Submission in the UPR review of: Pakistan

Legal and Statutory framework:

Pakistan maintains **criminal sanctions against sexual activity between consenting adults**. Pakistan's Penal Code (Act XLV of 1860) in Section 377 provides:

> Section 377 '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 a fine."

Pakistan's international human rights obligations:

Provisions against sexual activity between consenting adults have been found to constitute **a clear violation of international human rights law**.

In *Toonen v Australia*, the **UN Human Rights Committee** in March 1994 confirmed that laws criminalizing consensual same-sex activity violate both the right to privacy and the right to equality before the law without any discrimination, contrary to articles 17(1) and 26 of the International Covenant on Civil and Political Rights.[1]

The Committee further considered that such laws interfere with privacy rights, whether or not they are actively enforced, and "run counter to the implementation of effective education programmes in respect of HIV/AIDS prevention" by driving marginalised communities underground.

The UN Human Rights Committee has affirmed this position on many occasions, either urging States to repeal laws which criminalize consensual same-sex activity or commending them for bringing their legislation into conformity with the Covenant by repealing such provisions.[2]

This position is consistent with other **regional and national jurisprudence**, including decisions of the European Court of Human Rights[3] and of the Constitutional Court of South Africa.[4]

States' international obligations to respect the human rights of all persons, irrespective of sexual orientation and gender identity, were recently articulated in the "***Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity***". The Principles were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including Asia. These experts included judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, members of civil society and others.

Principle 2 of the Yogyakarta Principles affirms the right of all persons to equality before the law without discrimination on the basis of sexual orientation or gender identity, and specifically confirms the obligation of States to "repeal criminal and other legal provisions that prohibit or are, in effect, employed to prohibit consensual sexual activity among people of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."

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[1] *Toonen* v *Australia*, CCPR/C/50/D/488/1992, April 4, 1994.
[2] See Human Rights Committee Concluding Observations: United States of America, A/50/40, October 3, 1995; Cyprus, CCPR/C/79/Add.88, April 6, 1998; Ecuador, CCPR/C/79/Add.92, August 18, 1998; Chile, CCPR/C/79/Add.104, March 30, 1999; Lesotho, CCPR/C/79/Add.106, April 8, 1999; Romania CCPR/C/79/Add.111, July 28, 1999; Australia, A/55/40, July 24, 2000; Egypt, CCPR/CO/76/EGY, November 28, 2002; Kenya, CCPR/CO/83/KEN, March 28, 2005; United States of America, CCPR/C/USA/CO/3, September 15, 2006; Barbados, CCPR/C/BRB/CO/3, May 11, 2007; Chile, CCPR/C/CHL/CO/5, May 18, 2007.
[3] *Dudgeon* v *United Kingdom*, *Series A no. 45.,* 1981; *Norris* v *Ireland*, 1991; *Modinos* v *Cyprus*, 1993.
[4] *National Coalition for Gay and Lesbian Equality and another v Minister of Justice and others,* 1998.

Principle 6 of the Yogyakarta Principles affirms the right of all persons, regardless of sexual orientation or gender identity, to the enjoyment of privacy without arbitrary or unlawful interference, and confirms States' obligation to "repeal all laws that criminalise consensual sexual activity among persons of the same sex who are over the age of consent, and ensure that an equal age of consent applies to both same-sex and different-sex sexual activity."[5] The Principles also call on States to "ensure that criminal and other legal provisions of general application are not applied to *de facto* criminalise consensual sexual activity among persons of the same sex who are over the age of consent."

The **UN High Commissioner for Human Rights** has welcomed the Yogyakarta Principles as a "timely reminder" of the basic tenets of universality and non-discrimination, and noted that "respect for cultural diversity is insufficient to justify the existence of laws that violate the fundamental rights to life, security and privacy by criminalizing harmless private relations between consenting adults."[6]

Social situation of LGBTI people in Pakistan

There is no known grassroots activism among lesbians, gays, bisexuals, transsexuals (zananas) and transgender communities in Pakistan. The absence of such activism and the silences around sexualit(ies) in Pakistan skews the assessment of life and human rights situation for LGBTI people in Pakistan. Anecdotal information about repression of homosexuality comes from members of the Pakistani LGBTI community who have migrated and not surprisingly can only provide a negative picture of repression, fear, secrecy, isolation, suicides, forced marriage, family and community pressure to convert or conform to heterosexual norms – all of which relate to the "private" sphere. Less is known about discrimination and violations that take place in the public sphere, because there is no known documentation, or documentation that has been publicly available.

A recent case involving a transgender man who married a heterosexual woman received widespread sensationalized press coverage. A High Court judge ordered an investigation of the transgender partner and made a ruling based on that investigation which resulted in a three-year prison sentence for both partners. However, on appeal, the Supreme Court agreed that there was sufficient evidence of judicial error on the part of the High Court and ordered the couple to be released on bail while it deliberated on the gender identity of the transgender man and the legality of the marriage. This would have been a precedent-setting case if recent political changes within Pakistan had not ousted the Supreme Court. While the case was being tried in the press, public sentiment gauged by letters to the editor and televised comments by psychiatrists showed sympathy for the couple and endorsed their right to love each other and marry.

Recommendation:

We therefore recommend that the Human Rights Council, in its upcoming review, urge Pakistan to bring its legislation into conformity with its international human rights obligations by repealing all provisions which criminalise sodomy or other sexual activity between consenting adults.

This information is submitted jointly by:

- **ILGA** (International Lesbian and Gay Association), a global federation of over 600 lesbian, gay, bisexual, transgender and intersex ("LGBTI") groups in over 90 countries – including 20 in Asia ;
- **ILGA-Europe**, an NGO with ECOSOC consultative status that is recognized by the EU, COE and OSCE;
- **International Gay and Lesbian Human Rights Commission**, a non-profit NGO which seeks to secure the full enjoyment of the human rights of all people and

[5] Available in all 6 UN languages at: www.yogyakartaprinciples.org.
[6] Statement of UN High Commissioner for Human Rights, Launch of the Yogyakarta Principles, 7 November, 2007, United Nations, New York.

communities subject to discrimination or abuse on the basis of sexual orientation or expression, gender identity or expression, and/or HIV status;

- **ARC International**, an NGO with a full-time presence in Geneva which engages with the UN Human Rights Council and related mechanisms to advance respect for human rights, including on the grounds of sexual orientation and gender identity.