

SUPPORTING THE MODEL DEFENSE OF ARTICLE 534: ARGUMENTS & STRATEGIES FROM INTERNATIONAL HUMAN RIGHTS LAW AND THE GLOBAL SOUTH

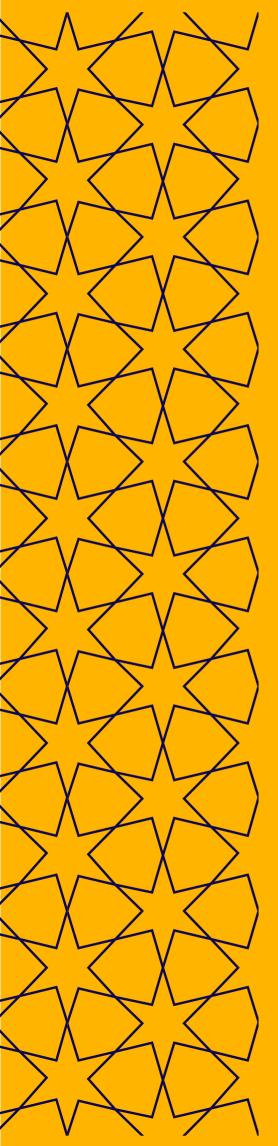


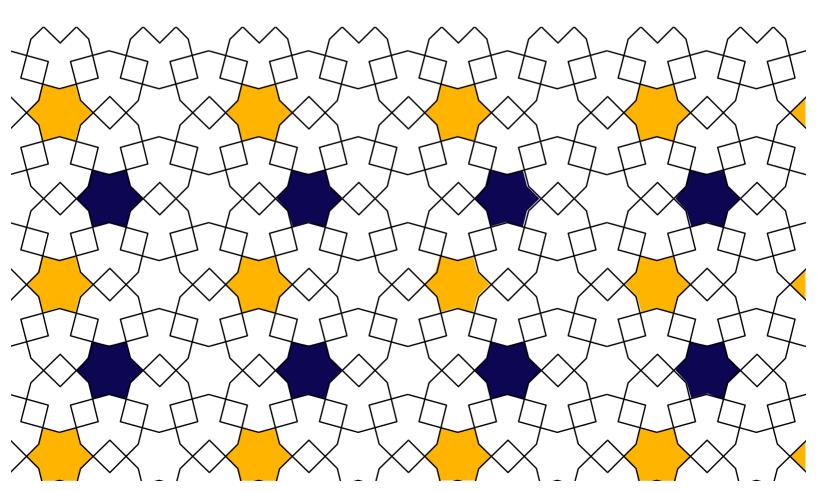
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INTRODUCTION

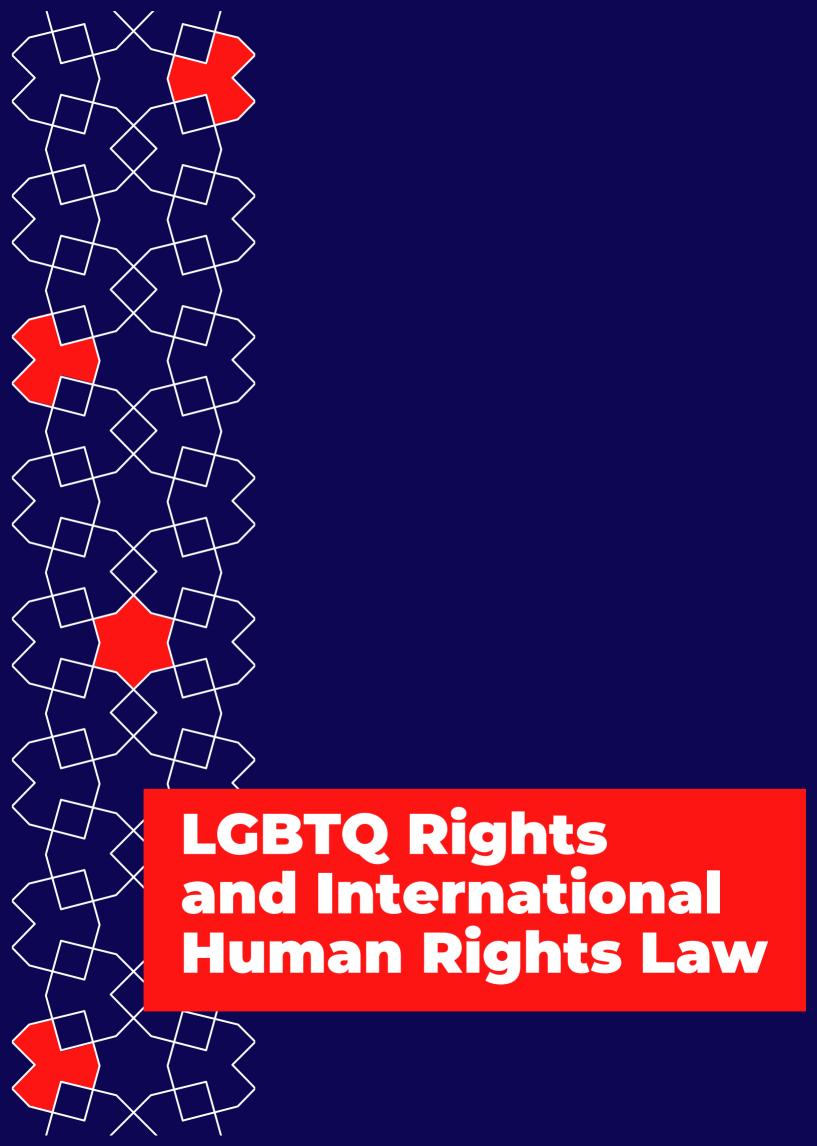
Over the past decade of advocacy in Lebanon, the question of the role of the judiciary in protecting minorities in Lebanon has become a salient topic through which much of contemporary activism and public discourse around minority rights is firmly connected to. Multiple minorities in Lebanon, including refugees, drug users, people with disabilities, and LGBTQ individuals to name a few, have experienced decades, if not centuries, of persecution without a serious engagement as to what the role is of the state and its institutions in protecting its minority citizens and non-citizens from discrimination and violence, especially as so many individuals and communities who fall under this rubric tend to also exist outside of social and family structures which have traditionally took the place of the state in providing security, sustenance, and other basic needs. When it comes to LGBTQ individuals especially, the salient perception of them as counters to established, recognized, and sanctified rubric of private and personal relationships, as well as traditional family values, created what has become to be termed as "unnatural relationships", and therefore become in opposition to this nature which ironically has been set by society and religion.

Article 534 of the Lebanese penal code currently criminalizes any and all sexual acts against the order of nature by imprisonment for up to one year. This law, a remanent of the French colonial legacy in Lebanon, has been the primary legal text through which same sex relationships, as well as individuals with non-normative gender expressions and gender identities, have been arrested, prosecuted, and detained in Lebanon. This contra naturam law is by far not exclusive to Lebanon but is found across many other countries in the MENA region and across the global south in countries that experienced the same European colonial legacy, particularly French and British. All of these countries had since experienced independence, but their laws and legal systems retained remnants of the colonial period under which Article 534 and its international siblings all currently reside.

most recently and impactfully in November 14, 2018 in the Beirut Appeals court presided by judge Rula Husseini.

Following the increase in number of court cases and rulings on the subject, Helem and the Legal Agenda published a model defense elucidating and expanding on multiple rulings where Article 534 was defeated in court and providing tactical and strategic guidance to lawyers and activists to engage in strategic litigation and law-based advocacy to counter and eventually repeal Article 534. The model defense remains extremely relevant as the arguments and guidance within it were predicated largely on an intimate knowledge of the Lebanese judiciary and the national jurisprudence that revolves around gender, minority rights, social cohesion, and the role of the Lebanese judge in society. However, equally important to that is the integration and consolidation of locally resonant arguments and approaches in conjunction with recent scholarship and developments on how LGBTO rights fit into existing international human rights law, particularly with the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention of Social and Economic Rights, and the Convention against Torture – all of which are treaties that Lebanon has signed and ratified. Not only are states under the obligation to ensure that their domestic laws are in conformity with international law, according to Article 2 of the Lebanese code of Civil Procedure, international treaties ratified by parliament are part considered part of the domestic legal system.

This report aims to enrich existing arguments and legal strategies against Article 534 in Lebanon by elucidating how LGBTQ rights have evolved to be an integral part of international human rights law despite not being mentioned specifically in legal texts. It also seeks to highlight some legal arguments, and results encountered in the counterarguments made by activists in India, Nepal, Botswana and Kenya – four countries in the global south whose penal codes contained almost identical contra naturam laws as remnants of their own colonial history. These countries have either succeeded in decriminalizing same sex relationships or have adopted increasingly effective strategies in that direction. The information gleaned from examining the landmark court cases in all of these countries are presented as annexes to the main report. It is the hope of the authors of this report to contribute to the scholarship and efforts of decriminalizing same sex relationships in Lebanon by examining and presenting their strategies to aid local efforts at removing Article 534 from the penal code once and for all.



I. Introduction

Although there is no international human rights body solely dedicated to the protection of LGBTQ rights, it has been generally accepted by the international human rights community that LGBTQ rights are protected under the already existing human rights bodies, including the International Covenant on Civil and Political Rights ("ICCPR"), the International Covenant on Economic, Social and Cultural Rights, and the Convention Against Torture.

Most of the protections given to LGBTQ rights are covered under the ICCPR and the Convention Against Torture, which are discussed in further detail in sections III and IV respectively. Both instruments are legally binding on the states that have ratified or acceded to them, and Lebanon has acceded to both the Convention Against Torture and the ICCPR without any reservations. Therefore, Lebanon is legally obligated to protect the rights enshrined within the documents, which include protecting the rights of LGBTQ individuals.

Before delving deeper into the legal obligations that states have towards LGBTQ rights under the ICCPR and the CAT, it is necessary to go into a brief history of the development of international protections for LGBTQ rights. In general, the international legal landscape views LGBTQ rights as important and has expressed a commitment to protecting these rights under international law.

II. The History of the Development of Legal Protections for LGBTQ Rights

Recognized legal protections for individuals on the basis of their sexual orientation have developed recently in international law. In 2003, then-UN Secretary-General Kofi Annan acknowledged that the rights of LGBTQ people must be protected, stating that "the United Nations cannot condone any persecution of, or discrimination against, people on any grounds." Since then, however, LGBTQ human rights have attracted much greater attention in the international sphere.

One of the earliest attempts to recognize a more expansive framework of LGBTQ human rights was in 2006 with the "Declaration of Montreal." The "Declaration of Montreal" was a document adopted by the International Conference on LGBT Human Rights which called for the

¹ "Reservations" are conditions issued by a state at the time of ratification. A state which issues a reservation to a provision of a treaty can claim that it is not bound to that provision. Because Lebanon has issued no reservations to either of the treaties, it is bound to the treaties in whole. For more information, visit: http://www.institut-fuer-menschenrechte.de/en/topics/development/frequently-asked-questions/19-what-are-reservations-to-human-rights-treaties-and-what-do-they-mean/.

² https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5451102/; https://www.un.org/press/en/2003/sgsm8812.doc.htm

³ http://www.declarationofmontreal.org/

recognition of basic rights and protections for LGBTQ individuals under human rights law.4 Among other demands, the Declaration called for the end of violence against individuals on the basis of their sexuality and an end to the criminalization of private, consensual same-sex activity between adults.⁵ A few months later, a group of international human rights experts convened in Yogyakarta, Indonesia in order to draft what would later become known as the "Yogyakarta Principles," a set of aspirational guidelines derived from international human rights sources on how to protect LGBTQ rights.⁶ Among its list of thirty-eight principles, the Principles called on states to decriminalize homosexuality and to protect against discrimination on the basis of sexual orientation.7 While neither the Declaration of Montreal nor the Yogyakarta Principles are legally binding⁸ and thus impose no actual obligations on the states, the documents nevertheless signified important early attempts to recognize an expansive set of international legal protections for LGBTQ rights. The Yogyakarta Principles were then expanded in 2017 to include newer developments in international human rights law and its intersection with gender expression and sexual characteristics.

Since 2006, human rights bodies have increasingly recognized the importance of legal protections on the basis of sexual orientation and gender identity. The United Nations Human Rights Council, for example, has issued several resolutions in favor of LGBTQ rights.⁹ The Human Rights Council is the "principal inter-governmental forum within the United Nations for questions relating to human rights."¹⁰ Its key job is to "monitor respect for human rights by all members of the United Nations"¹¹ and to establish "international standards in the field of human rights."¹² Although the resolutions it issues are not legally binding, they indicate strong political commitments to LGBTQ rights protections in the international human rights sphere and can carry strong political influence.¹³

⁴ http://www.declarationproject.org/?p=633

⁵ http://www.declarationproject.org/?p=633

 $^{^{6} \}underline{\text{https://www.amnestyusa.org/pdfs/YogyakartaPrinciples.pdf?_sm_au} = \underline{\text{iVV5402rZ6PZQ066}}; \\ \underline{\text{https://yogyakartaprinciples.org/}}$

⁷ http://yogyakartaprinciples.org/principles-en/about-the-yogyakarta-principles-2/. For example, the Yogyakarta Principles assert that "Laws criminalising homosexuality violate the international right to non-discrimination."

⁸ The UN, for example, has never officially adopted the Yogyakarta Principles as a standard. http://www.ishr.ch/news/majority-ga-third-committee-unable-accept-report-human-right-sexual-education.

⁹ http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx

¹⁰ https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en, p. 5.

¹¹ https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide en, p. 6.

¹² https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide_en, p. 5.

¹³ https://www.eda.admin.ch/dam/eda/en/documents/publications/InternationaleOrganisationen/Uno/Human-rights-Council-practical-guide en, p. 5, 23.

In 2011, the United Nations Human Rights Council issued Resolution 17,14 which condemned "acts of violence and discrimination" against individuals because of their sexual orientation or gender identity. ¹⁵ In addition, the Resolution commissioned a study that would examine "discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, in all regions of the world, and how international human rights law can be used to end violence and related human rights violations based on sexual orientation and gender identity."¹⁶ This study was published in November of the same year, and was the first official UN report on LGBTQ human rights.¹⁷ In addition to presenting facts and statistics on the violence and discrimination faced by LGBTQ individuals all around the world, the study also listed states' five core legal obligations under international law to protect LGBTQ rights (discussed in greater detail below).¹⁸ Relying on these five core obligations, the study called on states to repeal all laws that criminalized homosexuality.¹⁹ Although the study itself is not a legally binding document, the study lists out the five core legal obligations that states are bound to follow under human rights treaties, and these human rights treaties are legally binding on the states.

In 2014, the Council again issued a non-binding resolution condemning acts of discrimination committed against individuals because of their sexual orientation or gender identity.²⁰ In 2016, the Council issued

¹⁴ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/17/19.

The states which voted in favor of Resolution 17 were Argentina, Belgium, Brazil, Chile, Cuba, Ecuador, France, Guatemala, Hungary, Japan, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay.

The states which voted against Resolution 17 were Angola, Bahrain, Bangladesh, Cameroon, Djibouti, Gabon, Ghana, Jordan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Republic of Moldova, Russian Federation, Saudi Arabia, Senegal, Uganda.

Burkina Faso, China, and Zambia abstained.

¹⁵ https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement. All resolutions related to LGBTQ rights can be found here:

http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx

¹⁶ https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/148/76/PDF/G1114876.pdf?OpenElement. All resolutions related to LGBTQ rights can be found here:

http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBTUNResolutions.aspx

¹⁷ http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf; https://news.un.org/en/story/2011/12/398432-un-issues-first-report-human-rights-gay-and-lesbian-people

 $^{18}\ http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41_English.pdf$

¹⁹ http://www.ohchr.org/Documents/Issues/Discrimination/A.HRC.19.41 English.pdf, p. 3; https://news.un.org/en/story/2011/12/398432-un-issues-first-report-human-rights-gay-and-lesbian-people

²⁰ http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/27/32. The states who voted in favor of Resolution 27 were Argentina, Austria, Brazil, Chile, Costa Rica, Cuba, Czech Republic, Estonia, France, Germany, Ireland, Italy, Japan, Mexico, Montenegro, Peru, Philippines, Republic of Korea, Romania, South Africa, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela (Bolivarian Republic of), Viet Nam

The states who voted against Resolution 27 were Algeria, Botswana, Côte d'Ivoire, Ethiopia, Gabon, Indonesia, Kenya, Kuwait, Maldives, Morocco, Pakistan, Russian Federation, Saudi Arabia, United Arab Emirates

Burkina Faso, China, Congo, India, Kazakhstan, Namibia, Sierra Leone abstained from the vote.

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Resolution 32,²¹ establishing an Independent Expert on the "protection against violence and discrimination based on sexual orientation and gender identity."²² Under this mandate, which is usually limited to a period of three years and later renewed, the Independent Expert is expected to "assess the implementation of existing international human rights instruments with regard to ways to overcome violence and discrimination against persons on the basis of their sexual orientation or gender identity, while identifying both best practices and gaps."²³ In addition, the Independent Expert is expected to conduct fact-finding country visits, to encourage countries to improve their LGBTQ human rights records, and to submit reports to the Human Rights Council and United Nations General Assembly on their findings concerning LGBTQ rights.²⁴

Since its creation in 2016, the Independent Expert has issued multiple press releases calling on states to respect the rights of LGBTQ individuals and to prevent violence against them.²⁵ While the Independent Expert's statements and recommendations are not legally binding on states, the creation of an Independent Expert dedicated solely to LGBTQ issues has symbolic weight and indicates the Human Rights Council's growing awareness of LGBTQ rights issues. In addition, the Human Rights Council has expressly encouraged states to cooperate with the Independent Expert, and "to give serious consideration to responding favorably to the requests of the Independent Expert to visit their countries and to consider implementing the recommendations made in the mandate holder's reports."²⁶

Other international bodies, including the United Nations General Assembly and the United Nations Security Council, have likewise acknowledged the need to protect individuals from discrimination, violence, and abuse as a result of their sexual orientation or gender identity.²⁷ For example, in a resolution issued in 2014 on extrajudicial,

Botswana, Ghana, India, Namibia, Philippines, South Africa abstained from the vote.

²¹ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2. The states who voted in favor of Resolution 32 were Albania, Belgium, Bolivia (Plurinational State of), Cuba, Ecuador, El Salvador, France, Georgia, Germany, Latvia, Mexico, Mongolia, Netherlands, Panama, Paraguay, Portugal, Republic of Korea, Slovenia, Switzerland, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, Venezuela (Bolivarian Republic of), Viet

The states who voted against Resolution 32 were Algeria, Bangladesh, Burundi, China, Congo, Côte d'Ivoire, Ethiopia, Indonesia, Kenya, Kyrgyzstan, Maldives, Morocco, Nigeria, Qatar, Russian Federation, Saudi Arabia, Togo, United Arab Emirates

²² http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2

²³ http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx

 $^{^{24} \, \}underline{\text{http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx;} \\ \text{http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2} \\$

²⁵ http://www.ohchr.org/EN/Issues/SexualOrientationGender/Pages/Index.aspx

²⁶ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/RES/32/2

²⁷ https://www.hrc.org/blog/in-a-historic-first-u.n.-security-council-convenes-to-discuss-lgbt-rights; The Role of the United Nations in Combatting Discrimination and Violence against Lesbian, Gay, Bisexual, Transgender and Intersex People: A

summary, and arbitrary executions, the United Nations General Assembly "urged all states" to "ensure the effective protection of the right to life of all persons" and to conduct "prompt, exhaustive and impartial investigations into all killings" that may be based on sexual orientation or gender identity.²⁸ The resolution also urged states to ensure that such violence is neither "condoned nor sanctioned by State officials or personnel."²⁹ Again, while the General Assembly's resolutions are also legally non-binding,³⁰ they nonetheless have symbolic value and denote a general recognition that LGBTQ rights must be protected under international rights law. Because the General Assembly is one of the "main organs of the United Nations" and is the "only one in which all Member States have equal representation,"³¹ its resolutions can carry persuasive weight. In addition, the fact that Lebanon voted "Yes" on this resolution may also give this resolution some persuasiveness.³²

The United Nations Security Council similarly acknowledged the importance of LGBTQ rights in 2015. During that year, the Security Council convened for the first time ever to discuss LGBTQ rights, focusing especially on the violence perpetuated against LGBTQ individuals by ISIS.³³ Although nothing concrete seems to have come from the Security Council's meeting, the Security Council's mere willingness to hold a meeting on the subject of LGBTQ rights is a positive if small step. As the only United Nations organ with the ability to issue binding resolutions on its Member States, and as the council that is responsible for maintaining "international peace and security,"³⁴ the United Nations Security Council is quite powerful. The Security Council's tentative willingness to discuss LGBTQ rights is therefore notable.

In addition to these non-binding resolutions, there is a general recognition that states have binding obligations under core human rights treaties to protect LGBTQ rights. As addressed above, the protection of individuals on the basis of their sexual orientation or gender identity has been recognized under multiple core human rights treaties, including the International Covenant on Civil and Political Rights, the Convention Against Torture, and the International Covenant on Economic, Social and Cultural Rights.³⁵

Programmatic Overview, United Nations,

http://www.ohchr.org/Documents/Issues/Discrimination/UN LGBTI summary 11Apr2017.pdf.

http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares69182

²⁸ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/182. There were 122 Yes votes for the resolution, 0 No votes, and 66 Abstentions. Lebanon voted Yes for the resolution.

²⁹ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/182;

³⁰ http://www.unfoundation.org/what-we-do/issues/united-nations/the-general-assembly.html

³¹ http://www.un.org/en/ga/

³² http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/182.

³³ https://www.hrc.org/blog/in-a-historic-first-u.n.-security-council-convenes-to-discuss-lgbt-rights

³⁴ http://www.un.org/en/sc/

³⁵ See http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf

In 2012, the High Commissioner for Human Rights issued a report articulating states' obligations under these treaties to protect LGBTQ individuals.³⁶ These five core obligations include: 1) the obligation to protect individuals from homophobic and transphobic violence, 2) the obligation to prevent torture and the cruel, inhuman and degrading treatment of LGBTQ individuals, 3) the obligation to decriminalize homosexuality and same-sex acts, 4) the obligation to prohibit discrimination, and 5) the obligation to respect the freedom of expression, association and peaceful assembly of LGBTQ individuals.³⁷ As stated above, these five core obligations are legally binding on states that are parties to the ICCPR and the Convention Against Torture, and therefore Lebanon is legally bound to follow the five obligations.

III. The Protection of LGBTQ Rights Under the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights (ICCPR)

Overview

Many of the state's obligations to protect LGBTQ individuals, including the obligation to decriminalize same-sex acts, are enshrined under the International Covenant on Civil and Political Rights ("ICCPR"). The ICCPR is a legally binding treaty that guarantees basic civil and political rights, including the right to privacy and the right to be free from discrimination.³⁸ Its monitoring body is the Human Rights Committee ("Committee"), which issues authoritative interpretations of the ICCPR that are then binding on the states.³⁹ As noted in the introduction, states that have acceded to the ICCPR are legally obligated to prevent and protect against violations of the rights enshrined within the treaty.

As a party to the ICCPR, Lebanon therefore is under an obligation to protect its citizens against violations of the five core obligations listed above. Under these obligations, Lebanon must 1) decriminalize same-sex acts in private between consenting adults and 2) prohibit discrimination against individuals on the basis of their sexual orientation or gender identity.

Lebanon itself has acknowledged that the ICCPR has legal force within its domestic system. Since its ratification, the provisions of the ICCPR

³⁶ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf

 $^{^{37}\,}http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf$

³⁸ http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx; https://www.equalityhumanrights.com/en/our-humanrights-work/monitoring-and-promoting-un-treaties/international-covenant-civil-and

³⁹ http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx. Each core human rights treaty has a "treaty body" composed of independent experts who help monitor the implementation of a treaty's obligations within a state. http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx

have been recognized to constitute "an integral part of the Lebanese legal system" that have "primacy over the provisions of ordinary law." In addition, Lebanon has acknowledged that the ICCPR complements the Universal Declaration of Human Rights ("UDHR"), 41 which the Lebanese Constitution expressly enshrines in its preamble. 42

Unlike the ICCPR, the UDHR is not a treaty and thus is not a binding instrument on its signatories.⁴³ As a significant symbolic human rights document, however, the UDHR has some persuasive weight in international law, and therefore may still be worth mentioning.⁴⁴ Furthermore, because the Lebanese Constitution enshrines the UDHR within its preamble, and because the ICCPR is viewed in Lebanon as a complement to the UDHR, both the legally binding ICCPR and the non-binding UDHR should be drawn upon as sources of Lebanon's legal obligations to decriminalize homosexuality. Both the ICCPR and the UDHR contain guarantees to the right of privacy⁴⁵ and the right to be free from discrimination on the basis of sexual orientation.⁴⁶ As discussed in greater detail below, criminalizing same-sex acts violates both of these enshrined rights and therefore violates Lebanon's legal obligations under the ICCPR.

The Right to Privacy

Under the ICCPR and the UDHR, states are under an obligation to decriminalize private, same-sex acts between consenting adult individuals.⁴⁷ If states fail to do so, they are violating the established right to privacy under these instruments.⁴⁸

Universal Declaration of Human Rights: Article 7: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

⁴⁰ Consideration of reports submitted by States parties under article 40 of the Covenant Third periodic reports of States parties due in 1999 Lebanon*

 $^{^{41}\} https://www\underline{.upr-info.org/sites/default/files/document/lebanon/session}\ \ 9\ -\ november\ \ 2010/ahrcwg66lbn1e.pdf$

⁴² https://www.upr-info.org/sites/default/files/document/lebanon/session 9 - november 2010/ahrcwg66lbn1e.pdf

⁴³ https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights. Lebanon was one of the parties that adopted the UDHR in 1948. https://web.archive.org/web/20130927221000/http://unyearbook.un.org/1948-49YUN/1948-49 P1 CH5.pdf.

 $^{^{44}\} http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx$

⁴⁵ International Covenant on Civil and Political Rights: Article 17: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."; Universal Declaration of Human Rights: Article 12: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation."

⁴⁶ International Covenant on Civil and Political Rights: Article 2(1): "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

⁴⁷ See, e.g., Born Free and Equal, supra note 4 (citing Concluding observations of the Human Rights Committee on Chile (CCPR/C/79/Add.104), at para. 20).

⁴⁸ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf.

In its seminal case on the matter, *Toonen v. Australia*, the Human Rights Committee emphasized that the criminalization of same-sex acts is forbidden under the ICCPR for violating the right to privacy.⁴⁹ *Toonen* was decided in 1994, when Nicholas Toonen brought a petition⁵⁰ to the Human Rights Committee challenging sections of Tasmania's penal code. ⁵¹ Specifically, the criminal code penalized "intercourse against nature" (Section 122) and "indecent practice between male persons (Section 123)." ⁵²

The Human Rights Committee held that these provisions in Tasmania's criminal code violated Article 17 of the ICCPR, which protects against "arbitrary or unlawful interference" with "privacy, family, home or correspondence." ⁵³ In addition, the Committee held that the mere presence of the provisions in the penal code criminalizing same-sex relations "continuously and directly interfere[d]" with the privacy of homosexual individuals. ⁵⁴ Although the Human Rights Committee held that some interferences with privacy are permitted under the ICCPR, the interference must be "proportional to the end sought." ⁵⁵ Here, however, the interference was not proportional.

The government of Tasmania attempted to argue that the provisions protected the public health and public morals, but the Committee rejected both claims.⁵⁶ First, the Committee noted that statutes criminalizing homosexual activity actually impede public health programs "by driving underground many of the people at the risk of infection."⁵⁷ Secondly, the Committee noted that the laws criminalizing same-sex acts were clearly "not necessary to protect public morals" because the laws had not previously been enforced in Tasmania.⁵⁸ Therefore, the Committee held that the interference with privacy was "neither proportional nor necessary" and thus a violation of Article 17 of the ICCPR.⁵⁹ Only three years after the decision in *Toonen*, Tasmania officially decriminalized same-sex conduct.⁶⁰

⁴⁹ http://hrlibrary.umn.edu/undocs/html/vws488.htm.

⁵⁰ Individual petitions alleging violations of human rights can be brought to the Human Rights Committee only if a state has ratified the Optional Protocol to the International Covenant on Civil and Political Rights. Lebanon has not ratified this treaty, and therefore individual complaints cannot be brought. http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx

⁵¹ Toonen v. Australia, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994.

⁵² http://hrlibrary.umn.edu/undocs/html/vws488.htm

⁵³ Toonen v. Australia, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994.

⁵⁴ Toonen v. Australia, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994.

⁵⁵ http://hrlibrary.umn.edu/undocs/html/vws488.htm

⁵⁶ http://hrlibrary.umn.edu/undocs/html/vws488.htm

⁵⁷ Toonen v. Australia, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994.

⁵⁸ Toonen v. Australia, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994.

⁵⁹ http://hrlibrary.umn.edu/undocs/html/vws488.htm

⁶⁰ http://www.austlii.edu.au/au/journals/AJHR/2001/6.html#fn151, fn. 150. Since *Toonen* was decided, it has been cited by other courts and human rights bodies, including the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi and Others* in 2009.

Although the Committee's decisions are not technically considered binding on states, the Committee's decisions rely on interpretations of the ICCPR, and these interpretations of the treaty are then legally binding. Therefore, the Committee's interpretation that the ICCPR forbids the criminalization of same-sex acts is legally binding on Lebanon, even though the case was specifically decided in Australia.

Since *Toonen*, the Committee has "repeatedly urged States to reform laws criminalizing homosexuality or sexual conduct between partners of the same sex" during its periodic review of states.⁶² As the monitoring body of the ICCPR, the Committee periodically reviews the human rights situations of party states in a mandatory state-reporting process.⁶³ States such as Lebanon which are legally bound to the ICCPR all must engage in the state-reporting process.⁶⁴ During the review, states submit a "state report" to the Committee detailing how the state has fulfilled its human rights obligations under the ICCPR.⁶⁵ The Committee then reviews this national report along with other submitted reports by NGOs and/or other interested parties.⁶⁶ After reviewing the reports, the Committee drafts a document with concluding observations on the state's human rights situation and provides recommendations for the state to follow in order to better align with the requirements of the ICCPR.⁶⁷

In the concluding observations of several reviews, the Committee has repeatedly asserted that states must decriminalize same-sex acts under the legal obligations of the ICCPR. During the review of Chile in 1999, for example, the Committee asserted that legislation which criminalized same-sex relations violated Article 17 of the ICCPR.⁶⁸ Likewise, in its concluding observations of its review of Cameroon in 2010, the Committee noted that the criminalization of same-sex acts "violate[d] the rights to privacy and freedom from discrimination enshrined" in the ICCPR, and urged Cameroon to repeal such laws.⁶⁹

The Committee has issued these recommendations to decriminalize same-sex acts even in the face of state resistance. In the case of Cameroon, for example, Cameroon attempted to justify its criminalization of same-sex acts by arguing 1) that doing so promoted morality and 2) that no discrimination was occurring against LGBTQ individuals because these individuals were "not being denied a right or service on the ground of their

⁶¹ http://www.ijrcenter.org/un-treaty-bodies/#gsc.tab=0

⁶² http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 31.

⁶³ http://ccprcentre.org/ccpr-state-reporting

⁶⁴ http://ccprcentre.org/ccpr-state-reporting

⁶⁵ http://ccprcentre.org/ccpr-state-reporting

⁶⁶ http://ccprcentre.org/ccpr-state-reporting

⁶⁷ http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIntro.aspx

⁶⁸ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 31–32.

⁶⁹ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 31–32.

presumed sexual orientation."⁷⁰ In its concluding observations, however, the Committee entirely ignored these arguments and did not address them.⁷¹ Instead, it again asserted that decriminalizing same-sex acts is necessary in order to bring the state in conformity with the ICCPR.⁷² Again, although the Committee's concluding observations are not technically binding on the states, the Committee's interpretation of the ICCPR as forbidding the criminalization of same-sex acts is legally binding.⁷³ Therefore, Lebanon is legally obligated to decriminalize same-sex acts if it wishes to avoid violating the right to privacy under the ICCPR.

Right to be Free from Discrimination

In addition to violating the ICCPR's protection of the right to privacy, the criminalization of same-sex acts also violates the right to be free from discrimination on the basis of sexual orientation. Under Article 2(1) of the ICCPR, all persons are protected from discrimination based on grounds "such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." "Sex" within Article 2(1) has been understood by the Committee to also protect "sexual orientation."74 This interpretation of the ICCPR has existed since Toonen, which first recognized this expansive interpretation of "sex." As addressed above, as an interpretation of the ICCPR, this reading is legally binding on the states.76 As a result, discrimination on the basis of sexual orientation or gender identity is prohibited under the ICCPR under Article 2(1).77 By criminalizing same-sex acts, which are more likely to be done by homosexual individuals, these laws are "inherently discriminatory" towards individuals on the basis of their sexual orientation.⁷⁸ Therefore, states such as Lebanon are currently in defiance of Article 2(1) of the ICCPR and are legally obligated to decriminalize same-sex acts. Not only does such

 $^{^{70}\} https://documents-dds-ny.un.org/doc/UNDOC/GEN/G07/106/04/PDF/G0710604.pdf? OpenElement$

⁷¹ http://tbinternet.ohchr.org/ layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CMR/CO/4&Lang=En

⁷² http://tbinternet.ohchr.org/ layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/CMR/CO/4&Lang=En

⁷³ Michael O'Flaherty, *The Concluding Observations of United Nations Human Rights Treaty Bodies*, 6 Human Rights Law Review 27 (2006).

⁷⁴ http://hrlibrary.umn.edu/undocs/html/vws488.htm

⁷⁵ http://hrlibrary.umn.edu/undocs/html/vws488.htm

 $^{^{76}\} http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf$

⁷⁷ See, e.g., Born Free and Equal, supra note 4 (citing Guarantee equal rights to all regardless of sexual orientation: Concluding observations of the Human Rights Committee on Chile (CCPR/C/CHL/CO/5), at para. 16. See also concluding observations of the Human Rights Committee on San Marino (CCPR/C/SMR/CO/2), at para. 7; and Austria (CCPR/C/AUT/CO/4), at para. 8. 90CCPR/C/USA/CO/3, at para. 25; see also Welcoming non-discrimination legislation: Concluding observations of the Human Rights Committee on Greece (CCPR/CO /83/GRC), at para. 5; Finland (CCPR/CO/82/FIN), at para. 3; Slovakia (CCPR/ CO/78/SVK), at para. 4; Sweden (CCPR/C/SWE/CO/6), at para. 3; Denmark (CCPR/C/DNK/CO/5), at para. 4; France (CCPR/C/FRA/CO/4); Concluding observations of the Committee on the Elimination of Discrimination against Women on Montenegro (CEDAW/C/MNE/CO/1), at para. 4(b)).

⁷⁸ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 48 (citing the Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (A/HRC/14/20), at para. 6.).

discrimination lead to the "increased social stigmatization" and increased vulnerability to violence of LGBTQ individuals, ⁷⁹ but the criminalization of same-sex acts also prevents such individuals from receiving adequate healthcare, education, and employment. ⁸⁰

IV. The Protection of LGBTQ Rights under the Convention Against Torture

Criminalizing same-sex acts violates the right to be free from torture. The right to be free from torture and ill treatment is recognized in Article 1 of the Convention Against Torture,⁸¹ which Lebanon acceded to in 2000. Like the ICCPR, the Convention Against Torture is a legally binding instrument, and its monitoring body is the Committee Against Torture.⁸²

Under the Convention Against Torture, states have an obligation to protect all individuals (regardless of sexual orientation or gender identity) from torture and other ill treatment, and the failure to do so is a violation of the treaty.⁸³ The failure to investigate and persecute perpetrators of torture is also in violation of the treaty.⁸⁴ For example, states that fail to adequately investigate and persecute law-enforcement personnel accused of assaulting people for their sexual orientation are in contravention of the Convention.⁸⁵ Thus, if Lebanon fails to properly investigate instances of abuse or mistreatment conducted by law enforcement against LGBTQ individuals, this can potentially amount to a violation of the treaty.

In addition, states have an obligation under the Convention to avoid the use of anal examinations. Such examinations have been understood by the Committee to potentially reach the level of torture or mistreatment, which is prohibited under the Convention Against Torture. ⁸⁶ In Lebanon, people arrested under Article 534 have often been subjected to anal examinations. Such examinations are scientifically worthless, ⁸⁷ and have

⁷⁹ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 33.

⁸⁰ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 47–52.

http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx. Article 1(1) of the Convention Against Torture: For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

⁸² http://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIntro.aspx

 $^{^{83}\ \}underline{http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf},\ p.\ 22.$

 $^{{\}color{blue}^{84}} \ \underline{http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf},\ p.\ 22.$

 $^{{}^{85}\,\}underline{http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf},\,p.\,\,24$

 $^{{}^{86}\,\}underline{http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf},\,p.\,\,22.$

⁸⁷ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf (citing Working Group on Arbitrary Detention Opinion No. 25/2009 on Egypt (A/HRC/16/47/Add.1), at paras. 23, 28-29).

been condemned by the Committee Against Torture and recognized to potentially amount to torture or ill treatment.88

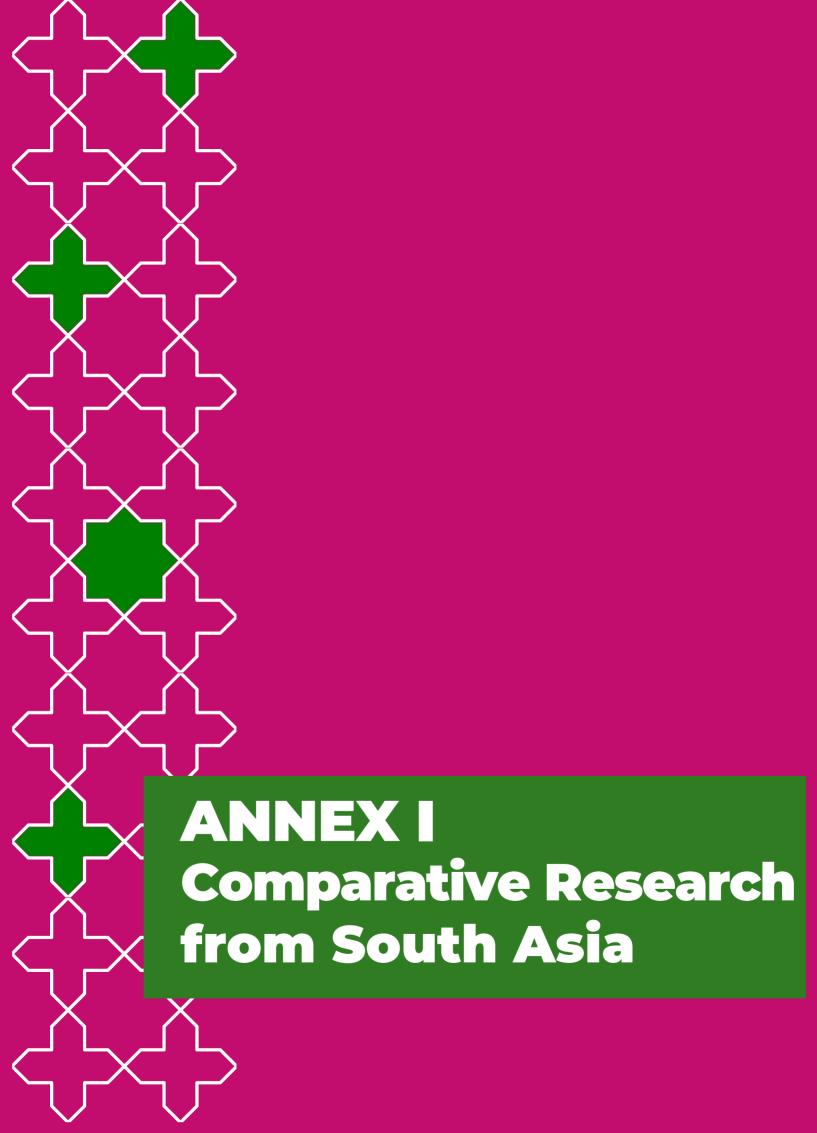
In its concluding observations on Egypt in 2002, for example, the Committee Against Torture expressed concern over Egypt's use of anal examinations on men accused of being homosexual and labeled such examinations as "ill-treatment." Although this concluding observation of the Committee Against Torture is not legally binding on the states, its interpretation that anal examinations can qualify as ill treatment under the Convention is legally binding. Similarly, other human rights bodies, including the Human Rights Council Working Group on Arbitrary Detention and the Office of the United Nations High Commissioner for Human Rights, have criticized the use of such tests and recognized that anal examinations are a violation of bodily integrity. 90

Although the comments of the Working Group and the High Commissioner are not binding, they lend further persuasive weight to the legally binding interpretations of the Committee Against Torture. Therefore, by criminalizing same-sex acts and exposing individuals to the use of such tests, Lebanon is violating its obligation to prevent the infliction of torture and ill treatment. Article 534 is thus in contravention of Lebanon's obligations under the Convention Against Torture.

⁸⁸ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 35–36 (Concluding observations of the Committee against Torture on Egypt (CAT/C/CR/29/4), at paras. 5-6, Reports of the Special Rapporteur on torture: A/56/156, at para. 24; A/HRC/4/33/Add.1, at para. 317; A/HRC/10/44/Add.4, at para. 61; and A/HRC/16/52/Add.1.)

⁸⁹ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf, p. 26;
https://tbinternet.ohchr.org/layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/CR/29/4&Lang=En;;
https://www.hrw.org/news/2012/08/10/lebanon-stop-tests-shame

⁹⁰ http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf



I. India

Overview

Homosexual conduct is criminalized between men (contra naturam), but not criminalized between women.⁹¹ Section 377 of the Indian Penal Code, entered into force in 1861: "Unnatural offences. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1*[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation. Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."⁹²

Legal Developments

In 2009, the Delhi High Court, the appellate court of that region that sits directly below the Supreme Court of India held in *Naz Foundation* that Section 377 "violated the fundamental rights of life and liberty and the right to equality as guaranteed in the Constitution." Specifically, the Court found that Section 377 violated Articles 21 (Right to Protection of Life and Personal Liberty), Article 14 (Right to equality before law) and 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth] of the Constitution by criminalizing consensual and private, sexual behavior.

In 2013, in *Koushal v. Naz Foundation* the Supreme Court of India reversed the 2009 Delhi High Court decision and upheld Section 377 as constitutional. The Supreme Court found that "the [Delhi] High Court [had] overlooked that [only] a minuscule fraction of the country's population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years, less than 200 persons have been prosecuted for committing offence under Section 377."93 The Court concluded that Section 377 "does not suffer from any constitutional infirmity" and left it to the "competent legislature... to consider the desirability and propriety of deleting Section 377 IPC from the statute book or amend the same as per the suggestion made by the Attorney General."94

Later in 2014, the Supreme Court fluctuated again on the rights of LGBTQ people. In *National Legal Services Authority v. Union of India and others*, the Court found that transgender people enjoy constitutional rights and ruled they should be treated as "as a third category and as a socially and economically backward class entitled to job reservation" which made it

⁹¹ http://kaleidoscopetrust.com/usr/library/documents/main/2015 speakingout 241115 web.pdf

⁹² https://indiankanoon.org/doc/1836974/

⁹³ Full case here: https://indiankanoon.org/doc/58730926/

⁹⁴ https://indiankanoon.org/doc/58730926/

mandatory for local and central governments to create quotas for education and employment opportunities.⁹⁵

The ruling was significant because, even though there is a significant "hijras" or transgender community in India with deep historical roots to Indian mythology, 96 transgender people were not able to vote in India until 1994.

Along with case law, 2014 also bore witness to legislative progress for the rights of transgender people: the Upper House of the Indian Parliament (*Rajya Sabha*) passed a The Rights of Transgender Persons Act. The original Act guaranteed rights and entitlements to transgender people, however after many revisions, the latest form of the Act did not prove unpopular among transgender activist because it identified transgender people as being "partly female or male; or a combination of female and male; or neither female nor male" and required individuals to submit themselves to a screening with a psychiatrist, a social worker and a member of the transgender community, rather than letting individuals self-identify as transgender.⁹⁷ Activists worry that this will encourage stigma, rather than stem it. It still has not passed the Lower House.

Lastly, and more relevant to Lebanon, August 2017, Supreme Court held that right to privacy is a fundamental right and that "[d]iscrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual."98 The Court said, "[e]quality demands that the sexual orientation of each individual in society must be protected on an even platform. The right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21 of the Constitution."99

Most significantly the Supreme Court of India agreed to review the constitutionality of Section 377 on January 8, 2018. Procedurally, the Court agreed to reconsider the 2013 decision in Suresh Kumar Koushal's case in front of a larger bench, noting that "a section of people or individuals who exercise their choice should never remain in a state of fear" and "societal morality also changes from age to age." The 2013 decision had overturned the 2009 Delhi High Court decision in the case of Suresh Kumar Koushal and another vs NAZ Foundation and Others, upholding the constitutionality of Section. Procedurally, the Court is considering its 2013 opinion once again because Navtej Singh Johar, a Bharatnatyam dancer, journalist Sunil Mehra, restaurateur Ritu Dalmia, hotelier Aman Nath of the Neemrana chain, and Ayesha Kapur, a psychology graduate filed a petition in 2016, asking the Court to re-hear the case. The petitioners are arguing that their "rights to

⁹⁵ https://www.mid-day.com/articles/supreme-court-transgenders-a-third-category/15232059

 $^{^{96} \, \}underline{\text{http://news.biharprabha.com/2014/04/supreme-courts-third-gender-status-to-transgenders-is-a-landmark/} \\$

⁹⁷ http://www.prsindia.org/billtrack/the-transgender-persons-protection-of-rights-bill-2016-4360/

⁹⁸ https://www.huffingtonpost.in/2017/08/24/full-text-the-supreme-court-judgment-that-made-privacy-a-fundamental-right_a_23159562/

^{100 &}lt;a href="https://www.independent.co.uk/news/world/asia/india-homosexuality-legalise-law-gay-lgbt-couples-supreme-court-ruling-a8148896.html">https://www.independent.co.uk/news/world/asia/india-homosexuality-legalise-law-gay-lgbt-couples-supreme-court-ruling-a8148896.html
101 Id.

¹⁰² Id.

sexuality, sexual autonomy, choice of sexual partner, life, privacy, dignity and equality, along with the other fundamental rights guaranteed under Part-III of Constitution, are violated by Section 377," and are hoping to capitalize on the Supreme Court decision recognizing the right of privacy as a constitutionally protected right.

Efforts to Modernize the Uniform Civil Code:

A "progressive" Uniform Civil and Criminal Code (UCC), providing for same sex marriage and marriage of transgender people has been submitted to the Law Commission of India. Providing for homosexual marriages and live-in, the draft UCC rules out any kind of gender-based discrimination for marriage, adoption, custody of child/children and inheritance.¹⁰³

Advocacy and Civil Society

The reinstatement of the anti-sodomy law resulted in massive protests across the country. 2014 was an election year in India and three of the political parties, AamAadmi Party, the Communist Party, and the Congress Party, said they would repeal Section 377 of the code. However, the Baharatiya Janata Party, which won the election, has no plans to repeal the law.¹⁰⁴

Key Legal and Advocacy Strategies:

- The constitutional arguments used were based on the rights of life and liberty and the right to equality.
- Several courts have found that the criminalizing statute, Section 377, violated Articles 21 (Right to Protection of Life and Personal Liberty), Article 14 (Right to equality before law) and 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth] of the Indian Constitution by criminalizing consensual and private sexual behavior.
- Other courts have also found that "[d]discrimination against an individual on the basis of sexual orientation is deeply offensive to the dignity and self-worth of the individual."
- The is very strong organization between NGOs and legal teams, who
 had jointly led the effort to decriminalize through both the courts as
 well as accompanying pressure form favorable media coverage and
 domination of public attention during the time the hearings were
 conducted.

 $^{^{103}\} http://www.catchnews.com/amp/india-news/a-new-ucc-for-a-new-india-progressive-draft-ucc-allows-for-same-sex-marriages-85386.html$

¹⁰⁴ http://kaleidoscopetrust.com/usr/library/documents/main/2015_speakingout_241115_web.pdf

II. Nepal

Overview

Homosexual conduct has been decriminalized in 2008. The Constitution of Nepal, which came into force in 2015, replacing the interim constitution of 2007, offers strong protections for LGBTQ people. For example, the Constitution recognizes the right to have their preferred gender display on their identity cards; prohibition on discrimination on any ground including sex or sexual orientation by the State; prohibition on discrimination on any ground, including sex or sexual orientation by anyone; eligibility for special protections that may be provided by law; substitution of gender-neutral terms for the previous "male", "female", "son", and "daughter"; and the right of access to state process and public services for gender and sexual minorities. 105

Legal Developments

A Supreme Court verdict in December 2007 has been the most prominent decision in the LGBTQ- rights field. It followed a petition in April 2007 filed by individuals from four leading LGBTQ NGOs against the government of Nepal. The petitioners in *Sunil Babu Pant and Others v. Government of Nepal and Others* called for the abolishment of laws discriminating against LGBTQ individuals, the establishment of a committee to study the possibility of allowing same-sex marriage, and the legal recognition of a "third gender."

The Supreme Court of Nepal ruled in 2007 that LGBTQ people would be regarded as "natural persons" under law. The judgment recognized the rights that LGBTQ people deserved qua citizens, thus citizenship became the basis for the court to advocate for equal rights, eliminating the need for a framing of "special" or "new" rights for LGBTQ people. In addition, the decision also positioned LGBTQ rights as demanded by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and International Covenant on Civil and Political Rights (ICCPR). The Supreme Court was projected as solidifying Nepal's position as a regional and international model for promoting the fundamental right of LGBTQ individuals.

Advocacy and Civil Society

¹⁰⁵ www.constitutionnet. org/les/draft_constitution_of_nepal_2015_idea_tranlation_0.pdf; https://www.huffingtonpost.com/tracy-fehr/nepal-constitution-lgbti-rights b 8239360.html

¹⁰⁶ Being Gay in Asia: Nepalhttp://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html

¹⁰⁷ Being Gay in Asia: Nepal<u>http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/beinglgbt-in-asia.html</u>

LBGTQ advocacy in Nepal was galvanized by some of the more tumultuous events in country's recent history; the community credits these events as aiding its advocacy efforts. Further, the movement was also supported by international donor money that flocked in to aid the HIV/AIDS effort. The donor interventions strengthened the LGBTQ community, starting with the establishment of Blue Diamond Society (BDS), whose founder Sunil Babu Pant is the petitioner that instigated the 2007 Supreme Court decision that de-criminalized discrimination on the basis of gender and sexual identity.

Starting with the 1990s when a multi-party democracy and constitutional monarchy replaced the previous regime, there has been a strong culture of civil society in Nepal, with more than 30.000 NGS registered with the government. It is reported that Nepal's LGBTQ movement, led by BDS, expanded rapidly because their key challenges were framed to international donors by prioritizing rights-based interventions targeting the HIV epidemic.¹⁰⁸ Other than international donor money, the LGBTQ movement was very active during the upheaval against the monarchy in 2002 and 2005, joining the calls for democracy. It has been further noted that "civil war provided space for civil society including LGBTQ groups to vastly expand programming and access external funding."¹⁰⁹

BDS took an active role in advocating for political parties to include LGBTQ rights into their party platforms, convincing the Nepali Congress, the Communist Party of Nepal and the Maoists, the three biggest parties in Nepal, to argue for LGBTQ issues. Sunil Babu Pant was the first openly gay man to be elected to the Nepalese Parliament, and upon the conclusion of his term, he established BDS.¹¹⁰ Many other LGBTQ activists ran for office, applied and got civil service positions and other government posts.¹¹¹

Due to the foregoing developments, it is safe to say that the LGBTQ community in Nepal is strong. As of 2014, there were at least 55 LGBTQ civil society organizations working across the country, though mostly in urban areas. The four organizations and lead activists involved in the Supreme Court case that legalized same sex identity and conduct were Blue Diamond Society (Sunil Babu Pant), Mitini Nepal (Mina Nepali), CruiseAIDS Nepal (Sanjeev 'Pinky' Gurung) and Parichaya Nepal (Manoranjan Kumar Vaidya). Also of note, the first-ever gay-rights conference in Southeast Asia was organized in Nepal in 2014, with the help UNDP, UNICEF and USAID, called Nepal National LGBTI Community Dialogue.¹¹² The Dialogue prepared a set of recommendations for the government, and provided a summary of the current state of socio-political and legal rights for gay people in Nepal.

 $^{{\}color{blue} ^{108} Being\ Gay\ in\ Asia:\ Nepal\ \underline{http://www.asia-pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-\underline{lgbt-in-asia.html}}$

http://www.astraeafoundation.org/uploads/files/Astraea%20Nepal%20Case%20Study.pdf; https://www.hrw.org/news/2017/02/16/nepals-civil-service-increasingly-transgender-inclusive

¹¹⁰ Being Gay in Asia: Nepal http://www.asia-

pacific.undp.org/content/rbap/en/home/operations/projects/overview/being-lgbt-in-asia.html

https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon

 $[\]frac{112}{https://medium.com/being-lgbti-in-asia/the-dawn-of-a-national-intersex-movement-the-first-national-intersex-workshop-in-nepal-621e8d7a826e$

Human Rights Watch says that "engaging the law" was key to LGBTQ activists' success: "[i]n appealing to international human rights, the activists wielded the Yogyakarta Principles, guidelines that interpret international human rights law as it applies to sexual orientation and gender identity, at the Supreme Court, while at the U.N. they appealed to international mechanisms that had emerged years before LGBTQ issues rose to today's prominence. Utilizing the local vernacular—for example, by co-opting a traditional Nepali festival as their "pride" celebration without renaming it as "gay"—they deftly negotiated legal recognition of a third gender during a period when discussions of minority identity categories—mostly caste and ethnic—colored mainstream political discourse. Throughout, activists embraced the often-incomprehensible fluidity of Nepali politics while demanding that their fundamental rights be respected."¹¹³

Key Legal and Advocacy Strategies

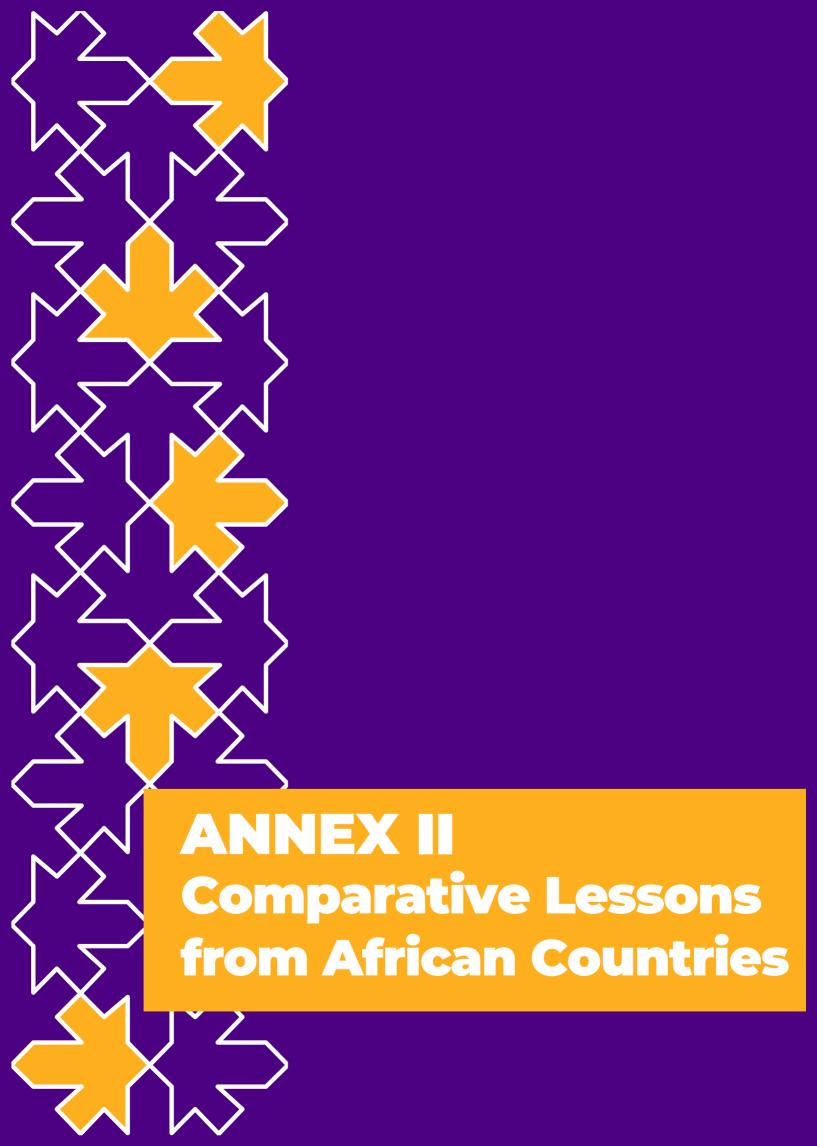
Special to the case of Nepal is country's new Constitution, which offers strong protections for LGBTQ people. The Constitution recognizes explicitly the right to have their preferred gender display on their identity cards; prohibition on discrimination on any ground including sex or sexual orientation by the State; prohibition on discrimination on any ground, including sex or sexual orientation by anyone; eligibility for special protections that may be provided by law; substitution of gender-neutral terms for the previous "male", "female", "son", and "daughter"; and the right of access to state process and public services for gender and sexual minorities.

The judgment of the Supreme Court recognized the rights that LGBTQ people deserved qua citizens, thus citizenship became the basis for the court to advocate for equal rights, eliminating the need for a framing of "special" or "new" rights for LGBTQ people.

In terms of advocacy, Nepal has a strong NGO culture cultivated by and integrated into the 1990s multi-party democracy movement, with strong connections with international non-profits and a solid external funding network that was expanded post-civil war.

NGOs have cultivated strong ties and lobbying with political parties to include LGBTQ rights into their party platforms, convincing the Nepali Congress, the Communist Party of Nepal and the Maoists, the three biggest parties in Nepal, to argue for LGBTQ issues.

https://www.hrw.org/news/2017/08/11/how-did-nepal-become-global-lgbt-rights-beacon



I. Botswana

Overview

Section 164 of Botswana's Penal Code forbids "unnatural offences," which are described as acts concerning "any person who a) has carnal knowledge of any person against the order of nature" or any person who "permits any person to have carnal knowledge of him or her against the order of nature." 114

LEGABIBO is the only organization in Botswana advocating solely for LGBTQ rights. In 2011, LEGABIBO filed a petition in the Botswana High Court calling for the decriminalization of homosexuality, but there is little information available as to LEGABIBO's strategies surrounding the case. LEGABIBO has actively lobbied city council members and has seen some successes in engaging them to support LGBTQ rights.

Botswana's Constitution

The Constitution of Botswana includes expansive rights protections against discrimination based on "race, place of origin, political opinions, color, creed or sex," (Art. 3). It also protects privacy (Art. 9), freedom of expression (Art. 12), and freedom of assembly (Art. 13).

Current Activism and Advocacy

LEGABIBO is the only organization in Botswana advocating solely for LGBTQ rights. 116

In 2016, LEGABIBO began working with a coalition of Gaborone city council members "to pass a motion requesting the Parliament of Botswana to decriminalize same-sex sexual acts in Botswana in order to strengthen the fight against HIV and AIDS." As a result of this coalition, the City Council of Gaborone passed the motion calling for Parliament to decriminalize homosexuality. Although the City Council does not technically have the ability to change laws and nothing has yet been seen of the motion, LEGABIBO considered the passage of such a motion successful. Interviews with LEGABIBO concerning this partnership with the Gaborone City Council and the current status of such a motion would be helpful.

¹¹⁴ See Appendix, Botswana Penal Code, Section 164.

¹¹⁵ http://www.bonela.org/images/Reports/shadow_report_botswana.pdf

¹¹⁶ http://www.bonela.org/images/Reports/shadow_report_botswana.pdf

¹¹⁷ LEGABIBO 2016: Expanding the Struggle, LEGABIBO (2016), https://legabibo.files.wordpress.com/2017/08/legabibo-2016-annual-report-1.pdf.

¹¹⁸ Declaration by High Representative, Federica Mogherini, on behalf of the European Union on the occasion of the International Day Against Homophobia, Transphobia And Biphobia, LEGABIBO (May 17, 2016), https://legabibo.wordpress.com/page/5/

¹²⁰ Darin Graham, *Botswana agrees to recognize transgender man in landmark case,* PinkNews (Dec. 7, 2017), http://www.pinknews.co.uk/2017/12/07/botswana-transgender-identity-court-ruling-salc-nd-high-court-registrar/.

LEGABIBO has also submitted joint reports to the Human Rights Committee (HRC) during Botswana's 2008 and 2013 UPRs pressuring Botswana to change its penal code. In its 2008 submission, LEGABIBO specifically cited sections 164, 165, and 167 of Botswana's penal code, arguing that such provisions violated the right to privacy and the right to equality without discrimination.¹²¹ The report also noted that such provisions violated the "Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity" and violated the African Charter of Human and Peoples' Rights.¹²² In its 2013 UPR report, LEGABIBO and a coalition of other NGOs again called for changing the penal code, stating that the provisions against homosexuality violated the non-discriminatory principle of the Botswana Constitution.¹²³

In general, LEGABIBO relies on strategies similar to those of LAMBDA in Mozambique, namely providing counseling legal assistance, and health advice to LGBTQ individuals; ¹²⁴ encouraging LGBTQ individuals to bring challenges to court in order to document cases of LGBTQ violence; ¹²⁵ publishing monthly articles in Zambeze and Canal de Moçambique, two national newspapers; ¹²⁶ running a radio program that is available via podcasts; and training professionals in various fields concerning "sexuality, human rights and STI and HIV/AIDS prevention." ¹²⁷. LEGABIBO focuses substantially on LGBTQ health and attempts to build partnerships with Botswana health care providers. ¹²⁸ In 2016, LEGABIBO and other LGBTQ health organizations formed a coalition to advocate for greater access to HIV/AIDS services "that are in line with international human rights norms and approaches." ¹²⁹ In addition, LEGABIBO participates in public advocacy campaigns, and in 2016, it installed five billboards in "four prominent locations in Botswana" advocating for LGBTQ inclusion and equality. ¹³⁰

Efforts to Decriminalize Homosexuality

In 2011, LEGABIBO supported a petition in the Botswana High Court calling for the decriminalization of homosexuality. A gay Botswanan man known by the initials LM had originally filed the petition on the grounds that the laws against homosexuality were unconstitutional and LEGABIBO was admitted as an observer into court proceedings.

 $^{^{121}\} https://www.upr-info.org/sites/default/files/document/botswana/session_3_-_december_2008/ilgabotswanae2008.pdf$

¹²² https://www.upr-info.org/sites/default/files/document/botswana/session_3_-december_2008/ilgabotswanae2008.pdf

¹²³ https://www.upr-info.org/sites/default/files/document/botswana/session_15_-january 2013/js1uprbwas152012jointsubmission1e.pdf

David Smith, Mozambique LGBT activists move on to next battle after anti-gay law scrapped, Guardian (June 30, 2015 7:32PM), https://www.theguardian.com/world/2015/jun/30/mozambique-lgbt-activists-anti-gay-law-scrapped.

¹²⁵ Mathew Lasky, *A Fight for Recognition: The LGBT Community's Battle in Mozambique* (Jan. 23, 2014, 2:48pm), https://www.huffingtonpost.com/mathew-lasky/a-fight-for-recognition-t_b_4646442.html.

¹²⁷ Id. at 17.

¹²⁸ LEGABIBO Health and Wellness Expo, LEGABIBO (Mar. 11, 2015), https://legabibo.wordpress.com/2015/03/.

¹²⁹ *LEGABIBO 2016: Expanding the Struggle*, LEGABIBO (2016), https://legabibo.files.wordpress.com/2017/08/legabibo-2016-annual-report-1.pdf.

¹³⁰ LEGABIBO 2016: Expanding the Struggle, LEGABIBO (2016), https://legabibo.files.wordpress.com/2017/08/legabibo-2016-annual-report-1.pdf.

The Botswana High Court has unlimited original jurisdiction in civil, criminal matters, and constitutional matters that pose a substantial question of law.¹³¹ After the High Court issues its decision, the parties can appeal the decision to the Court of Appeal, which is the highest court in Botswana's court system.¹³²

According to an article published in the African Human Rights Journal, "three areas or themes in respect of which the judgment makes a significant jurisprudential contribution [are]: (i) Its purposive approach to the interpretation of constitutional provisions gives expression to the underlying values of the Constitution, among others, democracy, pluralism, inclusivity, tolerance and diversity. The Court determines the scope of the rights in a way that upholds and relies upon constitutional values. (ii) The Court engages meaningfully with the state's justification for limiting rights and freedoms; particularly meaningful is the Court's rejection of bare assertions of or speculation about public morality and the extent to which the Court seeks to limit the role that public opinion plays in this inquiry. (iii) It used the participation of an amicus curiae to assist the Court in relevant matters of fact and law, thus allowing for enrichment of the quality of public-law jurisprudence. The participation by the amicus curiae was shown to be useful, especially since it could demonstrate to the Court the impact that laws criminalizing consensual same-sex sexual acts have on the lives of those not in Court as litigants. The judgment also makes a significant contribution to the discourse about consensual anal sexual intercourse being merely a variant of human sexuality. Moreover, it clearly and unambiguously dispels the myth that homosexuality is in any way 'un-African¹¹³³."

II. Kenya

Overview

Kenya's penal code still criminalizes homosexuality. The Penal Code forbids "unnatural offences" (Art. 162), attempts to commit unnatural offences (Art. 163), and "indecent practices between males" in public or private.

There are at least two major organizations focused on LGBTQ rights in Kenya: the Gay and Lesbian Coalition of Kenya (GALCK) and the National Gay & Lesbian Human Rights Commission (NGLHRC).¹³⁴ Curiously, neither GALCK nor the NGLHRC mention each other by name on their websites,

¹³¹ Botswana: Legislation and the Judicial System, BrillOnline, http://referenceworks.brillonline.com.ezp-prod1.hul.harvard.edu/entries/foreign-law-guide/botswana-legislation-and-the-judicial-system-COM_036301# (last visited Feb. 13, 2018); Constitution of Botswana, http://www.chr.up.ac.za/undp/domestic/docs/c_Botswana.pdf.

¹³² Constitution of Botswana, http://www.chr.up.ac.za/undp/domestic/docs/c Botswana.pdf.

¹³³ Esterhuizen, Tashwill, *Decriminilsation of consensual same-sex sexual acts and the Botswana Constitution*, (2019), African Human Rights Law Journal, vol.19 n.2; http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1996-20962019000200015

¹³⁴ The Rights of LGBTI People in Kenya, Sida (Jan. 2015), https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-kenya.pdf.

despite their similar goals, and neither organization has the other listed as a partner.

GALCK and NGLHRC have both filed petitions challenging this provision in Kenya's High Court. The two organizations also submitted a joint report to Kenya's UPR in 2015.

NGLHRC has a particularly impressive PR strategy, which includes providing trainings to judges, prosecutors, and police officers. In addition, NGLHRC has worked with Parliamentarians to encourage the decriminalization of homosexuality in Kenya's penal code.

Kenya's Constitution

The Constitution of Kenya provides expansive rights protections. It prohibits discrimination based on "race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth" (Art. 27) and protects privacy (Art. 31), freedom of association (Art. 33), and freedom of assembly (Art. 36).

Current Activism and Advocacy

There are at least major organizations are focused on LGBTQ rights in Kenya: The Gay and Lesbian Coalition of Kenya (GALCK) and the National Gay & Lesbian Human Rights Commission (NGLHRC).¹³⁵

- (1) GALCK: is an umbrella organization of LGBTQ NGOs that was formed around 2006. It currently consists of five LGBTQ organizations: Ishtar MSM, Artists for Recognition and Acceptance, Gay Kenya Trust, Transgender Education Advocacy, and Minority Women in Action. Recently, GALCK has adopted a "Multi-Tier Approach" towards "Equality and Non-discrimination of LGBTQ People" that hopes to go beyond merely legal approaches to LGBTQ advocacy. Specifically, GALCK and its partners hope to target "media, society, government, religious leaders and healthcare" in order to more broadly change attitudes about LGBTQ individuals.¹³⁶
- (2) NGLHRC: was founded in 2012 and has been noted in particular for its use of strategic litigation and legal aid to change laws regarding LGBTQ people.¹³⁷ NGLHRC is responsible for the 2015 High Court case

¹³⁵ The Rights of LGBTI People in Kenya, Sida (Jan. 2015), https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-kenya.pdf.

136 Id

¹³⁷ Kenya: Turning the Tide for LGBT Rights in Kenya, allAfrica (Mar. 7, 2007), http://allafrica.com/stories/201703080284.html; https://www.nglhrc.com/legal-aid-centre.

challenging the use of anal examinations on LGBTQ people and for filing petition 150 in 2016 challenging Kenya's penal code. In bringing these cases, NGLHRC hopes to share with the court and the public the "lived experience" of discrimination faced by LGBTQ people in Kenya. Is

Efforts to Decriminalize Homosexuality

NGLHRC and GALCK have filed petitions in the Kenya High Court challenging Kenya's penal code:140

- NGHLHC filed petition 150 of 2016,141 in which it argued that the penal code's provisions criminalizing same-sex relations contradicted the Constitution's provisions on equality and freedom discrimination, human dignity, freedom and security of the person, privacy, and the right to health.¹⁴² The NGLHRC also argued that the criminalizina homosexuality contradicted provisions Constitution's provisions on legal certainty, arguing that the disputed provisions were too vague to be constitutional.143
- In 2016, GALCK filed petition 234 in the Kenya High Court, which called for the decriminalization of same-sex relations in Kenya's penal code. This petition was later consolidated with NGLHRC's petition described above.¹⁴⁴
- The filing of pleadings has been completed and the hearing took place February 22nd, 145 with five issues of focus: 146
 - 1) [t]he criminal or other status of private consensual sexual conduct between adult persons of the same sex in Kenya, especially in light of the spirit of the **Constitution.**
 - 2) [t]he constitutionality or otherwise of Sections 162 and 165 of the Penal Code;"
 - **3)** whether the relevant provisions of the penal code meet the threshold for limitations of rights as articulated in Article 24 of the Constitution.
 - 4) the "correct interpretation" of Sections 162 and 165 of the penal code, and

¹³⁹ *Id*.

¹³⁸ *Id*.

¹⁴⁰ *Id*.

¹⁴¹ Available at http://kenyalaw.org/caselaw/cases/view/122862/

¹⁴² Id.

¹⁴³ Id.

¹⁴⁴ Litigation & Advocacy, GALCK, https://www.galck.org/litigation-and-advocacy/ (last visited Feb. 13, 2018).

¹⁴⁵ Court Judgments, NGLHRC, https://www.nglhrc.com/litigation#judgements (last visited Feb. 13, 2018).

¹⁴⁶ http://kenyalaw.org/caselaw/cases/view/122862/

5) the correct interpretations of the articles in Kenya's Constitution protecting freedom from discrimination, human dignity, freedom and security of the person, privacy, and the right to health.

The petition relied heavily on Kenya's Constitution in making its legal arguments: ¹⁴⁷_Specifically, it relied on articles protecting freedom from discrimination, human dignity, freedom and security of the person, privacy, and the right to health. ¹⁴⁸ It also incorporated stories of people suffering under the penal code, uses anthropology and post-colonial theory to show that this law is an insult to African cultural heritage.

Kenya National Commission on Human Rights

Although not dedicated solely to LGBTQ rights, the Kenya National Commission on Human Rights has also been active in advocating for LGBTQ individuals. In 2010, it submitted a report during Kenya's UPR calling for the repeal of Sections 153(a) and (c) of Kenya's criminal code penalizing homosexuality. In addition, it has played a role in LGBTQ litigation, and has acted as an interested party in some of the cases brought to the courts.

Societal Pressures

Like Botswana, LGBTQ individuals in Kenya face discrimination and violence that is motivated in part by religious organizations.¹⁵¹ In Likoni, Mombasa, on the coast of Kenya, for example, HIV training workshops have been the victims of attacks organized by both Christian and Muslim religious leaders.¹⁵² Specifically, leaders from the Council of Imams, the Preachers of Kenya, and the National Council of Churches of Kenya have been responsible for inciting violence against LGBTQ individuals.¹⁵³ In 2012, these leaders condemned the Kenya National Commission on Human Rights for its support of decriminalizing same-sex conduct.¹⁵⁴ More recently, religious leaders from the Kenya Christian Professionals Forum condemned the Kenya High Court's order to register the NGLHRC as an NGO, calling the ruling "in bad taste." ¹⁷⁵⁵

¹⁴⁷ **I**d

¹⁴⁸ http://kenyalaw.org/caselaw/cases/view/122862/

¹⁴⁹ https://www.upr-info.org/sites/default/files/document/kenya/session 8 -

may 2010/knhrcuprkens082010thekenyanationalcommissiononhumanrights.pdf

¹⁵⁰ ANNUAL REPORT, APRIL 2015 TO MARCH 2016 Towards Enhanced Human Rights-Centred Governance at All Levels, Kenya National Human Rights Commission, http://www.khrc.or.ke/publications/131-khrc-annual-report-april-2015-to-march-2016/file.html.

¹⁵¹ The Rights of LGBTI People in Kenya, Sida (Jan. 2015), https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-kenya.pdf.

¹⁵³ The Issue is Violence: Attacks on LGBT People on Kenya's Coast, Human Rights Watch (Sep. 28, 2015), https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast. ¹⁵⁴ Id.

¹⁵⁵ *Id*.

In addition, government representatives have made "hostile public statements" about LGBTQ individuals.¹⁵⁶ Current Deputy President William Ruto has openly expressed homophobic views, and he expressed his opposition to the High Court's ruling in favor of the NGLHRC in 2015.¹⁵⁷

An interview conducted by the authors of this report with Eric Citari, Executive Director of NGLHRC, yielded useful strategies to consider for Lebanon and other countries considering adopting legal strategies to repeal their own contra naturam laws. One of the more effective strategies was the use of strategic litigation and legal aid to change laws regarding LGBTO people¹⁵⁸ and changing the jurisprudence around the subject within the judiciary at large. What was also extremely useful was to submit periodic reports to the Human Rights Council in Geneva for Kenya's UPR calling for the decriminalization of same-sex relations in Kenya's penal code. 159 Successful partnerships with other collectives and organizations also allowed for breakthroughs within previously inaccessible spaces, including Kenyan Human Rights Commission and the Kenyan Judges Association which allowed for the training and engagement of prosecutors, police officers, and judges. Allowing the general public to access free and quality workshops and trainings on LGBTQ issues, particularly rights and history, was also very useful in building momentum around the topic and bypassing more difficult spaces to engage with the public, like the media and the education system.

Engagement with parliament members in order to soften and complexify their video of LGBTQ rights and people was also crucial in this effort. NGLHRC drafted letters that opposed the passage of anti-LGBTQ laws in Kenya and circulated it to Parliamentarians through direct engagement and then worked closely with members who responded favorably by organizing formal and informal meetings, retreats, and conferences in order to collectively strategize and work towards pushing the LGBTQ movement forward in the judicial and legislative branches of government.

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 $^{{}^{156}\} The\ Rights\ of\ LGBTI\ People\ in\ Kenya}, Sida\ (Jan.\ 2015), \\ {\underline{https://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/lgbti/rights-of-lgbt-persons-kenya.pdf}.$

¹⁵⁷ *The Issue is Violence: Attacks on LGBT People on Kenya's Coast*, Human Rights Watch (Sep. 28, 2015), https://www.hrw.org/report/2015/09/28/issue-violence/attacks-lgbt-people-kenyas-coast.

¹⁵⁸ Kenya: Turning the Tide for LGBT Rights in Kenya, allAfrica (Mar. 7, 2007),

http://allafrica.com/stories/201703080284.html; https://www.nglhrc.com/legal-aid-centre.

¹⁵⁹ https://www.upr-info.org/sites/default/files/document/kenya/session_21_-_january_2015/js9_-_joint_submission_9.pdf