



UNITED NATIONS INDEPENDENT EXPERT ON SEXUAL ORIENTATION AND
GENDER IDENTITY

May 2023

**INTERNATIONAL COMMISSION OF JURISTS' (ICJ) RESPONSE TO THE
CALL FOR INPUTS FOR THE UN INDEPENDENT EXPERT'S REPORT ON
COLONIALISM AND SEXUAL ORIENTATION AND GENDER IDENTITY**

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ICJ SUBMISSION FOR THE UN INDEPENDENT EXPERT'S REPORT ON COLONIALISM AND SEXUAL ORIENTATION AND GENDER IDENTITY

This submission gives an overview of the criminalization and marginalization of gender and sexual minorities in select Asian and African countries.

Oppressive laws as well as prejudicial attitudes fueled by rigid gender and sexual stereotypes and norms have resulted in people facing discrimination, harassment and violence across Asia and Africa motivated in whole or in part by prejudice, hostility, and hatred against their actual or perceived personal protected characteristics or status, such as sexual orientation, gender identity, gender expression, or sex characteristics.

In many of these countries, the marginalization of sexual, gender and other minorities is intimately tied to their colonial experience. Antiquated colonial legislation such as laws criminalizing “unnatural intercourse”, “carnal intercourse”, “gross indecency”, “cross-dressing”, “public nuisance”, and “vagrancy” still exist, which leads to a climate of insecurity that is exacerbated by societal prejudices and the lack of adequate protection measures.

South Asia

Pakistan

India was a British colony until independence in 1947, when Pakistan was also created as a separate state.

In many ways, the marginalization of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) people in South Asia was closely tied to the colonial State's creation of a “new public order”. Key to this “new public order” was a redefinition of masculinity as the ruler's ideology, with the British man representing the apex of masculinity. The ideal man was physically strong, occupied himself with “masculine” pursuits like hunting and sports, and above all, ruled the vast subcontinent in an “enlightened” manner. Below the British in the hierarchy of masculinity were the Indian “martial races” of Sikhs, Pathans and Muslims, followed by the “effeminate” Bengalis. Women were excluded from this public order except under the protection of their respective male counterparts.¹

The “discovery” by British colonizers of a gender variant community of “eunuchs” in the 1850s – or *hijras* as they were called in North India – therefore subverted the

¹ Jessica Hinchy (2014) Obscenity, Moral Contagion and Masculinity: Hijras in Public Space in Colonial North India, *Asian Studies Review*, 38:2, 274-294, DOI: 10.1080/10357823.2014.901298.

hierarchy of masculinity the colonial rulers sought to create. The Colonial State, in its response, sought to discipline and ultimately erase gender diverse people and communities as visible social categories by “criminalizing” them under the Criminal Tribes Act of 1871, thereby, creating a pattern of control that continues to this day.²

In post-colonial Pakistan, these colonial practices of criminalization, exclusion and marginalization of gender diverse people were seamlessly folded into the State structure. They were given a new life by the rightwing and religious groups and parties.

Section 377³ was introduced in India through the Indian Penal Code in 1860. The intent behind the provision was clearly to criminalize individuals whose real or imputed sexual relations the colonial government found to be “unnatural” and undesirable.⁴ While Section 377 has been read down by the Indian Supreme Court to exclude consensual same-sex relations, it is still part of the Pakistan Penal Code.

Sri Lanka

Sri Lanka has been ruled by three colonial powers: the Portuguese, the Dutch and the British. Of these the British purportedly criminalized same-sex sexual relationships through the introduction of provisions relating to ‘unnatural offences: carnal intercourse against the order of nature⁵’ and ‘gross indecency⁶’ in the Penal Code of 1883⁷. Neither of these terms have been defined in the law but have in practice been interpreted as referring to those who engage in same-sex sexual relationships. Sri Lanka gained independence from the British in 1948. But these penal provisions continue to be in place with a few amendments⁸ and while rarely used have proven to be a tool of blackmail and harassment against LGBTI individuals.

² Ibid.

³ “Unnatural offences: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which shall not be less than two years nor more than ten years, and shall also be liable to fine.”

⁴ See for example HRW, “This Alien Legacy” December 2008, available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>; and Arvind Narrain, *Queer- Despised Sexuality, Law and Social Change*, Books for Change, 2004.

⁵ Section 365 of the Penal Code originally read: ‘Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment of either description [i.e. simple or rigorous] for a term which may extend to ten years, and shall also be liable to a fine’. The explanation states: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

⁶ Section 365A of the Penal Code originally read: ‘Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of an offence, and shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both, and shall also be liable to be punished with whipping.’

⁷ Ordinance No.2 of 1883

⁸ In 1995, Section 365 was amended to increase the penalty to rigorous imprisonment between ten and twenty years if the offence was committed by someone over the age of eighteen on someone below the age of sixteen. More importantly Section 365A was amended with the words ‘any male person’ being replaced by ‘any person’ making it gender neutral, bringing women within its folds. It also included a provision for compensation to be determined by the court and payable to a person under the age of sixteen. In 2006, an explanation was added to both sections mentioning that ‘injuries include psychological or mental trauma’.

Human Rights violations against LGBTI individuals have been documented by many local organizations throughout the years.⁹

When an amendment was proposed to the Penal Code in 1995, the technical committee set up by the government which consisted of various stake holders made several recommendations including repealing sections 365 and 365A, but these recommendations were ignored and instead the gross indecency provision which had hitherto been applicable to males was made 'gender neutral'.¹⁰ Sections 365 and 365A are used by the police to arrest persons even when there is not evidence of an 'act' under these sections by merely looking at gender performance and claiming that an act may take place in the future, most times charges are not filed or the accused is not taken to court and instead bribery (monetary or sexual) or violence occurs.¹¹

The Vagrants Ordinance of 1841¹² is another colonial imposition that is still in practice. The Ordinance acts as a decency law penalizing certain social behaviour such as behaving in a 'riotous and disorderly manner', 'wandering', 'idling', 'gather or collector of alms under false pretense', 'endeavoring by the exposure of wounds, deformities, leprosy or loathsome disease', 'soliciting', 'acts of indecency' etc. Those who engage in such conduct are labelled 'rogues,' 'vagabonds' or 'incorrigible rogues'. 'Incorrigible rogues' are not only convicted for the 'crime' they committed but are also expected to provide monetary security for one year after release to guarantee their future good behaviour. Gay men, butch lesbians and trans sex workers are frequently targeted by these provisions and are subject to extortion or sexual harassment by the police.¹³

Both the Army Act of 1949 and Airforce Act of 1950 state that any person who commits an act of an unnatural kind would be guilty of an offence and upon conviction by a court martial be liable to imprisonment (simple or rigorous) for up to 3 years or maybe given a lesser punishment. The provisions are similar to their Indian counterparts.

⁹ Annexed please find 'Human Rights Violations Analysis -2021-2022' prepared by ICJ's partner organizations forming the 'BRIDGE to Equality' and Monologues on Human Rights Violations available at <https://www.youtube.com/playlist?list=PLZLmSqTVL2X6okos8XBrdH2tADXsAZiU-> See also 'Historic Court Win for LGBTIQ Community' <https://groundviews.org/2021/12/13/historic-court-win-for-lgbtig-community/>, 13 December 2021 and Women's Support Group, "Not Gonna Take It Lying Down" Experiences of Violence and Discrimination as Told by LBT Persons in Sri Lanka, Colombo: WSG, 2014 available at <https://www.scribd.com/document/214827257/Not-Gonna-Take-It-Lying-Down-English#>

¹⁰ Priya Thangarajah, Strengthening of Legal Protection for LGBT in Sri Lanka: Road to Decriminalization, Colombo: Equal Ground, 2013 available at <https://www.equal-ground.org/wp-content/uploads/Situation-Analysis.pdf>

¹¹ supra n.5

¹² Ordinance No. 4 of 1841 available at http://www1.umn.edu/humanrts/research/srilanka/statutes/Vagrants_Ordinance.pdf

¹³ ICJ interview with survivors in 2022-2023

70.2% of the Sri Lankan population practices Buddhism¹⁴ according to the last census report published in 2012. Writers note that the Buddha did not say anything specifically about same-sex relationships because it had never been an issue.¹⁵

Even in history, the 'Mahawansa', which chronicles the history of Sri Lanka, describes an intimate relationship between the King Kumaradasa and the renowned Sanskrit poet Kalidasa in the 5th century CE. Further, in 1547 AD a letter by the Governor of Goa at the time, Joao de Casto, stated that King Bhuvanaka Bahu VII of Kotte used to engage in gay activities.¹⁶ In the 17th Century book by Robert Knox entitled 'A Historical Relation of the Island of Ceylon' he notes that the King had several attractive male attendants with whom the ruler had a special relationship.¹⁷

Southeast Asia

Laws criminalizing consensual same-sex sexual activity

In Southeast Asia, four countries (Brunei, Indonesia,¹⁸ Malaysia and Myanmar) continue to criminalize consensual same-sex sexual activity in some form, including through laws introduced by the British during the colonial era in Brunei, Malaysia and Myanmar.

¹⁴ Preliminary findings of Country Visit to Sri Lanka by the Special Rapporteur on freedom of religion or belief, <https://www.ohchr.org/en/news/2019/08/preliminary-findings-country-visit-sri-lanka-special-rapporteur-freedom-religion-or>

¹⁵ They note that the Tripitaka, a holy scripture highlights the case of a Bhikku (monk) Wakkali who became a monk purely because he was physically attracted to the Buddha. The scripture also highlights a transsexual incident in which a married man with children was physically attracted to a monk, and therefore changed into a female and married another man. The same scripture also refers to an incident where a novice monk masturbated a high ordained monk. See for example Bellanvila Sudaththa Thero and Cecil J. Dunne, Homosexuality, Buddhism and Sri Lankan Society, 28.08.2007, available at <https://groundviews.org/2007/08/28/homosexuality-buddhism-and-sri-lankan-society/>.

These same arguments were recently made in the Supreme Court during the hearings against the constitutionality of the Penal Code (Amendment) Bill which seeks to decriminalize same-sex sexual relationships.

¹⁶ "the sin of sodomy is so prevalent... that it makes us very afraid to live there. And if one of the principle men of the kingdom is questioned about if they are not ashamed to do such a thing as ugly and dirty, to this they respond that they do everything that they see the king doing, because that is the custom among them." See 'Montage of Sexuality in Sri Lanka' available at <https://srilanka.unfpa.org/sites/default/files/pub-pdf/Montage%20of%20Sexuality.pdf>

¹⁷ "Most of his Attendants are Boys, and Young Men, that are well favored, and of good Parentage. For the supplying himself with these, he gives order to his Dissava's or Governors of the countreys to pick and choose out Boys, that are comely and of good Descent, and send them to the Court. These boys go bare-headed with long hair hanging down their backs. Not that he is guilty of Sodomy, nor did I ever hear the Sin so much as mentioned among them" (Robert Knox, An Historical Relation of the Island of Ceylon, 1681).

¹⁸ It is worth noting that Indonesia, in particular, did not have any laws criminalizing consensual same-sex sexual conduct introduced during the colonial era. In Indonesia, same-sex activity is criminalized in several provinces, cities and districts through local ordinances, and the newly introduced Criminal Code, passed on 6 December 2022, also contains provisions which introduce de facto criminalization of same-sex activity, including through provisions on extramarital sex and cohabitation under articles 411 and 412; see, ICJ, "Indonesia: New Penal Code is a major human rights setback and must be repealed or substantially amended", 9 December 2022, available at: <https://www.icj.org/indonesia-new-penal-code-is-a-major-human-rights-setback-and-must-be-repealed-or-substantially-amended/>.

In Brunei, section 377 of the Penal Code criminalizes “unnatural offences” with up to 30 years’ imprisonment and whipping.¹⁹ In Malaysia, section 377, 377A and 377B of the Penal Code criminalizes “carnal intercourse against the order of nature”, defined as a sexual connection by the introduction of the penis into the anus or mouth of another person, with up to 20 years’ imprisonment and/or whipping. Section 377D also punishes acts of “gross indecency” committed in public or private with up to 2 years’ imprisonment.²⁰ In Myanmar, section 377 of the Penal Code criminalizes “carnal intercourse against the order of nature” with the potential punishment of “transportation for life”, up to ten years’ imprisonment, and a fine.²¹

Singapore’s Parliament repealed section 377A of the Penal Code on 29 November 2022, a colonial law which criminalized acts of “gross indecency” between men, following years of advocacy from LGBTI human rights groups and defenders, and several rounds of constitutional challenges against the law.²² There was little, if any reference to “colonialism” and “decolonization” in parliamentary debates on the repeal of the law.²³

While the detrimental impacts of these colonial-era criminal laws cannot be understated, the agency of these countries in choosing to retain these colonial laws and introduce other provisions criminalizing gender and sexual diversity must also be emphasized. For instance, in Brunei, Parliament voted to increase the punishment for a conviction under section 377 of the Penal Code from ten years’ imprisonment and a fine, to 30 years’ imprisonment and whipping.²⁴ Brunei, Malaysia and Indonesia have also introduced Syariah laws criminalizing consensual same-sex sexual activity, which are more actively enforced than the criminalizing provisions under the secular Penal Codes.²⁵

¹⁹ Section 377, Chapter 22, Penal Code, No. 16 of 1951, available at: https://www.agc.gov.bn/AGC%20Images/LAWS/ACT_PDF/Cap.22a.pdf; Penal Code (Amendment) Order 2017, available at: https://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2017/EN/S061.pdf.

²⁰ Sections 377, 377A, 377B, and 377D, Penal Code, available at: <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/61339/117909/F1085941047/MYS61339%202015.pdf>.

²¹ Section 377, Myanmar, The Penal Code, available at: <https://www.wipo.int/edocs/lexdocs/laws/en/mm/mm004en.pdf>.

²² ICJ, “Singapore: Long overdue decriminalization of consensual same-sex relations between men overshadowed by discriminatory constitutional amendment purporting to “protect” definition of marriage”, 28 November 2022, available at: <https://www.icj.org/singapore-long-overdue-decriminalization-of-consensual-same-sex-relations-between-men-overshadowed-by-discriminatory-constitutional-amendment-purporting-to-protect-definition-of-mar/>.

²³ Notably, Singapore’s Prime Minister Lee Hsien Loong stated that the government’s intention to repeal the law was made following the most recent decision in the Court of Appeal (*Tan Seng Kee v Attorney General*) on the constitutional challenge against section 377A, as “the Minister for Law and the Attorney General have advised that in a future court challenge, there is a significant risk of s377A being struck down, on the grounds that it breaches the Equal Protection provision in the Constitution.” See, Prime Minister’s Office, “National Day Rally 2022”, 21 August 2022, available at: <https://www.pmo.gov.sg/Newsroom/National-Day-Rally-2022-English>.

²⁴ Penal Code (Amendment) Order 2017, available at: https://www.agc.gov.bn/AGC%20Images/LAWS/Gazette_PDF/2017/EN/S061.pdf.

²⁵ ILGA World: Lucas Ramon Mendos, Kellyn Botha, Rafael Carrano Leles, Enrique López de la Peña, Ilia Savelev and Daron Tan, *State-Sponsored Homophobia 2020: Global Legislation Overview Update*, December 2020, p. 130, 131, 133, available at: https://ilga.org/downloads/ILGA_World_State_Sponsored_Homophobia_report_global_legislation_overview_update_December_2020.pdf.

Influence of criminalization on continued legal and social stigmatization of LGBTI people

The criminalization of gender and sexual plurality has had cascading effects in legitimizing and entrenching other forms of discrimination, violence and stigmatization of LGBTI people in these countries, including through discriminatory laws, policies and practices.

For instance, there are arbitrary legal restrictions on the dissemination of LGBTI-related content in Indonesia, Malaysia, and Singapore, both in offline and online spaces. These restrictions are typically justified based on the prevailing political and social stigma against gender and sexual diversity, as legitimized by the criminalization of sexual and gender diversity.²⁶

In Indonesia, LGBTI content is explicitly restricted through Circular Letters issued by the Indonesian Broadcasting Commission, and also restricted as “content against propriety” under article 27(1) of Law No. 11 of 2008 on Electronic Information and Transactions.²⁷ In Malaysia, LGBTI content is explicitly restricted through the Guidelines on Film Censorship, and restricted under vague and overbroad legal provisions under the Communications and Multimedia Act 1998 and Printing Presses and Publication Act 1984.²⁸ In Singapore, LGBTI content is explicitly restricted through Codes of Practice issued under the Broadcasting Act 1994, including the Internet Code of Practice and Content Code for Over-the-Top, Video-on-Demand and Niche Services.²⁹

LGBTI people in these countries also endure unjustified exclusions on the rights to family, housing, health, education, as well as labour and other rights due to the continuing stigma against them. For instance, despite the recent decriminalization of consensual same-sex sexual acts between men in Singapore, institutionalized

²⁶ See for instance, in the context of Singapore: Josephine Teo, “No Change to Content Regulation Policies with S377A Repeal”, Facebook, 27 August 2022, available at: <https://www.facebook.com/Josephine.LM.Teo/posts/pfbid0299ZFGVtVsBzNEwDduSiexWLokAutpnk2j12LhLy4FpveSDTPVevCKZqcWU5osoSpl..>

²⁷ Article 27(1), Law No. 11 of 2008 on Electronic Information and Transactions, available at: <https://peraturan.bpk.go.id/Home/Details/37589/uu-no-11-tahun-2008>; Kominfo, “Siaran Pers No. 38/HM/KOMINFO/02/2019 Rabu, 13 Februari 2019 tentang IG Penuhi Permintaan Kominfo Tutup Akun Komik Muslim Gay”, 13 February 2019, available at: https://www.kominfo.go.id/content/detail/16358/siaran-pers-no-38hmkominfo022019-tentang-ig-penuhi-permintaan-kominfo-tutup-akun-komik-muslim-gay/0/siaran_pers; Komisi Penyiaran Indonesia, “Edaran Kepada Seluruh Lembaga Penyiaran Untuk Program yang mengangkat tema Lesbian, Gay, Biseksual dan Transgender (LGBT)”, 18 February 2016, available at: <https://www.kpi.go.id/index.php/id/edaran-dan-sanksi/33258-edaran-kepada-seluruh-lembaga-penyiaran-untuk-program-yang-mengangkat-tema-lesbian-gay-biseksual-dan-transgender-lgbt>.

²⁸ Ministry of Home Affairs, “Garis Panduan Penapisan Filem”, 2010, available at: [https://lpf.moha.gov.my/lpf/images/Perundangan/GARIS_PANDUAN_PENAPISAN_FILEM\(1\).pdf](https://lpf.moha.gov.my/lpf/images/Perundangan/GARIS_PANDUAN_PENAPISAN_FILEM(1).pdf); Sections 37(e), 233, and 263(2) Communications and Multimedia Act (1998), available at: https://www.mcmc.gov.my/skmmgovmy/media/General/pdf/Act588bi_3.pdf; Section 7(1), Printing Presses and Publications Act 1984, available at: https://www.moha.gov.my/images/maklumat_bahagian/PQ/Act301.pdf.

²⁹ Section 6, Broadcasting Act 1994, available at: <https://sso.agc.gov.sg/Act/BA1994?ProvIds=P13-#pr6->; IMDA, “Internet Code of Practice”, para. 2, available at: <https://www.imda.gov.sg/-/media/Imda/Files/Regulations-and-Licensing/Regulations/Codes-of-Practice/Codes-of-Practice-Media/PoliciesandContentGuidelinesInternetInterneCodeOfPractice.pdf>.

discrimination is still pervasive. Examples of discriminatory laws and policies include the prevention of LGBTI persons from purchasing public housing before the age of 35; discriminatory sexuality education policies in schools; and above all, a clause in the Constitution that curtail judicial review of all regulations and executive actions that discriminate against LGBTI persons.³⁰

Africa

Despite progress in recent years, the majority of countries in Africa continue to criminalize and discriminate against LGBTI persons in different ways.³¹ 32 out of 54 African countries continue to criminalize private consensual same-sex activity.³² A majority of these are criminal laws from the colonial era.

Some countries have since repealed these laws, while others have re-enacted or attempted to re-enact new criminalizing laws. In criminalizing countries, the laws often prohibit 'sodomy' or 'carnal knowledge against the order of nature'. The laws may also criminalize consensual same-sex relationships and same-sex marriages. In a few instances, the laws go as far as criminalizing the provision of aid and support to LGBTI persons. Criminalizing laws may stipulate imprisonment of up to 30 years or even the death penalty.

Politicians often justify criminalization on the grounds that consensual same-sex relationships are 'unAfrican' even though there is ample contradictory historical evidence. With the exception of South Africa, gay marriage is not legal in any African country and less than half of the countries on the continent have legalized same-sex relationships. Namibia will recognize same-sex marriage conducted in another country. In most instances of criminalization, the criminal and penal laws derive from colonial legacy laws that criminalize same-sex relationships under provisions that prohibit "sodomy" and "carnal knowledge against the order of nature".³³ In other instances, a growing trend of newly enacted laws criminalizes same-sex marriage, expressions of same-sex affection, transgender identity and expression, as well as association and advocacy for or in support of LGBTI issues.³⁴ In some of these countries, courts have not offered much support in the protection of the rights of those found to be contravening the "homophobic laws", and in some circumstances, they have resorted to reliance on technicalities, in making their decisions.³⁵ Consequently, homophobic social attitudes, discrimination, and even violence have remained openly or tacitly supported by the State, thus heightening the dangers that LGBTI persons face in Africa. The laws stem from colonial laws, policies, and practices

³⁰ ICJ, *Legal Analysis: Repeal of Singapore's Penal Code Section 377A and Constitutional Amendments Said to Protect the Definition of Marriage*, 28 November 2022, available at: <https://ici2.wpenginepowered.com/wp-content/uploads/2022/11/Singapore-377A-Repeal-and-Constitutional-Amendments-Legal-Analysis-Final.pdf>.

³¹ A Jjuuko 'The protection and promotion of LGBTI rights in the African regional human rights system: Opportunities and challenges' in S Namwase & A Jjuuko (eds) *Protecting the human rights of sexual minorities in contemporary Africa* (2017) 261.

³² State Sponsored Homophobia Report, ILGA December 2019

³³ A Gupta 'This alien legacy: The origins of "sodomy" laws in British colonialism' (2008) 26 – 27.

³⁴ Jjuuko (note 1 above) 261 - 262.

³⁵ For example, the Nigerian case of *Teriah Joseph Ebah v Nigeria* (Suit No FHC/ABJ/CS/197/2014).

that have been deeply influential in the present-day regulation of sexual orientation and gender identity in many African countries. Kenya, Ghana and Uganda are examples of former British colonies that continue to criminalize conduct deemed “unnatural offences,” including consensual same-sex sexual activity, through laws that are relics from British colonial rule.³⁶

Kenya

Kenya was colonized by the British in 1895 and adopted the Colonial Office Model Code in 1930.³⁷ This Code criminalized acts of “gross indecency” and “carnal knowledge against the order of nature” which carried a maximum sentence of fourteen years’ imprisonment. Only men are criminalized under this law. After gaining independence in 1963, the same Penal Code was retained and to this day, criminalizes consensual same-sex sexual activity between men specifically.³⁸ While the law criminalizes men, reports show that police often use other provisions of the Code such as “loitering”, “impersonation” and “solicitation” to target and arrest LGBTI individuals.³⁹

Ghana

Like Kenya, Ghana also inherited British colonial laws criminalizing same-sex sexual activity.⁴⁰ The Criminal Code of 1960 prohibits consensual same-sex sexual conduct between men in the same provision as the offence of bestiality.⁴¹ Also like Kenya, the justification for continued criminalization of homosexuality in Ghana is rooted in arguments invoking cultural and religious beliefs, with opponents specifically asserting that they contradict African customs and values.⁴² 2021 saw the introduction of the Promotion of Proper Human Sexual Rights and Ghanaian Family Values Bill which, if passed, would have the effect of further trampling on the rights of LGBTI individuals and restricting advocacy for LGBTI rights.

Uganda

³⁶ International Commission of Jurists, *Invisible, Isolated, and Ignored Human Rights Abuses Based on Sexual Orientation and Gender Identity/Expression in Colombia, South Africa and Malaysia* (2021) 16, available at : <https://icj2.wpenginepowered.com/wp-content/uploads/2021/03/Colombia-SouthAfrica-Malaysia-SOGIE-Publications-Reports-Thematic-reports-2021-ENG.pdf>; Human Rights Watch, *Progress and Setbacks on LGBT Rights in Africa — An Overview of the Last Year*, available at: <https://www.hrw.org/news/2022/06/22/progress-and-setbacks-lgbt-rights-africa-overview-last-year>.

³⁷ This set of laws was based on the Queensland Code of 1899 and later replaced the Indian Penal Code. See Courtney E. Finerty, “Being Gay in Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws” available at: <https://www3.lawschool.cornell.edu/research/ILJ/upload/Finerty-final-version.pdf>.

³⁸ See sections 162 (“unnatural offences”), 163 (“attempt to commit unnatural offences and 165 (“indecent practices between males”).

³⁹ Human Dignity Trust, “Kenya country profile”, available at: <https://www.humandignitytrust.org/country-profile/kenya/>.

⁴⁰ The present-day Criminal Code does not directly derive from the Indian Penal Code but is generally based on the Offences against the Person Act of 1861 which was enforced throughout the colonies of Britain.

⁴¹ Section 104 of the Criminal Code proscribes so-called “unnatural carnal knowledge” of someone over the age of 16 without his consent or with an animal.

⁴² Claire Provost & Nana Darko Sekyiamah, “Exclusive: Millions in Western aid flowed to churches in Ghana despite years of campaigning against LGBTQI+ rights” CNN, available at: <https://edition.cnn.com/2022/12/13/africa/us-europe-aid-lgbtqi-ghana-churches-investigation-as-equals-intl-cmd-dg/index.html>.

Uganda, like Kenya and Ghana, inherited British criminal law during the colonial period from 1895 to 1961 and retained colonial-era laws criminalizing consensual same-sex activity at independence. The country is particularly hostile to LGBTI persons. Its Penal Code of 1950⁴³ criminalizes consensual same-sex sexual activity between men and women which is deemed an “unnatural offence” under sections 145 and 146 and carries a maximum penalty of life imprisonment.⁴⁴ In recent years, regular enforcement of this law has resulted in many arrests, arbitrary detention of LGBTI individuals, forced anal “examinations” and other forms of torture or ill-treatment.⁴⁵ Uganda has made repeated attempts to further bolster these colonial laws and the discrimination that their enforcement perpetuates, including through the introduction of the Anti-Homosexuality Bill of 2023.⁴⁶ The 2023 Act, which goes beyond prohibiting same-sex acts to criminalize merely identifying as LGBTI and to impose harsh penalties, has not yet been signed into law by the Ugandan President.⁴⁷

Pre- and post-colonial regulation of SOGI in Kenya, Ghana, and Uganda continues to negatively affect the lives of LGBTI persons. These countries inherited laws criminalizing same-sex sexual activity that may not always lead to convictions but perpetuate violence and entrench discrimination against LGBTI persons in these countries. Culture and religion have been the two main reasons why people discriminate against LGBTI people in most African countries.⁴⁸ This seems to be reflective of British colonial norms and Christian values rather than of African customs and cultures.⁴⁹ These remnants of colonial rule are further strengthened by newer legislation that seeks to go as far as to punish merely identifying as LGBTI persons. Efforts to repeal or challenge these laws have also faced considerable resistance.⁵⁰

⁴³ The Penal Code has its roots in which has its roots in the Indian Penal Code which was introduced in several former African colonies of the British Empire.

⁴⁴ Section 145 states that “any person who— (a) has carnal knowledge of any person against the order of nature; (b) has carnal knowledge of an animal; or (c) permits a male person to have carnal knowledge of him or her against the order of nature, commits an offence and is liable to imprisonment for life.”

⁴⁵ Human Dignity Trust, “Uganda country profile” available at: <https://www.humandignitytrust.org/country-profile/uganda/>.

⁴⁶ Amnesty International, Uganda: President’s failure to veto anti-LGBTI Bill an ‘abhorrent’ violation of LGBTI rights”, 2 May 2023 available at: <https://www.amnesty.org/en/latest/news/2023/05/president-must-veto-anti-lgbti-law/>. See also news on the 2014 Anti-Homosexuality Bill: Amnesty International, “Uganda: Anti-Homosexuality Act prompts arrests, attacks, evictions, flight, 15 May 2014, available at: <https://www.amnesty.org/en/latest/news/2014/05/uganda-anti-homosexuality-act-prompts-arrests-attacks-evictions-flight/>.

⁴⁷ Ibid; see also Equaldex, LGBT Rights in Uganda, available at: <https://www.equaldex.com/region/uganda>

⁴⁸ See, for example, Al Jazeera, “Why are Kenya and Uganda cracking down on LGBTQ rights?” 23 March 2023, available at: <https://www.aljazeera.com/news/2023/3/23/why-are-kenya-and-uganda-cracking-down-on-lgbtq-rights>; See also Human Rights Watch, *This Alien Legacy The Origins of “Sodomy” Laws in British Colonialism* (2008), available at: <https://www.hrw.org/report/2008/12/17/alien-legacy/origins-sodomy-laws-british-colonialism>. https://digitalcommons.csumb.edu/cgi/viewcontent.cgi?article=2450&context=caps_thes_all

⁴⁹ Ambani, John, “A Triple Heritage of Sexuality? Regulation of Sexual Orientation in Africa in Historical Perspective” in Sylvie Namwase & Adrian Jjuuko, *Protecting the human rights of sexual minorities in contemporary Africa*, Pretoria University Law Press (2017).

⁵⁰ See, for example, Human Rights Watch, “Kenya: Court Upholds Archaic Anti-Homosexuality Laws”, 24 May 2019, available at: <https://www.hrw.org/news/2019/05/24/kenya-court-upholds-archaic-anti-homosexuality-laws>

