual preference”.
6		Cyprus	2011	Prohibition of incitement to hatred based on sexual orientation was introduced through the Combating of Certain Forms and Expression of Racism and Xenophobia by means of Criminal Law in 2011.
7		Denmark	2004	Section 266(b) of the Criminal Code penalises any person who, publicly or with the intention of wider dissemination, makes a statement or imparts other information by which a group of people are threatened, insulted or degraded on account of their “sexual inclination”.

8	 Estonia	2006	Section 151(1) of the Penal Code specifies sanctions for incitement to hatred on the basis of sexual orientation.
9	 Finland	2011	Chapter 11, Section 10 of the Criminal Code criminalises the public expression of an opinion or message that threatens, defames or insults a certain group on the basis of, <i>inter alia</i> , sexual orientation. Section 10(a) provides for enhanced punishment where that speech involves incitement or enticement to genocide, murder or serious violence.
10	 France	2005	Article 222(18)(1) of the Criminal Code criminalises a threat to commit an offence where the threat was made on the basis of the “victim’s true or supposed sexual orientation”.
11	 Greece	2013	Article 79 of the Penal Code proscribes incitement to hatred based on sexual orientation.
12	 Hungary	2013	Section 332 of the Criminal Code was amended to include “incitement against a community” which lists sexual orientation as a prohibited ground.
13	 Iceland	2004	Article 233(a) of the Penal Code (2003) specifies “sexual inclination” as being protected from anyone who publicly mocks, defames, denigrates or threatens a person or group of persons by comments or expressions of another nature, for example by means of pictures or symbols, for their sexual orientation.
14	 Ireland	1989	The Prohibition of Incitement to Hatred Act (1989) penalises incitement to hatred, violence or discrimination on the ground of, <i>inter alia</i> , sexual orientation.
15	 Lithuania	2005	Article 170 of the Criminal Code proscribes incitement to violence on the basis, <i>inter alia</i> , of sexual orientation.
16	 Luxembourg	1997	Article 457(1)(1) of the Criminal Code outlaws incitement to hatred or violence based on, <i>inter alia</i> , sexual orientation.
17	 Malta	2012	Articles 82A and 82C of the Criminal Code of Malta (amended by Act No. VIII of 2012) set out the circumstances and penalties for incitement to hatred based on, <i>inter alia</i> , sexual orientation.
18	 Monaco	2005	Article 16 of the Law on Public Freedom of Expression proscribes incitement to hatred or violence based on sexual orientation.
19	 Montenegro	2013	Article 443 of the Criminal Code proscribes incitement to hatred based on sexual orientation.
20	 Netherlands	1994	Section 137(c) of the Penal Code prohibits the intentional making of an insulting statement about a group of persons based on, <i>inter alia</i> , their sexual orientation. Section 137(d) prohibits the incitement of hatred or discrimination about a group of persons based on, <i>inter alia</i> , their sexual orientation.
21	 Norway	1981	Article 135(a) of the Penal Code criminalises the public utterance of a discriminatory or hateful expression, defined as speech that is “threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone” because of their “homosexuality, lifestyle or orientation”.

22	 Portugal	2007	Article 240(1) and (2) of the Penal Code proscribes incitement to discrimination, hatred or violence based on sexual orientation.
23	 San Marino	2008	Law No. 66 amended Article 179 of the Penal Code of San Marino to include sexual orientation as a protected ground from incitement to hatred and violence (Article 179 <i>bis</i>).
24	 Serbia	2010	Articles 13 of the Law on the Prohibition of Discrimination proscribes “severe forms of discrimination” consisting of incitement of inequality, hatred and enmity on the grounds of, <i>inter alia</i> , sexual orientation.
25	 Slovenia	2008	Article 297(1) of the Penal Code criminalises the public provocation or stirring up of hatred, strife or intolerance on the basis of sexual orientation.
26	 Spain	2003	Articles 510, 511 and 515 of the Penal Code penalise those who “provoke discrimination, hate or violence” on the grounds of “sexual preference”.
27	 Switzerland	2018	Article 261 <i>bis</i> of the Criminal Code was updated to include “sexual orientation” in the provision that criminalises public incitement to hatred or discrimination, as well as the public dissemination of ideologies that systematically denigrate or defame members belong to a protected group.
28	 United Kingdom	2004 2008	Section 74 and Schedule 16 of the Criminal Justice and Immigration Act (2008) prohibits the incitement to hatred on the ground of sexual orientation. In 2004, Section 8 of the Public Order (Northern Ireland) Order 1987 was amended to comprehensively deal with incitement to hatred based on sexual orientation (Sections 9-13).

Is there more in Europe?

Sweden

Due to the constitutional protections afforded to sexual orientation in 2003, the text of the **Penal Code** is taken to automatically read in sexual orientation. Chapter 16, Section 8 states that those who “disseminate statement or communication, threatens or expresses contempt” may be subject to a fine or up to two years in jail.

Oceania (0)

Is there more in Oceania?

Australia

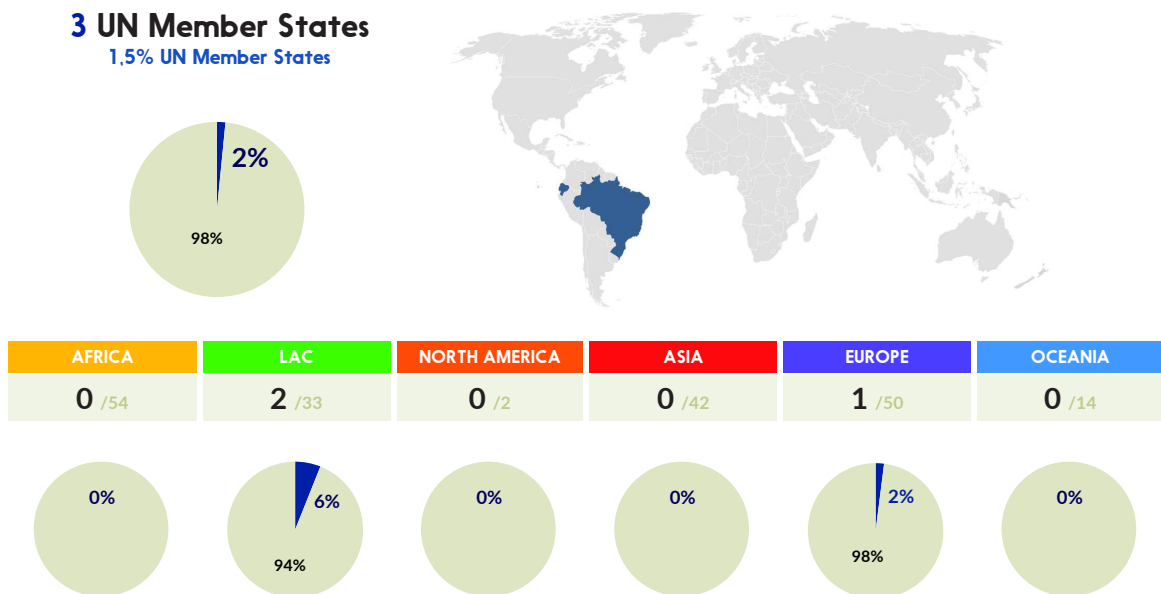
There is no federal provision prohibiting incitement to hatred based on sexual orientation in Australia, and less than half (41%) the population live in areas where provincial laws specify such protection.

Article 123(3)(e) of the **Broadcasting Services Act 1992** stipulates that Codes of Practice should take into account “the portrayal in programs of matter that is likely to incite or perpetuate hatred against, or vilifies, any person or group” on the basis of sexual orientation (among other grounds).

Several states have enacted laws which prohibit incitement based on sexual orientation: **Australian Capital Territory** (Art. 67A(1)(f), 2004); **New South Wales** (Sec 49ZT(1), 1993); **Queensland** (Sec. 124A(1), 2003); **Tasmania** (Sec. 19(c), 1999).

Bans against "Conversion Therapy"

Highlights



Introduction

The number of States that prohibit the pseudo-scientific practices of so-called "conversion therapy" is strikingly low.

Since our 2017 edition, there has been growing attention on this issue. Although we still have to report that only 3 UN Member States have nationwide bans, considerable progress has been made, especially at the subnational level.

Below we include the list of countries that have enacted bans against "conversion therapies" by means of a law (either civil or criminal) or other types of *legal/official instruments*. These do not include official position statements or directives issued by private professional associations or organisations.

Additionally, we map a few countries that have not enacted explicit bans on "conversion therapies" but have prohibited mental health diagnosis based exclusively on sexual orientation. Even though these laws do not ban these therapies explicitly, they may prevent licenced health professionals from administering some types of sexual orientation change efforts.

What does International Human Rights Law say?

Everyone has the right to the highest attainable standard of physical and mental health, regardless of sexual orientation, gender identity, gender expression or sex characteristics.

Yogyakarta Principle 17

States shall: Prohibit any practice [...] allowing intrusive and irreversible treatments [...] including [...] "reparative" or "conversion" therapies, when enforced or administered without the free, prior, and informed consent of the person concerned.

Yogyakarta Principle 10.e

Latin American and the Caribbean (2)

1	 Brazil	1999	Resolution 1/99 issued by the Federal Council of Psychology, prohibits the "pathologisation of homoerotic behaviours and practices" and orders all licenced psychologists to "refrain from coercive or unsolicited treatment to homosexuals". It also prohibits their participation in events or services offering a "gay cure". In 2013, the Commission for Human Rights of Brazil's lower house of Congress approved a bill that would repeal Resolution 1/99. The proposal was later abandoned. In 2017, a federal judge first overruled then reaffirmed Resolution 1/99 in a case brought by an evangelical Christian and psychologist whose licence was revoked in 2016 after she offered "conversion therapy".¹
2	 Ecuador	2013	Section 20(a) of the Ministerial Order No. 767 prohibits conversion therapies in rehabilitation institutions. Article 151(3) of the Comprehensive Organic Penal Code of 2014 also criminalizes any act of torture (defined in broad terms) perpetrated with the intention of modifying a persons' sexual orientation.

Is there more in Latin America and the Caribbean?

Argentina	Section 3(c) of the Law on Mental Health (2010) establishes that a person cannot be diagnosed on their mental health exclusively on the basis of their "sexual choice or identity". This law does not ban conversion therapies explicitly, but it prevents health professionals, particularly psychiatrists, from legally engaging in sexual orientation change efforts (SOCE).
Uruguay	Article 4 of the Mental Health Law (2017) prohibits any mental health diagnosis on the exclusive basis of sexual orientation and gender identity. This law does not ban conversion therapies explicitly, but it prevents health professionals, particularly psychiatrists, from legally engaging in sexual orientation change efforts (SOCE).

North America (0)

Is there more in North America?

Canada	While there are no nationwide bans on conversion therapy in Canada, an increasing proportion of cities and provinces have adopted or are considering adopting such bans. This includes the provinces of Manitoba (2015), Ontario (2015), Nova Scotia (2018) and the city Vancouver (2018). Therefore, around 46% of the Canadian population lives in areas with legal bans in force. The Respect for Sexual Orientation and Gender Identity Bill was introduced in Nova Scotia in September 2018. ² A petition to ban conversion therapy nationally will be presented to the Canadian House of Commons in January 2019. ³
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¹ Don Philips, 'Brazilian judge approves 'gay conversion therapy, sparking national outrage,' *The Guardian* (London, United Kingdom), September 19, 2017, World section; Mateus Rodrigues and Raquel Morais, 'Juiz federal do DF altera decisão que liberou 'cura gay' e reafirma normas do Conselho de Psicologia', *Globo.com* (Brazil), December 15, 2017, Federal District section.

² Michael Gorman, 'Bill passes banning conversion therapy in Nova Scotia', *CBC News*, 25 September 2018; Liam Bretten, 'Vancouver to ban businesses offering conversion therapy', *CBC News*, 6 June 2018.

³ Katie Dangerfield, 'Petition to ban conversion therapy across Canada gains steam, survivor says it's 'long overdue'', *Global News*, 9 October 2018.

United States of America

There is no federal law banning conversion therapy at the federal level. However, by January 2019, a total of 15 states and the District of Columbia had local laws proscribing these practices: **California** (2012); **Connecticut** (2017); **Delaware** (2018); **District of Columbia** (2014); **Hawaii** (2018); **Illinois** (2015); **Maryland** (2018); **Nevada** (2017); **New Hampshire** (2018); **New Jersey** (2013); **New Mexico** (2017); **New York** (2019); **Oregon** (2015); **Rhode Island** (2017); **Vermont** (2016); **Washington** (2018). A number of counties and cities have also enacted local bans.⁴ This means that around 40% of the population lives in jurisdictions where these "therapies" are banned. Several states have also tried to introduce such bans but have not been successful, including includes **Massachusetts**, **Maine** and **Colorado**.

In California, **AB-2943**, which considered advertising, offering to engage in, engaging in for sale, or selling services constituting sexual orientation change efforts an unlawful practice prohibited under the Consumer Legal Remedies Act, was withdrawn after being brought before its state assembly.⁵

Asia (0)

Is there more in Asia?

China

Several court decisions have ruled in favour of victims of conversion therapy though there has not been a legislative ban against such practices. In December 2014, a Beijing court ruled that the electronic shock therapy the claimant received was not necessary because homosexuality did not require treatment and ordered the psychiatric clinic to pay 3,500 yuan in compensation and post an apology to its website.⁶ In December 2017, a court in Henan province ordered a city psychiatric hospital to publish an apology in local newspapers and pay the 38-year old male claimant 5,000 yuan in compensation on the basis that he was forcibly treated.⁷

Israel

A bill which would have banned conversion therapy performed on minors was rejected by the legislature in 2016.⁸ However, the Israel Medical Association (which represents around 90% of the country's doctors) issued a ban on "conversion therapy" that would result in the expulsion of any doctor who performs such practices.⁹

India

In December 2018, a doctor was summoned by the Delhi High Court for allegedly violating the Indian Medical Council Act, after he was banned by the Delhi Medical Council for engaging in "conversion therapy".¹⁰

⁴ According to Movement Advancement Project (MAP), these are the counties and cities with local bans in force. (1) Counties: Albany County, NY (2018); Broward County, FL (2018); Erie County, NY (2018); Palm Beach County, FL (2017); Pima County, AZ (2017); Ulster County, NY (2017); Westchester County, NY (2018). (2) Cities: Albany, NY (2018); Allentown, PA (2017); Athens, OH (2017); Bay Harbor Islands, FL (2016); Bellefonte, PA (2018); Bethlehem, PA (2018); Boca Raton, FL (2017); Boynton Beach, FL (2017); Cincinnati, OH (2015); Columbus, OH (2017); Dayton, OH (2017); Delray Beach, FL (2017); Doylestown, PA (2017); Eau Claire, WI (2018); El Portal, FL (2017); Gainesville, FL (2018); Greenacres, FL (2017); Key West, FL (2017); Lake Worth, FL (2017); Lakewood, OH (2018); Madison, WI (2018); Miami, FL (2016); Miami Beach, FL (2016); Milwaukee, WI (2018); New York City, NY (2017); North Bay Village, FL (2016); Oakland Park, FL (2017); Philadelphia, PA (2017); Pittsburgh, PA (2016); Reading, PA (2017); Riviera Beach, FL (2017); Rochester, NY (2018); Seattle, WA (2016); State College, PA (2018); Tampa, FL (2017); Toledo, OH (2017); Wellington Village, FL (2017); West Palm Beach, FL (2016); Wilton Manors, FL (2016); Yardley, PA (2018).

⁵ 'California Assemblyman Drops So-Called 'Gay Conversion Therapy Ban' Bill', *CBN News*, 31 August 2018.

⁶ 'China orders payout in 'gay shock therapy' case', *BBC News*, 19 December 2014.

⁷ 'Chinese man wins forced gay conversion therapy lawsuit', *The Guardian*, 4 July 2017.

⁸ Marissa Newman, 'Day after marking LGBT rights, Knesset nixes 5 gender equality bills', *The Times of Israel*, 24 February 2016.

⁹ Rachel Savage, 'Israeli doctors ban gay conversion therapy as risks 'mental damage'', *Thomas Reuters Foundation News*, January 9, 2019.

¹⁰ "Delhi HC Summons Doctor Treating Homosexual Patients Using Electric Shocks", *Outlook India*, December 8, 2018.

Taiwan (China)	On February 22, 2018, the Ministry of Health and Welfare issued a public announcement (Yi-Zih No. 1071660970) ¹¹ stating that while legislative amendments to the Physicians Act to include “conversion therapy” as prohibited treatment were being debated, individuals and organisations carrying out such practices could be liable for an offence under the Children and Youth Welfare Act or the Criminal Code of the Republic of China. ¹²
Malaysia Negative development	In 2017, the federal government’s Islamic Development Department endorsed and promoted “conversion therapy”. ¹³ According to local sources, State officials have been organising “conversion therapy” courses aimed at transgender women. ¹⁴
Indonesia Negative development	In 2016, the Indonesian Psychiatrists Association (PDSKJI) classified “homosexuality”, “bisexuality” and “transsexualism” as mental disorders, which “can be cured through proper treatment”. ¹⁵

Europe (1)

1  Malta	2016	The Affirmation of Sexual Orientation, Gender Identity and Gender Expression Act (<i>an act to prohibit conversion therapy, as a deceptive and harmful act or interventions against a person's sexual orientation, gender identity and, or gender expression, and to affirm such characteristics</i>) prohibits the performance of conversion therapy both by professionals (Section 3.b) and by non-professionals (Section 3.a).
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Is there more in Europe?

European Union	In March 2018, the European Parliament of the European Union approved a resolution that “welcomes initiatives prohibiting LGBTI ‘conversion therapies’” and called on member states to outlaw such practices. ¹⁶
Spain	Even though there is no nationwide ban, several jurisdictions within Spain have prohibited conversion therapy, including Madrid (2016), Murcia (2016), Valencia (2017) and Andalusia (2017).
United Kingdom	While the Counsellors and Psychotherapists (Regulation) and Conversion Therapy Bill 2017-19 is still making its way through the UK Parliament, a Memorandum of Understanding was signed by both NHS England and NHS Scotland to commit to ending the practice of conversion therapy. ¹⁷

¹¹ A free English translation of the official document can be accessed [here](#). This translation was offered to ILGA World by Marriage Equality Coalition Taiwan.

¹² “性傾向扭轉治療爭議，衛福部最新函釋確定禁止”，*Apple Daily Taiwan*, 22 February 2018.

¹³ ‘Sexual orientation can be changed, Jakim says in new LGBT video’, *MalayMail*, 13 February 2017.

¹⁴ ‘Malaysian transgender conversion plan sparks alarm’, *MalayMail*, 30 December 2017.

¹⁵ Liza Yosephine, ‘Indonesian psychiatrists label LGBT as mental disorders’, *The Jakarta Post*, 24 February 2016.

¹⁶ ‘European Parliament takes a stance against LGBTI conversion therapies for the first time’, *Integroup on LGBT Rights (web page)*, 1 March 2018.

¹⁷ ‘Memorandum of Understanding on Conversion Therapy in the UK’, *UK Council for Psychotherapy (web page)* (2017).

Oceania (0)

Is there more in Oceania?

Australia	Though there is no federal ban on conversion therapy in Australia, in September 2018, the Australian Senate passed a motion seeking to ban conversion therapy across the country. Though not legally binding, the motion urges the federal government to pressure states to ban the practice. In Victoria, under the Health Complaints Act, the Health Complaints Commissioner has the power to investigate and issue temporary or permanent bans on unregistered health providers, including those providing “conversion therapy”.¹⁸ In May 2018, the state government also launched an inquiry into such practices.¹⁹
Fiji	Section 3(1)(d) of the Mental Health Decree 2010 (Decree No. 54 of 2010) provides that a person is not to be considered mentally ill because they express or refuse or fail to express a particular sexual preference or sexual orientation. While this does not explicitly prohibit the practice of “conversion therapy”, it prevents health professionals, particularly psychiatrists, from legally engaging in sexual orientation change efforts (SOCE).
Nauru	Nauru’s Mentally Disordered Persons Act was amended in 2016 to introduce Section 4A(1)(d) under which a person cannot be regarded as mentally disordered if they express, exhibits or refuses or fails to express a particular sexual preference or sexual orientation. While this does not explicitly prohibit the practice of “conversion therapy”, it prevents health professionals, particularly psychiatrists, from legally engaging in sexual orientation change efforts (SOCE).
Samoa	Section 2 of the Mental Health Act 2007 provides that a person is not to be considered mentally ill because they express or refuse or fail to express a particular sexual preference or sexual orientation. While this does not explicitly prohibit the practice of “conversion therapy”, it prevents health professionals, particularly psychiatrists, from legally engaging in sexual orientation change efforts (SOCE).

¹⁸ ‘Gay conversion therapy, fake doctors to be banned in Victoria’, ABC News, 9 February 2016.

¹⁹ Danny Tran, ‘Gay conversion therapy to be investigated by Victoria’s health watchdog’, ABC News, 17 May 2018.

GLOBAL OVERVIEW

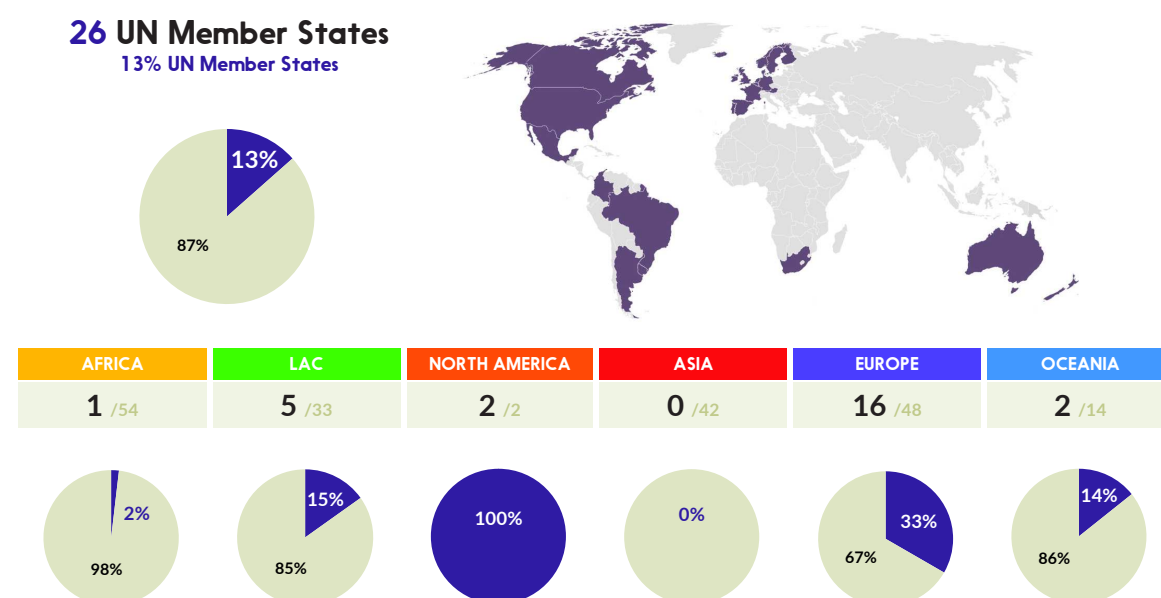
RECOGNITION

STATE-SPONSORED HOMOPHOBIA 2019



Same-Sex Marriage

Highlights



Introduction

Since 2001, an ever-increasing number of States have extended the definition of marriage to include same-sex couples. These amendments have been the result of the organised advocacy efforts carried out by civil society organisations in each country, regionally and internationally.

In most legal frameworks, the institution of marriage remains the most comprehensive legal vehicle for the official recognition of a loving relationship and the one that affords the largest number of benefits, rights and duties.

Therefore, the possibility of having access to such protection on an equal footing offers same-sex couples the stability and the protection traditionally afforded to heterosexual people only.

What does International Human Rights Law say?

States shall ensure that laws and policies recognise the diversity of family forms [...] and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination [...].

Everyone has the right to found a family, regardless of sexual orientation, gender identity, gender expression or sex characteristics. [...].

Yogyakarta Principle 24

Africa (1)

- | | | | | |
|---|---|---------------------|------|--|
| 1 |  | South Africa | 2006 | Despite the title of the law, the Civil Union Act (2006) confers the right to marriage to persons of the same-sex. In December 2018, the Civil Union Amendment Act (2018) repealed Section 6, which allowed a marriage officer to inform the Minister that they objected on the ground of conscience, religion, and belief to solemnising a civil union between persons of the same sex. |
|---|---|---------------------|------|--|

Latin American and the Caribbean (5)

- | | | | | |
|---|---|------------------|------|--|
| 1 |  | Argentina | 2010 | The Law on Marriage Equality (Law No. 26,618) is the federal law that provides for same-sex marriage nationwide. |
| 2 |  | Brazil | 2013 | Resolution No. 175 (2013) issued by the National Council of Justice states that notaries can no longer refuse to register same-sex marriage. Previously in May 2011, the Supreme Federal Court of Brazil had issued a decision indicating that same-sex “stable unions” should be converted to marriage and recommended the Congress to do so though no legislative action has been taken so far. Another decision recognised same-sex couples living in “stable unions” as “family units” and entitled to the same rights as heterosexual couples living in that kind of unions. |
| 3 |  | Colombia | 2016 | After several years of legal uncertainty, in 2016, Colombia’s Constitutional Court issued Decision SU214/16 , establishing that notaries could no longer refuse to register same-sex marriages. In 2011, the Court had issued Decision C-577/11 recognising same-sex couples as “family entities” and ordered the Congress to legislate on the matter. To date, no law has been adopted. |
| 4 |  | Mexico | | There is no federal law on same-sex marriage. ¹ Some jurisdictions have enacted local laws providing for this right, including Campeche (2016); Coahuila (2014), Colima (2016), Mexico City (2009); Michoacán (2016); Morelos (2016) [constitutional amendment]; and Nayarit (2015). In Quintana Roo (2012), same-sex marriages were allowed by local authorities through a progressive construction of local regulations. ² Similarly, in Baja California (2018), Chihuahua (2017) and Oaxaca (2018), local authorities have administratively allowed same-sex marriages to be performed. ³ In several other States, judicial decisions have ordered the recognition of same-sex marriages: Chiapas (2017); Jalisco (2016); Puebla (2017). ⁴ |
| 5 |  | Uruguay | 2013 | Law on Marriage Equality (Law No. 19,075) redefined marriage as the union of two persons “of different or same-sex”. |

¹ In June 2015, the Supreme Court of Mexico **declared** that bans on marriage equality were unconstitutional and states must recognise the marriage of same-sex couples conducted in other states. However, the lack of *erga omnes* effect of these decisions (they do not repeal legislation) means that same-sex marriages have been celebrated on a case-by-case basis in States where legislation still does not provide for such unions.

² Adriana Varillas, “**Revocan anulación de bodas gay en QRo**”, *El Universal*, Estados, 3 May 2012.

³ “**Aún sin avances en derechos de LGBTI en Baja California, CEDH interviene para 50 bodas**”, *ZETA*, 22 June 2018; “**Van 6 matrimonios igualitarios en Oaxaca durante 2018**”, *NVI Noticias*, 27 August 2018; “**Reitera corral: Nadie puede negar el matrimonio igualitario**”, *Entrelineas*, 12 April 2017.

⁴ “**Celebran primera boda igualitaria en Chiapas**”, *El Universal*, 31 July 2017; Víctor Hugo Ornelas, “**Oficial el primer matrimonio igualitario en Jalisco**”, *Milenio*, 20 February 2016; “**Corte avala bodas gay en Puebla**”, *Excelsior*, 1 August 2017.

Is there more in Latin America and the Caribbean?

Costa Rica	Following the Advisory Opinion issued by the Inter-American Court of Human Rights, the Supreme Court of Costa Rica held in August 2018 that sections of the Family Code prohibiting same-sex marriage are unconstitutional and ordered the Legislative Assembly to reform the law, failing which the ban would be abolished automatically by May 2020. ⁵
Chile	A marriage equality bill has been pending in Congress since 2017 despite the government's commitment to introduce marriage equality under a 2016 settlement agreement before the Inter-American Commission on Human Rights (IACHR). ⁶ Following a Supreme Court ruling that affirmed the right to marry and found a family, a same-sex couple filed an appeal in January 2019 to be granted marriage by the Civil Registry. ⁷
Cuba	The government had initially planned to include a constitutional amendment that would introduce a gender-neutral definition of marriage but such text was removed from the final draft. ⁸
Ecuador	Judges in two cases ruled in favour of same-sex couples after the Civil Registry office had rejected the couples' marriage license applications. ⁹ The judges ruled that the Civil registry must immediately allow the women to wed, following the Advisory Opinion issued by the Inter-American Court of Human Rights. However, in September 2018, the Labour Chamber of the Provincial Court of Justice overturned one of the cases and held that marriage equality should be decided by the National Assembly or the Constitutional Court. ¹⁰
El Salvador	The Constitutional Chamber of the Supreme Court of Justice rejected a marriage equality case in January 2019 on technical grounds. ¹¹ This followed the Supreme Court's ruling that blocked lawmakers from ratifying a constitutional change that would bar same-sex marriage and prohibit same-sex couples from adopting children in early 2018, similarly due to procedural issues. ¹²
Honduras	Local activists filed two lawsuits with the Supreme Court to legalise same-sex marriage on the authority of the Advisory Opinion issued by the Inter-American Court of Human Rights. One was dismissed due to technical errors and the other case remains pending before the court. ¹³
Peru	In 2016, the seventh Constitutional Court of Peru ordered the National Registry of Identification and Civil Status (RENIEC) to recognize and register a same-sex marriage celebrated abroad. ¹⁴

⁵ Sala Constitucional de la Corte Suprema de Justicia (Costa Rica), *Sentencia No. 2018-12782*, Expte. 15-013971-0007-CO, 8 August 2018; "Con este comunicado, Sala IV anunció decisiones sobre matrimonio y uniones gays", *La Nación*, 9 August 2018.

⁶ "Press Release: Friendly Settlement before the IACHR Furthers Progress on Marriage Equality in Chile", *Organisation of American States (website)*, 2 February 2017.

⁷ Rosario Gallardo, "Homosexual couple will file an appeal for protection for rejection of the Civil Registry to grant time for marriage", *Latercera*, 15 January 2019.

⁸ "Cuba decides to scrap same-sex marriage law in new constitution despite majority support", *The Telegraph*, 19 December 2018.

⁹ Shannon Power, "In historic move, court rules Ecuador's same-sex marriage ban is illegal", *Gay Star News*, 4 July 2018.

¹⁰ "Corte de Justicia rechaza matrimonio igualitario", *El Telégrafo*, 10 September 2018.

¹¹ Sala de lo Constitucional de la Corte Suprema de Justicia, *Sentencia 18-2018*, 11 January 2019.

¹² "El Salvador: Constitutional ban on same-sex marriage blocked", *WTOP news*, 21 January 2018.

¹³ "Justicia de Honduras rechazó recurso por matrimonio igualitario", *Agencia Presentes*, 13 November 2018.

¹⁴ Séptimo Juzgado Constitucional, *Expediente No. 22863-2012-O-1801-JR-CI-08*, 21 December 2016.

North America (2)

1	 Canada	2005	The Civil Marriage Act 2005 is the federal law by which same-sex marriage was recognised nation-wide. Starting with Ontario in 2003, most jurisdictions (provinces and territories) allowed for same-sex marriage before the federal law was enacted. The provinces of Alberta and Prince Edward Island, and the territories of Nunavut and the Northwest Territories were the only jurisdictions without such laws before 2005.
2	 United States of America	2015	The Supreme Court of the United States rules that same-sex couples had a constitutional right to marry in <i>Obergefell v. Hodges</i> , making same-sex marriage available in all 50 states. Prior to this decision, only 13 of the 50 states still outlawed same-sex marriage. Same-sex marriage is also legal in US territories: Guam (2015), Puerto Rico (2015), Northern Mariana Islands (2015), US Virgin Islands (2015), except for American Samoa.

Asia (0)

Is there more in Asia?

Taiwan (China)

The Constitutional Court of Taiwan ruled in May 2017 that same-sex couples have the right to marry under the Constitution and ordered the Legislative Yuan to amend the marriage laws within two years by May 2019.¹⁵ However, legislative reform was stalled by a referendum in November 2018 that voted against amending the Civil Code to legalise marriage equality. According to the secretary-general of the Judicial Yuan, a separate law needs to be drafted to provide for same-sex marriage though it remains unclear how this issue will develop following the referendum.¹⁶

Europe (17)

1	 Austria	2019	Following a decision by the Constitutional Court, same-sex marriage came into effect from 1 January 2019. ¹⁷ The court had held that the distinction between marriage and a registered partnership constituted discrimination against same-sex couples.
2	 Belgium	2003	Article 143 of the Belgian Civil Code was, by act of Parliament, amended to read; "Marriage is contracted by two persons of different-sex or of the same-sex" in 2003.
3	 Denmark	2012	Section 2 of Law No.532 (2012) incorporates marriage between "two people of the same sex" into existing marriage laws. Same-sex marriage came into force in Greenland in early April 2016 ¹⁸ and in the Faroe Islands in 2017. ¹⁹

¹⁵ Wu J R, "Taiwan court rules in favor of same-sex marriage, first in Asia", *Reuters*, 24 May 2017.

¹⁶ "Marriage law 'cannot contradict' ruling", *Taipei Times*, 30 November 2018.

¹⁷ "Distinction between marriage and registered partnership violates ban on discrimination", *Constitutional Court of Austria* (website), 5 December 2017.

¹⁸ Constance Johnson, "Greenland: Same-sex Marriage Bill Passes", *Library of Congress* (website), 11 June 2015.

¹⁹ Eir Nolsøe, "Same-sex marriage legalised in the Faroe Islands", *Faroeisland.fo*, 16 June 2017

4	 Finland	2017	In February 2015, the Finnish government signed a gender-neutral marriage law that amends the text of the law through Act 156/2015 to the marriage of “two persons” and which came into force on 1 March 2017.
5	 France	2013	Article 1 of the Law Opening Marriage to Same-Sex Couples (Law No. 2013-404 of 17 May 2013) establishes marriage as available to persons of the same or different, sex. The law also applies to the overseas regions of Guadeloupe and Martinique .
6	 Germany	2017	The German parliament, adopted a marriage equality bill in July 2017, with the first marriages solemnized in October of that year. ²⁰ This occurred after the Chancellor Angela Merkel allowed a conscience vote, and gives same-sex couples the same rights as heterosexual couples, including the right to joint adoption.
7	 Iceland	2010	In 2010, the parliament passed Bill 138 on changes to the Marriage Act , of which Article 3.1 establishes the right to marry regardless of gender, thereby repealing the 1996 registered partnership law.
8	 Ireland	2015	In October 2015, the Marriage Act 2015 was signed into law specifying its application to same-sex couples. The law replaced the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 . Interestingly, the 2015 law was enacted six months after the success of a legally binding Constitutional referendum to alter Article 41(4) to reframe marriage as gender – neutral.
9	 Luxembourg	2015	Article 143 of the Civil Code was amended in 2014 (in force 1 January 2015) to simply say that two people of the same-sex can marry.
10	 Malta	2017	The Marriage Act and other Laws (Amendment) Act was signed into law on 1 August 2017 and entered into operation on 1 September 2017. Amendments included eliminating any reference to “husband and wife.” In the term’s place is the gender-neutral “spouse” to cover all situations such that same-sex marriage is made equal to heterosexual marriage.
11	 Netherlands	2001	Article 30 of the Act on the Opening up of Marriage states “[a] marriage can be contracted by two persons of different-sex or of the same-sex”, thereby making the Netherlands the first country in the world to enact same-sex marriage laws.
12	 Norway	2009	Chapter 1, Section 1 of the 1993 Marriage Act (amended 2009) states “[t]wo persons of opposite sex or of the same-sex may contract marriage”.
13	 Portugal	2010	Article 1 of Law No 9/2010 of 31 May states that the law allows for marriage of persons of the same-sex.
14	 Spain	2005	The 2005 amendments made to Article 44(2) of the Civil Code state that marriage confers the same rights and responsibilities on same-sex couples as it does on spouses of different-sex.

²⁰ “German president signs gay marriage bill into law”, *DW.com*, 21 July 2017.

15	 Sweden	2009	In 2009 the 1987 Swedish Marriage Code was revised to be gender-neutral.
16	 United Kingdom	2014	Section 1(1) of the Marriage (Same-sex Couples) Act 2013 (in force 2014) simply states that “marriage of same-sex couples is lawful”. This Act is only applicable in England and Wales, where it repealed the Civil Partnership Act 2004 . The Scottish Marriage and Civil Partnership (Scotland) Act of 2014 defines ‘spouse’ as being both different as well as same-sex. Northern Ireland does not enjoy marriage equality. Same-sex marriage is also available in several British Overseas Territories. ²¹

Is there more in Europe?

Armenia	The Ministry of Justice stated in July 2017 that all marriages performed abroad are valid in Armenia, including marriages between people of the same sex pursuant to Article 143 of the Family Code of Armenia .
Romania	A referendum to change the constitution to ban same-sex couples from marriage equality failed due to poor turnout in October 2018. ²² However, in July 2018, the Constitutional Court ruled that the state must grant residency rights to same-sex spouses of European Union citizens following the decision of the European Court of Justice on the matter. ²³

Oceania (2)

1	 Australia	2017	The Marriage Amendment (Definition and Religious Freedoms) Act 2017 legalized marriage between two persons of marriageable age, regardless of their gender.
2	 New Zealand	2013	Marriage (Definition of Marriage) Amendment Act of 2013 amended the Marriage Act 1955 to allow for marriage between 2 people “regardless of their sex, sexual orientation, or gender identity”. This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).

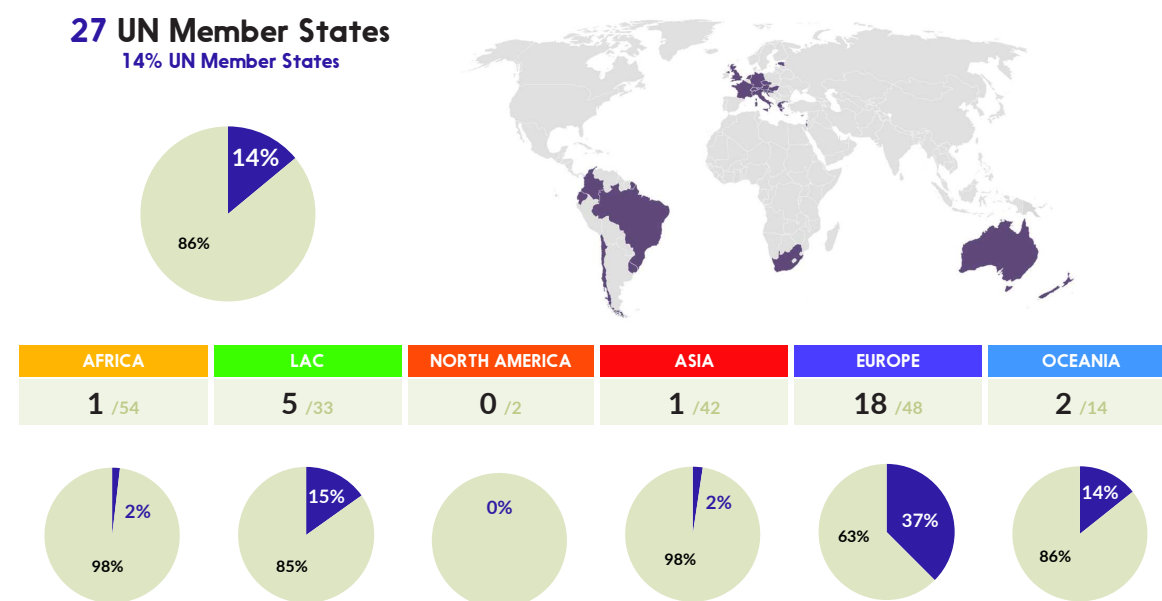
²¹ Pitcairn Islands (2015), Ascension Island (2016), Isle of Man (2016), British Antarctic Territory (2016), Gibraltar (2016), Guernsey (2017), Falkland/Malvinas Islands (2017), Tristan da Cunha (2017), Saint Helena (2017), Jersey (2018) and Alderney (2018). In Bermuda, same-sex marriage was **legalized** by the Bermuda Supreme Court in May 2017 but the legislature passed the **Domestic Partnership Act** in December 2017 to limit marriage to between a man and a woman. However, the Supreme Court **struck down** the prohibition in June 2018 and **dismissed** the government’s appeal in November 2018. In December 2018, the government mounted a last-ditch legal attempt to appeal to the Privy Council. Note: ILGA is aware of the sovereignty dispute between Argentina and the United Kingdom over the Falkland Islands/Islands Malvinas. Under Argentine law, same-sex marriage is legal since 2010. The British administration of the Islands, with effective control over that territory, legalised same-sex marriage in 2017.

²² “Romanian referendum to ban same sex marriage fails on low turnout”, *CBC News*, 7 October 2018.

²³ “Romania must give residency rights to same-sex spouses, court rules”, *Reuters*, 18 July 2018.

Partnership Recognition for Same-Sex Couples

Highlights



Introduction

Several states have progressively recognised legal effects to stable relationships of two people of the same gender. Advocacy efforts by local organisations have led to various forms of recognition around the world. Legal recognition of rights and duties for same-sex couples was achieved through different legal vehicles, with different names and varying levels of recognition of rights.

Historically, partnership recognition for same-sex couples was achieved before same-sex marriage. Starting in Denmark in 1989 with the first “registered partnership” entered into by same-sex couples,¹ an ever-increasing number of jurisdictions have made these unions available.

Prior to the 12th edition, this publication had differentiated between forms of relationship recognition between those that offer a *minimum* protection and those conferring many of the rights enshrined in marriage between different sex couples. However, we find that this distinction is no longer as relevant as it used to be, as the status of those relationships have generally been strengthened.

What does International Human Rights Law say?

States shall ensure that laws and policies recognise the diversity of family forms, including those not defined by descent or marriage, and take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination [...].

Yogyakarta Principle 24(b)

States shall take all necessary legislative, administrative and other measures to ensure that any obligation, entitlement, privilege, obligation or benefit available to different-sex unmarried partners is equally available to same-sex unmarried partners.

Yogyakarta Principle 24(f)

¹ Sheila Rule, “Rights for Gay Couples in Denmark”, *The New York Times*, 2 October 1989.

Africa (1)

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|---|---|---------------------|------|---|
| 1 |  | South Africa | 2006 | The Civil Union Act, 2006 confers the right to civil unions to persons of the same-sex. This is the same piece of legislation that allows for same-sex marriage. |
|---|---|---------------------|------|---|

Is there more in Africa?

Namibia

In January 2018, the Namibian government agreed to allow the same-sex partner of a Namibian man to remain in the country on a visitor's permit just before his temporary work visa expired.² The couple had applied to the High Court to issue a certificate of identity that would recognise the non-citizen partner as the spouse. No decision has been released yet.

Latin American and the Caribbean (5)

- | | | | | |
|---|---|-----------------|------|---|
| 1 |  | Brazil | 2011 | Supreme Federal Court of Brazil recognised same-sex civil unions with <i>erga omnes</i> effects in two joint decisions (Ação Direta de Inconstitucionalidade 4,277 and Arguição de Descumprimento de Preceito Fundamental 132). |
| 2 |  | Chile | 2015 | The Law on Civil Union Agreement (Law 20,830) provides for civil unions, open to all couples (same-sex or not) that share a home, with the purpose of regulating the legal effects derived from their common affective life, and with a stable and permanent nature. |
| 3 |  | Colombia | 2011 | In C-577/11 , the Constitutional Court held that while marriage may be defined as between a man and a woman under the Constitution, same-sex couples cannot be prohibited from legal recognition of their relationship. This <i>de facto</i> led to the judicial recognition of civil partnerships though no legislative reform has been introduced. |
| 4 |  | Ecuador | 2008 | Article 68 of the Constitution of Ecuador provides for civil unions regardless of the gender of spouses and establishes that these unions will be granted the same rights afforded to married couples, with the exception of adoption.

On 22 August 2014, the Civil Registry issued Resolution No. 174 to allow same-sex couples to register their unions. On 21 April 2015, the National Assembly approved the Civil Code Amendment Law , which amends the Civil Code to incorporate the regulation of civil unions. |
| 5 |  | Uruguay | 2008 | Law 18,246 affords same-sex couples the right to have their union recognized (locally referred to as "union concubinaria"). |

² Roberto Igual, "Namibia: Small victory for gay couple suing for marriage recognition", *Mamba Online*, 10 January 2018.

Is there more in Latin America and the Caribbean?

Argentina	Even though there is no federal law providing for civil unions, they are recognised in the Province of Río Negro (2003), and the cities of Buenos Aires (2002), Villa Carlos Paz (2007) and Río Cuarto (2009).
Costa Rica	A 2013 amendment to the 2002 Law on Youth inserted a non-discrimination clause with regard to <i>de facto</i> unions which appeared to allow for same-sex civil unions (even though progressive caselaw used this clause as the legal basis to recognise same-sex <i>de facto</i> unions, Article 242 of the Family Code still restricts these unions to different-sex couples). In recent years, considerable progress has been made: in 2014, Governmental Social Security Agency (CCSS) granted health insurance benefits for same-sex couples, and in 2015 the Executive Order No. 38,999 was issued, addressing agencies within the Executive Branch to regulate certain rights for same-sex <i>de facto</i> unions (sick leave, care-leave, etc). In 2016, survivor's pensions were granted to same-sex couples. In May, the government submitted a request for an advisory opinion to the Inter-American Court of Human Rights on same-sex patrimonial rights under the ACHR, which prompted its Advisory Opinion No. 24.
Mexico	There is no federal law providing for civil unions. However, civil unions and other forms of registered partnerships are recognised in several jurisdictions within Mexico, such as Campeche (2013); Coahuila (2007); Colima (2013); Jalisco (2013); Federal District (2007); Morelos (2016); Nayarit (2015).

North America (0)

Is there more in North America?

Canada	Besides marriage (see previous section), civil unions, domestic partnerships and other forms of unions are available to same-sex couples in several jurisdictions: Alberta (2002); Manitoba (2001/2002); Nova Scotia (2001); and Quebec (2002).
United States of America	Even though there is no federal law providing for civil unions, they are locally recognised in several states. ³

Asia (1)

1	 Israel	1994	According to a submission by the State of Israel before the UN, two alternatives to the traditional institution of marriage exist for same-sex couples: 1. Recognition of "Reputed Couples" (common-law partners), which enjoy similar legal rights and duties as legally married couples; 2. Registration before the Israeli Population Registration of marriages celebrated abroad (according to a ruling of the Israeli High Court ruling in November 2006), which renders the civil (legal) status of reputed and/or same-sex couples equal to that of legally married couples.⁴
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³ "Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States", *National Center for Lesbian Rights* (2017), accessed 22 January 2019.

Taiwan (China)	2015 2016	Over 80% of the population lives in jurisdictions that allow same-sex couples to administratively register their relationships. ⁵ The registration is archived in a partnership registry and some city governments have entered into agreements to share their registries so that partnerships recognized in one city or municipality would be recognized in the others. The registration confers on same-sex couples limited rights such as medical decision-making and other areas.
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Is there more in Asia?

Hong Kong

In June 2018, the Hong Kong Court of Appeal **overturned** a lower court's decision that ruled that the government had to grant benefits to same-sex spouses of government employees married abroad. The applicant filed an appeal to the Court of Final Appeal, which was **partially allowed** by the Court of Appeal in September 2018. This case followed an earlier Court of Final Appeal's **decision** that held that the denial of a spousal visa to a lesbian spouse in a civil partnership with a Hong Kong native amounted to unlawful discrimination.

Japan

Various cities and city wards have recognized civil partnerships by issuing partnership certificates, including Sapporo (2017), Fukuoka (2018) and Osaka (2018).⁶

Europe (18)

1	 Andorra	2014	In November 2014, the General Council of Andorra introduced Law 34/2014 that recognised same-sex civil unions as holding equivalence to marriage in terms of most rights and the basis on which family can be founded.
2	 Austria	2010	The Registered Partnership Act (Text No. 135/2009) has strong contractual and financial securities enshrined, but offers no recognition of family life, including family name.
3	 Croatia	2014	The Same-sex Life Partnership Act of July 2014 provides comprehensive civil union protections regarding recognition and maintenance, but the law has been criticized for being weak in relation to parenting rights. ⁷
4	 Cyprus	2015	The Civil Partnership Law (L184(1)/2015) applies to same-sex and different-sex couples regarding financial and accommodation issues, but with limited familial protection.

⁴ *Combined second, third and fourth periodic reports of States parties due in 2008: Israel*, CRC/C/ISR/2-4, 28 August 2012, paras. 324-325. For more information, see: Talia Einhorn, "Same-sex family unions in Israeli law" *Utretch Law Review* 4 no. 2 (2008), 222.

⁵ Lee Bing-shen, "All Taiwan Municipalities To Recognize Same-Sex Relationships", *The News Lens*, March 7, 2016; 徐亚旻, "全台同婚登记 女同婚比男同婚多近4倍", *Huaxia News*, 9 August 2017.

⁶ Josh Jackman, "Japanese city of two million becomes biggest to recognise same-sex partnerships", *Pink News*, 1 June 2017; Josh Jackman, "Japanese city of 1.5 million recognises same-sex partnerships in landmark move", *Pink News*, 2 April 2018; "Osaka to start recognizing LGBT couples from July", *Nikkei Asian Review*, 27 June 2018.

⁷ "LGBT Parenting" (webpage), životno Partnerstvo (website).

5	 Czechia	2006	The Registered Partnership Act (Law No. 115/2006) confers comprehensive civil union protections to same-sex partners only but same-sex couples were not allowed to adopt children. In 2016, the Czech Constitutional Court struck down the ban and ruled that individuals in a same-sex partnership may adopt individually, but not as a couple.⁸ Article 3020 of the 2012 Civil Code makes the provision that “the rights and responsibilities of spouses shall apply <i>mutatis mutandis</i> to registered partnership and the rights and obligations of partners” (referring to the first, third and fourth part of the section on Marriage at Section 655).
6	 Estonia	2016	The Registered Partnership Act (2014) that entered into force on 1 January 2016 is open to same-sex and different-sex couples and contains limited adoption rights - second parent adoption (or joint adoption), but ‘marriage’ in Estonian law requires a union between a man and a woman. ⁹
7	 France	1999	Law 99-944 of 15 November 1999 (on the Civil Solidarity Pact) offered same-sex couples some level of legal recognition.
8	 Germany	2001-2018	The Act on Registered Life Partners provides significant protections for same-sex partners (to whom the Act is limited), and some familial scope regarding adoption (Section 9). This law was repealed when same-sex marriage was legalised. Therefore, no new registered partnerships can be formalised.
9	 Greece	2015	Article 1 of Law No. 4356 on Covenant Partnership of December 2015 confers gender-neutral partnership rights, and limited co-parenting provisions.
10	 Hungary	2009	Section 6:514 of the 2009 Civil Code sets out quite limited provisions pertaining to gender-neutral civil partnership in Hungary.
11	 Italy	2016	Article 1 of Law May 20 n. 76 regarding civil partnership and cohabitation establishes it is limited to same-sex couples. This legislation provides for equality in matters of tax, social security and inheritance. In 2012, the Court of Cassation denied a petition to recognise a same-sex marriage, ¹⁰ but with a reasoning that represented a fundamental change in approach to the issue. ¹¹
12	 Liechtenstein	2011	The Act on Registered Life Partnership confers limited protections to same-sex partners, but overtly denies joint parental rights at Section 9.
13	 Malta	2014	Section 4(1) of the Civil Unions Act confers “the corresponding effects and consequences in law of civil marriage” and, as per Section 3(2), applies to same-sex and different couples equally.

⁸ [Pl. ÚS 7/15](#).

⁹ Peter Roudik, “[Estonia: Legalization of Civil Partnerships](#)”, *Library of Congress*, 14 January 2016.

¹⁰ “[Italy, Corte di Cassazione, Rights of same-sex couples, judgment n. 4184/12](#)” (webpage), *Centre for Judicial Cooperation (website)*, accessed January 22, 2019.

¹¹ Massimo Fichera and Helen Hartnell, “[All you Need is Law: Italian Courts Break New Ground in the Treatment of Same-Sex Marriage](#)” *International Journal of Human Rights and Constitutional Studies* 2, no 2 (2014): 171.

14	 Netherlands	1998	Co-existing with same-sex marriage, Article 1:80(a)-(e), Book 1 of the Civil Code confers comprehensive protections to both same-sex and of different-sex civil partners, analysed as virtually equivalent to marriage. The Netherlands' constituent country, Aruba, does not allow same-sex marriage, but in September 2016 voted to allow civil partnerships. ¹²
15	 San Marino	2018	On 5 December 2018, the Law on the Regulation of Civil Unions (Law No. 147 of 20 November 2018) came into effect, allowing same-sex and opposite-sex couples to enter into a union and enjoy certain rights with regard to residency, social security, pension, healthcare and survivorship.
16	 Slovenia	2017	Article 8(1) of the Civil Partnership Registration Act (into force February 2017) confers the rights to subsistence and maintenance, jointly owned property, occupancy, inheritance and partner healthcare, but is silent on joint or second parent adoption provisions (see second parent adoption below).
17	 Switzerland	2004	The Federal Law on Registered Partnership Between Persons of the Same-sex (RS 211.231) contains protective financial and property provisions.
18	 United Kingdom	2005	The UK's Civil Partnership Act 2004 was adopted in Northern Ireland in 2005, but not rescinded when marriage equality emerged in all other parts of the UK in 2013. In 2012, the Crown Dependency of Jersey introduced Civil Partner (Jersey) Law .

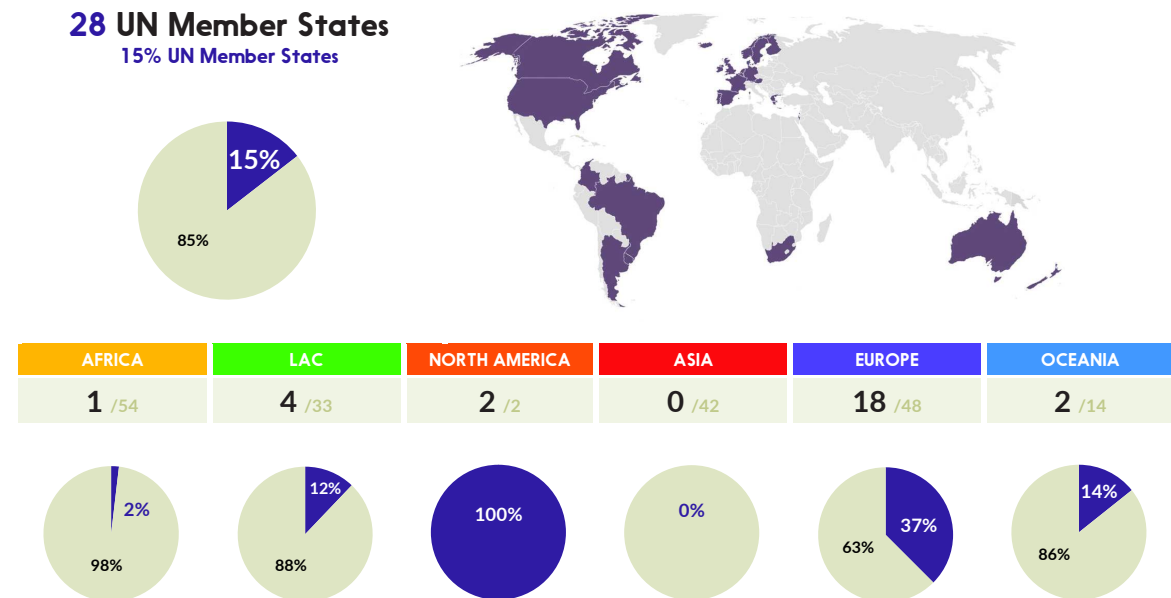
Oceania (2)

1	 Australia	2002- 2016	In 2008, the Australian Government introduced reforms to remove the discriminations between <i>de facto</i> same-sex and different-sex <i>de facto</i> couples under the Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008 and Same-Sex Relationships (Equal Treatment in Commonwealth Laws—Superannuation) Act 2008. <i>Civil unions</i> are available (only to same-sex couples) in the Australian Capital Territory (2012) [domestic partnerships had been available in the ACT since 1994]. <i>Registered partnerships</i> are available in New South Wales (2010); Queensland (2012); South Australia (2016); Tasmania (2003); Victoria (2008). <i>Domestic partnerships</i> are available in South Australia (2007). <i>De facto relationships</i> are also recognized in Western Australia (2002) and in the Northern Territory (2004).
2	 New Zealand	2008	The Civil Union Act (2004) provides for civil unions, available to same-sex or different-sex couples.

¹² Wendy Zeldin, "Aruba: Same-Sex Partnerships Recognized by Law", *Library of Congress*, 23 September 2016.

Joint Adoption by Same-Sex Couples

Highlights



Introduction

An ever-increasing number of States and jurisdictions have fully recognised the right to found a family and the possibility to jointly-adopt children to same-sex couples.

Depending on the legal requirements of joint adoption in each country, marriage (or even a formalised union) may not be a requirement. In countries where joint adoption is only possibly for married couples, the enactment of same-sex marriage laws automatically extended adoption rights, while in others specific amendments were subsequently made.

What does International Human Rights Law say?

States shall take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption [...].

Yogyakarta Principle 24(a)

Africa (1)

1		South Africa	2002	In the 2002 Constitutional Court case <i>Du Toit & Or.</i> it was ordered that the words "or by a person whose permanent same-sex life partner is the parent of the child" be adjoined to bring Section 17(c) of the 1983 <i>Child Care Act</i> in line with the <i>Constitution</i> .
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Latin American and the Caribbean (4)

1	 Argentina	2010	The Law on Marriage Equality (Law No. 26,618) grants same-sex couples all rights derived from marriage, including joint adoption.
2	 Brazil	2010	The Superior Court of Justice of Brazil (STJ) ruled in April 2010 that same-sex couples may adopt children. This judgment was upheld in the Supreme Federal Court of Brazil in August 2010.
3	 Colombia	2015	In November 2015, the Constitutional Court issued Decision C-683/15 that same-sex couples in Colombia can jointly adopt children. ¹
4	 Uruguay	2013	Law on Marriage Equality (Law No. 19,075) grants same-sex couples all rights derived from marriage, including joint adoption.

Is there more in Latin America and the Caribbean?

Mexico

There is no federal law allowing for joint adoption by same-sex couples. In some jurisdictions, which cover over 15% of the nation's population, legislation provides for joint adoption of married couples: **Campeche** (Art. 407, 2016); **Coahuila** (Art. 253, 2014); **Chihuahua** (2015); **Colima** (Art. 391(b), 2016); **Mexico City** (2010); **Michoacán** (2016); **Morelos** (2016); **Nayarit** (Art. 385, 2016); **Veracruz** (2011).

North America (2)

1	 Canada	1996- 2011	Joint adoption by same-sex couples is legal in all Canadian provinces and territories. Every jurisdiction has its own laws and regulation on the matter. Alberta (2007), British Columbia (1996), Manitoba (2002), New Brunswick (2008), Newfoundland & Labrador (2003), Northwest Territories (2002), Nova Scotia (2001), Nunavut (2011), Ontario (2000), Prince Edward Island (2009), Quebec (2002), Saskatchewan (2001).
2	 United States of America	2015	As a result of the Supreme Court decision in Obergefell v. Hodges , joint adoption by same-sex married couples is now available in all 50 states. However, there are several states that have laws permitting state-licensed child welfare agencies to discriminate against LGBT people, including married couples. ² Mississippi was the last state in the USA to remove blocks to joint adoption. ³

¹ For more information, see: "[Adopción igualitaria](#)", *Colombia Diversa (Website)* (In Spanish only).

² "[Joint Adoption](#)", *Movement Advancement Project (website)*, accessed 22 January 2019.

³ Neal Broverman, "[Nation's Last Gay Adoption Ban Falls](#)", *The Advocate*, 3 May 2016.

Asia (1)

1	 Israel	2008 2018	Although revisions to the 1981 Adoption Law make no reference to 'reputed spouses', in 2008 the Attorney General declared it should nonetheless be interpreted as also relating to them.⁴ The right to joint adoption was affirmed in a 2018 decision by the High Court of Justice that ordered the Interior Ministry to list the names of a same-sex couple as the legal parents on the birth certificate of their adopted child.⁵
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Europe (17)

1	 Andorra	2014	Law 34/2014 recognises same-sex civil unions as holding direct equivalence to marriage, and Article 24 applies this to adoption rights of same-sex couples.
2	 Austria	2016	In late 2014, the Constitutional Court in Austria ruled that provisions barring joint adoption by same-sex couples contravened the right to equality, and not in the best interest of the child. ⁶ As such, Articles 178-185 of Civil Code are applicable to same-sex couples as of early 2016. The legalization of same-sex marriage in 2019 reaffirms the status of same-sex families as well.
3	 Belgium	2006	Articles 4 and 5 of the " Law amending certain provisions of the Civil Code with a view to enabling adoption by persons of the same-sex " primarily concern Article 353 of the Civil Code and ensures full joint-parental rights.
4	 Denmark	2010	Section 5.1 of 2010 Adoption Act (updated Adoption (Consolidation) Act 2014) sets out that a partner or spouse can jointly adopt. Greenland enacted such legislation in 2016.
5	 Finland	2017	Section 9 of the 2012 Adoption Act stipulates that only persons who are married may adopt. On 1 March 2017, amendments to the Marriage Act that allow for gender-neutral marriage came into force.
6	 France	2013	Article 1 of the Law Opening Marriage to Same-Sex Couples (Law No. 2013-404 of 17 May 2013) updates at Articles 345(1), 360 and 371(4) in the Civil Code regarding joint adoption.
7	 Germany	2017	The passage of marriage equality allows same-sex couples to adopt children who are not biologically related to them.
8	 Greece	2018	Article 8 of the Child Adoption Law (2018) allows same-sex couples to adopt and become foster parents.
9	 Iceland	2010	Articles, 2, 8 and 29 of the 2010 Marriage Act stipulate the joint parental responsibilities of spouses: these apply to adoption.

⁴ Talia Einhorn, "Same-sex family unions in Israeli law" *Utretch Law Review* 4 No. 2 (2008): 222, 230.

⁵ Roberto Igual, "Israel | Gay dads must both be named on birth certificate", *Mamba Online*, 16 December 2018.

⁶ "Constitutional Court Struck Down Joint Adoption Ban | Austria", *European Commission on Sexual Orientation Law (webpage)*, 15 January 2015.

10	 Ireland	2015	Part 11 of the Children and Family Relationships Act 2015 (introduced a month before a Constitutional referendum on same-sex marriage) amends prior legislation to allow for joint adoption by same-sex couples.
11	 Luxembourg	2015	With the introduction of full marriage equality in force in January 2015, Article 203 of the Civil Code was amended in 2014 (in force 1 January 2015) to assert the obligation of parents to their children, including those jointly adopted.
12	 Malta	2014	As reflected in Section 12 the Civil Unions Act 2014 , Article 100B(1) of the Civil Code was amended to guarantee full joint adoption rights to same-sex partners, with the first same-sex adoption approved by the Maltese Family Court in July 2016. ⁷ The legalization of same-sex marriage reaffirms the status of same-sex families as well.
13	 Netherlands	2001	Article 1 of the Dutch law on adoption by persons of the same-sex amends Article 227(1) of the Civil Code to allow for joint adoption by same-sex couples.
14	 Norway	2009	In line with recent marriage provisions, Section 5 of the Adoption Act was amended to include same-sex partners as eligible to jointly adopt.
15	 Portugal	2016	Articles 1-7 of the Law No.2/2016 establish that same-sex couples enjoy all the adoption rights of different-sex couples, and amends the appropriate areas of the Civil Code .
16	 Spain	2005	Article 67(7) of Law 13/2005 amends Article 175 of the Civil Code to specify spouses can jointly adopt.
17	 Sweden	2009	Articles 4-8 of the 2003 Act on Parenting lay out the conditions for joint adoption for married couples, same-sex and different-sex.
18	 United Kingdom	2014	Sections 144 and 150 of the Adoption and Children Act 2002 that entered into force in England and Wales in 2005, establish that joint adoption applies to same-sex couples. Section 2 of the Adoption Agencies (Scotland) Regulations 2009 in Scotland defines civil partners as subject to the law, and in 2013 in Northern Ireland, the Court of Appeal mandated that civil partners can jointly adopt. Several British Overseas Territories recognise joint adoption by same-sex couples. ⁸

Is there more in Europe?

Poland

In 2018, the Supreme Administrative Court ruled in favour of a lesbian couple who sought to register their child under both their names after local administrators rejected their request.⁹

⁷ "Malta's first child adopted by a gay couple; parents appeal the public to educate others", *The Malta Independent*, 15 July 2016.

⁸ Section 3(3) of the **Adoption of Infants Ordinance 2015** of Pitcairn Islands, and the **Civil Partnership Act 2014** (converted to marriage in 2016) in Gibraltar both allow joint adoption, as does the law in Bermuda following a 2015 [decision](#). The Crown Dependencies of the Isle of Man introduced joint adoption in 2011 to **civil partners**, and Jersey legislated for joint adoption in 2012 through the **Civil Partner (Jersey) Law**.

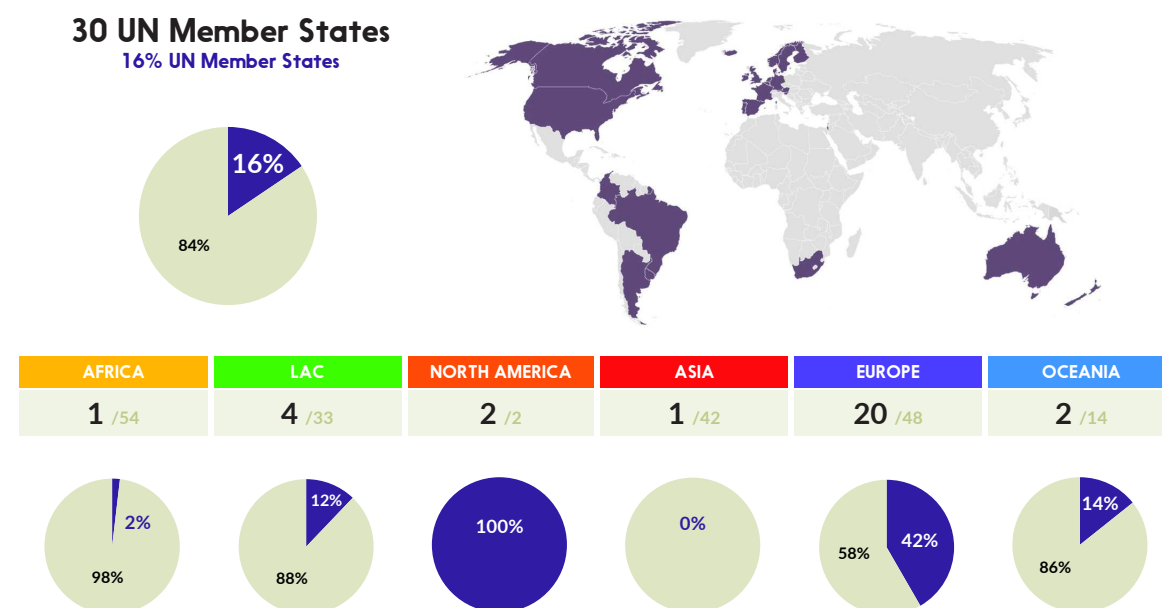
⁹ "Lesbian Couple Granted The Right To Register Child As Their Own In Poland", *The Huffington Post*, 12 October 2018.

Oceania (2)

1	 Australia	2002- 2018	Joint adoption by same-sex couples is currently possible in all Australian states and Territories: Australian Capital Territory (2004); New South Wales (2010); Queensland (2016); South Australia (2017); Tasmania (2013); Victoria (2016); Western Australia (2002); Northern Territory (2018).
2	 New Zealand	2013	Schedule 2 of the Marriage (Definition of Marriage) Amendment Act of 2013 amended the Adoption Act 1955 to allow for joint adoption by same-sex married couples. This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).

Second Parent Adoption by Same-Sex Couples

Highlights



Introduction

Second parent adoption is an important legal vehicle by means of which a person adopts the child of their partner.

For children of people who are in a same-sex stable relationship being adopted by the partner of their parent may have multiple beneficial effects, such as increasing their protection, as well as their economic security and support.

Furthermore, the recognition of the link between the child and the second parent protects their respective rights and duties towards each other on an equal footing.

What does International Human Rights Law say?

States shall take all necessary legislative, administrative and other measures to ensure the right to found a family, including through access to adoption [...].

Yogyakarta Principle 24

Africa (1)

- | | | | | |
|---|---|---------------------|------|---|
| 1 |  | South Africa | 2006 | Section 231(1)(c) of the Children's Act (2005) stipulates that married persons or those in life partnerships are eligible to adopt, and the Civil Union Act (2006) confers those status to persons of the same-sex. |
|---|---|---------------------|------|---|

Latin American and the Caribbean (4)

1	 Argentina	2010	Law 26,618 (Law of Marriage Equality) grants same-sex couples all rights derived from marriage, including adoption. Article 631 of the Civil Code lays out the conditions by which the spouse of the biological parent may adopt their child. As per Article 621, courts may decide on the subsistence of links with other parents.
2	 Brazil	2010	The Superior Court of Justice of Brazil (STJ) ruled in April 2010 that same-sex couples may adopt children. This judgment was upheld in the Supreme Federal Court of Brazil in August 2010.
3	 Colombia	2015	The Constitutional Court of Columbia determined in its Decision SU-167 of 2014 that same-sex couples have the right to adopt the biological child of their partner.
4	 Uruguay	2013	Law on Marriage Equality (Law No. 19,075) grants same-sex couples adoption rights. Article 139 of Law 17,823 (as amended by Law 18,590) establishes that adoption by the spouse of the biological parent is possible only if the link with the child and the other parent is terminated.

Is there more in Latin America and the Caribbean?

Mexico

Second parent adoption for same-sex couples is not available in all states. Some jurisdictions have local regulations on the matter, among them: **Campeche** (Art. 408B, 2016); **Federal District** (Art. 391(5), 2010); **Coahuila** (Art. 377, 2015), **Colima** (Art. 391(b), 2016); **Nayarit** (Art. 389(2), 2016).

Venezuela

In 2016, the Supreme Tribunal of Justice (TSJ) of Venezuela **ordered** a child be registered with the last names of his two mothers.

North America (2)

1	 Canada	2005	Second parent adoption is available in several provinces and territories, including Alberta (1999), British Columbia (1996), Manitoba (2002), New Brunswick (2008), Newfoundland & Labrador (2003), Northwest Territories (2002), Nova Scotia (2001), Nunavut (2011), Ontario (2000), Prince Edward Island (2009), Quebec (2002), Saskatchewan (2001).
2	 United States of America	2015	The availability and conditions for second parent adoption vary by state. An NGO report states that about 29 states permit second parent adoption while 10 have limited or prohibited adoption. ¹

¹ "Adoption by LGBT Parents", *National Center for Lesbian Rights (website)*, accessed January 22, 2019.

Asia (1)

1	 Israel	2005	In <i>Yaros-Hakak v. Attorney General</i> two women had each given birth via ART and were raising their children together. The Supreme Court of Israel judged that the State's adoption law permitted second-parent adoption (without curtailing the first parent's rights), according to the "supreme principle" that the best interests of the child should prevail. ²
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Europe (20)

1	 Andorra	2014	Law 34/2014 recognises same-sex civil unions as holding direct equivalence to marriage, and Article 24 applies this to adoption rights of same-sex couples.
2	 Austria	2013	Following the return of <i>X. and others v. Austria</i> to the European Court of Human Rights in early 2013, Article 182 of the Civil Code was amended to allow same-sex second parent adoption. The legalization of same-sex marriage in 2019 reaffirms the status of same-sex families as well.
3	 Belgium	2006	Articles 8 of the Law amending certain provisions of the Civil Code with a view to enabling adoption by persons of the same-sex primarily concern Article 353 of the Civil Code and ensures second-parent adoption rights.
4	 Denmark	1999	Section (4)1 of the Law amending the law on Registered Partnership expressly sets out that a registered partner may adopt their partner's child. Greenland enacted second parent adoption to same-sex couples in 2009. The Faroe Islands passed second parent adoption legislation which comes into force later in 2017. Section 4a(2) of 2010 Adoption Act (updated Adoption (Consolidation) Act 2014) sets out that a partner or spouse can adopt the other's child.
5	 Estonia	2016	Section 15(1-4) of the Registered Partner Act offer second-parent adoption rights to same-sex couples, where an individual may adopt the natural or adopted child of their partner.
6	 Finland	2009	Section 9 of the 2001 Registered Partnership Act was amended in 2001 to clarify that civil partners could adopt, but not as constructed in adoption legislation. However, since coming into force in March 2017 Act 156/2015 confers full joint adoption rights to same-sex couples in Finland.
7	 France	2013	Article 1 of the Law Opening Marriage to Same-Sex Couples (Law No. 2013-404 of 17 May 2013) inserted a paragraph (345(1)(a) to the existing Civil Code that establishes second parent adoption. The law also applies to the overseas regions of Guadeloupe and Martinique .

² "Yaros-Hakak v. Attorney General, Supreme Court of Israel (10 January 2005)", International Commission of Jurists (website), accessed January 22, 2019.

8	 Germany	2017	Following the passage of marriage equality which granted the same adoption rights to same-sex couples, the Federal Court of Justice held that being in a same-sex marriage does not automatically make the wife of the mother of a child the co-parent. The wife would have to apply to adopt the child, a process which has been described as “difficult and bureaucratic”, and can take up to 18 months. ³
9	 Iceland	2000	Section 6 of Law amending the Registered Partnership Act (1996) specifies that civil partners can adopt one another’s children.
10	 Ireland	2015	Article 5 of the Children and Family Relationships Act 2015 (introduced a month before a Constitutional referendum on same-sex marriage) defines the civil partner and spouse under ‘parentage’.
11	 Luxembourg	2015	With the introduction of full marriage equality in force in January 2015, Article 203 of the Civil Code was amended to assert the obligation of parents to their children, including those in second parent adoption.
12	 Malta	2014	As reflected in Section 12 the Civil Unions Act 2014, Article 100B(1) of the Civil Code was amended to guarantee full joint adoption rights to same-sex partners. The legalization of same-sex marriage reaffirmed the status of same-sex families as well.
13	 Netherlands	2001	Article 1 of the Dutch law on adoption by persons of the same-sex amends Article 228(f) of the Civil Code to allow for second parent adoption by same-sex couples, but only through a court application procedure which was eased in 2014.
14	 Norway	2009	Section 5 of the Adoption Act was amended to include same-sex partners as eligible to adopt. Section 13 regulates the adoption of the children of the spouse or cohabitant (stepchild adoption) and specifies that current or former same-sex spouses or cohabitants may not adopt a stepchild if the child has been adopted from a country that does not permit persons of the same sex to adopt together.
15	 Portugal	2016	Articles 1-7 of the Law No.2/2016 establish that same-sex couples enjoy all the adoption rights of different-sex couples, and amends the appropriate areas of the Civil Code .
16	 San Marino	2018	Article 10 of the Law no. 147 of 20/11/2018 on civil unions passed in November 2018 allows partners in a civil union to adopt their partner’s children.
17	 Slovenia	2011	The right to step-parent adoption for same-sex couples was recognized by the Ministry of Labour, Family, Social Affairs and Equal Opportunities in 2011 on the basis of the 1976 Law on Marriage and Family Relations , despite the fact that Article 135 stipulates adopters must be married. ⁴

³ Damien McGuinness, “Gay Germans’ joy mixed with adoption angst”, BBC News, July 22, 2017.

⁴ “Ministry response in relation to the decision to adopt a biological child of a same-sex partner” [Odziv ministrstva v zvezi z odločbo o posvojitvi biološkega otroka istospolne partnerice], Ministry of Labour, Family, Social Affairs and Equal Opportunities (website), 19 July 2011.

18	 Spain	2005	Article 67(7) of Law 13/2005 amends Article 175 of the Civil Code to allow for second parent adoption.
19	 Sweden	2009	Article 8 of the Act on Parenting (2003) lay out the conditions for second parent adoption for married couples, same-sex and different-sex.
20	 United Kingdom	2005	Sections 144 and 150 of the Adoption and Children Act 2002 that entered into force in England and Wales in 2005, establish that second parent adoption applies to same-sex couples. Section 2 of the Adoption Agencies (Scotland) Regulations 2009 in Scotland defines civil partners as subject to the law, and in 2013 in Northern Ireland, the Court of Appeal mandated that civil partners enjoy second parent adoption. Several British Overseas Territories also recognize second-parent adoption. ⁵

Is there more in Europe?

Croatia	Articles 45-49 of Same-sex Partnership Act (2014) falls short of providing second parent adoption rights, but the court can be petitioned to establish the right <i>de facto</i> .
Italy	No law allows for second parent adoption, but there has been important judicial activity in this regard. A high profile case involving the adoption of the birth daughter of a lesbian partner was resolved in the couple's favour in late-2016. ⁶ The Court of Appeal of Naples ordered full recognition of second-parent adoption on 5 April 2016, and the Court of Appeal in Trento recognised the second father as a co-parent of twins through surrogacy. ⁷ In September 2018, the Bologna Court of Appeal also affirmed an American adoption order on the basis that it was in the best interests of the child to do so. ⁸

Oceania (2)

1	 Australia	2002-2018	Second parent adoption by same-sex couples is currently possible in all Australian States and Territories: Australian Capital Territory (2004); New South Wales (2010); Queensland (2016); South Australia (2017); Tasmania (2013); Victoria (2016); Western Australia (2002); Northern Territory (2018).
2	 New Zealand	2013	A step-parent in a same-sex couple is able to adopt their spouse's child under the Adoption Act 1955 (as amended by the Marriage (Definition of Marriage) Amendment Act of 2013). This law is not effective in any of New Zealand territories (Cook Islands, Niue or Tokelau).

⁵ Section 3(4) of the [Adoption of Infants Ordinance](#) 2015 of Pitcairn Islands, and the [Civil Partnership Act 2014](#) (converted to marriage in 2016) in Gibraltar both accommodate second parent adoption. The Crown Dependencies of the Isle of Man introduced second parent adoption at Section 98 of the [Civil Partnership Act 2011](#), Jersey legislated for second parent adoption in 2012 through the [Civil Partner \(Jersey\) Law](#), and Guernsey approved second parent adoption coming into force in 2017 through the 2016 [Same-Sex Marriage Law](#).

⁶ "Supreme Court: Full Recognition of Two Mothers | Italy", *European Commission on Sexual Orientation Law (website)*, 30 June 2016.

⁷ "In landmark ruling, Italy recognizes gay couple as dads to surrogate babies", *thelocal.it*, 28 February 2017.

⁸ Elaine Allaby, "Italian appeals court upholds validity of US adoption by lesbian couple", *The Local.it*, 27 September 2018.

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