

# LOVE, HATE AND THE LAW

DECRIMINALIZING  
HOMOSEXUALITY

**AMNESTY**  
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# SUMMARY

By institutionalizing discrimination, laws criminalizing homosexuality reinforce systemic disadvantage of lesbians, gay men and bisexual people and against transgender people, who may be heterosexual, and act as an official incitement to or justification for violence against them, whether in custody, in prison, on the street or in the home. These laws allow law enforcement officials to invade the private residences of individuals alleged to be engaging in consensual same-sex sexual relations. They can result in impunity for arbitrary arrests on the basis of allegations about sexual orientation, rumours of sexual behaviour or objection to gender presentation, with few, if any, consequences for torture or other ill-treatment. Homophobic and transphobic individuals or groups take these laws as permission to target lesbian, gay, bisexual and transgender people, organizations and events. Survivors of human rights abuses may have no recourse to justice and be deprived of access to redress. Without the fundamental protection of legality, it is impossible for activists to form organizations and campaign for the right to engage in consensual same-sex practices, or even to meet in public. Even their use of the internet in private can be used in prosecutions against them.

The paper explores the different legal approaches to criminalizing homosexuality, including less direct approaches that may not explicitly criminalize same-sex sexual conduct but instead seek to prevent the promotion of homosexuality, protect children, or respond to public health concerns. Increasingly we are seeing the invocation of a link between criminalization and morality and how criminalization of same-sex sexual acts and, increasingly, of same-sex marriage is used by some states to whip up a “moral panic” against lesbians and gay men. Though rarely used in some of the seven countries where men – and four countries where women – may be sentenced to death for same-sex sexual relations, the very fact that the death penalty applies is a breach of international human rights law. Several countries have, or have had, laws criminalizing homosexuality on the statute books though those laws are never enforced. The continued existence of such a law functions to repress those who identify as lesbian, gay or bisexual, those who want to explore same-sex sexuality, and those who defy the strict categorisation and accepted “norms” of two gender categories.

Criminalization of homosexuality does not prevent the proscribed consensual sexual acts, nor is it the only barrier to full equality. Decriminalization is not the whole answer, but it is a key step towards respecting, protecting and fulfilling the human rights of lesbian, gay, bisexual, same-sex practicing and transgender people.

## A NOTE ON TERMINOLOGY

The language people use to describe their sexual orientation or gender identity varies widely. Terminology is both constantly evolving and deeply imbued with the cultural connotations attached to the specific terms used. Some words with pejorative connotations have in some cases been rehabilitated and embraced by same-sex desiring or practising people. Individuals' use of language claims a position as a sexual subject, as opposed to being labelled by others, pejoratively, as a "deviant" sexual object. This marks the development of sexual agency and is an important part in the negotiation of positive self-esteem. At the same time, individuals may be "same sex practicing" without regarding their behaviour or claiming an identity based on that behaviour. This paper uses language of consensual same-sex practices or conduct and adult consensual sex, as for many people (and legal systems) around the world, it is not your sexual orientation that counts but your practice; individuals are discriminated against on the basis of what they do, or are presumed to be doing.

In this report the terms *lesbian*, *gay*, *bisexual* and *transgender* are used because they are commonly found in the international human rights discourse. It is impossible to fully reflect the diversity of terms and identities of the people and groups affected by the issues discussed here. The fact that these particular terms are used is not intended to essentialise or fix individuals into an identity which for some is changeable over time and location. Nor is the use of these terms in any way intended to ignore or otherwise show disrespect to the diversity of terms by which individuals choose to describe their sexual orientation or gender identity.

## WHAT THIS PAPER IS...AND IS NOT

This paper offers an analytical overview of the criminalization of homosexuality. It maps out different justifications used for criminalization, including on grounds of morality, public health and the protection of children, and draws on examples of how, even when inactive, these provisions affect the lives of thousands of people in countries across the world. There are success stories too, both at national and international level. It is through analysing these underlying obstacles and how they have been overcome that we can chart a way forward to the full realisation of human rights without discrimination on the basis of sexual orientation or gender identity.

This paper does not provide a survey of statutes and practices that directly or indirectly criminalize individuals for consensual same-sex practices and, by erroneous association, transgender people irrespective of their sexual orientation. Such a study requires careful research across languages and criminal law, analysing specifically what actions are criminalized; how vague laws are interpreted by law enforcement officials and across the legal system(s); how actual or imputed behaviour, gender expression and claims to sexual or gender identity are differently criminalized for women, men and transgender people; how these practices of criminalization are informed by race and class, and so forth. Such a study would be invaluable but is outside the scope of this overview.

# PRIVATE CHOICES, PUBLIC CONSEQUENCES

“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres...”

*Lawrence v. Texas*, US Supreme Court, 2003

When the right to choose who to love and with whom to live is a criminal offence, the private choices we should all be able to make about with whom we share our most intimate moments can have very public consequences. Individuals may face criminal penalties and community disapprobation.

Such laws, even when not implemented, construct societal attitudes, sending a clear message of, at best, second-class citizenship to people who identify as lesbian, gay, bisexual or transgender, or anyone who engages in any form of consensual same-sex sexual conduct, or those whose self-defined gender identity or gender expression differs from acceptable “norms” of gender and sexuality. It is not just the conduct that is denounced by law but the individual who performs it. Such laws encourage private and state acts of violence and fuel impunity for those acts. Instead, states should provide a series of rights protections and take actions to promote human rights to create the necessary enabling conditions to ensure that people are able to enjoy sexual rights and find love.

In considering the USA’s first periodic report in 1995, the UN Human Rights Committee, the treaty body tasked with monitoring states’ compliance with the International Covenant on Civil and Political Rights, noted “*the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private, and the consequences thereof for their enjoyment of other human rights without*

*discrimination.*"<sup>1</sup>

Individuals who identify as lesbian, gay or bisexual, those who engage in same-sex sexual relations without adopting an associated identity, and transgender people, live in a context of the prevailing primacy given to heterosexuality and adherence to the gender binary, the acceptance of only two fixed gender roles of male or female. Transgressing these norms – with women seeking to exercise autonomy over their bodies and their lives; men seen as denying masculine privilege because they are perceived as adopting “feminine” roles; bisexual people challenging the belief that individuals are attracted only to one sex, be it the same or different to their own, and transgender people calling into question the traditional assumption that all humankind must fall irrevocably into one of two gender categories – they risk discrimination, exclusion and at times violent attack.

In most countries there remain social taboos against homosexuality which lead to discrimination and other human rights abuses against individuals who engage, or are presumed to engage, in consensual same-sex practices and transgender people. In some countries consensual sexual relations between individuals of the same sex are explicitly or indirectly criminalized. Laws criminalizing homosexuality encourage the dehumanisation of lesbians and gay men by effectively making that aspect of their identity illegal. Although understandings of sexuality and gender are historically and culturally constructed, all people have a sexual orientation and a gender identity and these are not factors that they can or should have to change.<sup>2</sup>

This legal focus on sexuality, and in particular on sex acts, in isolation from other, nonsexual, aspects of personhood and lifestyle, effectively labels individuals as “deviant” in relations to traditional sex roles of women and men and leads to a tendency to view them as “morally dangerous”. It becomes a self-propagating system, with the negative emphasis on (homo)sexuality providing the “justification” for discrimination and persecution of lesbian, gay, bisexual and transgender people, for example by positioning them as a sexual threat to children.<sup>3</sup>

By institutionalising discrimination beyond legislating against particular sex acts, criminalization laws can reinforce systemic disadvantage of lesbian, gay, bisexual and transgender people and incite or justify violence against them, whether in custody, in prison, on the street or in the home. These laws allow law enforcement officials to invade the private residences of individuals alleged to be engaging in consensual same-sex acts.<sup>4</sup> They can result in impunity for arbitrary arrests on the basis of allegations about sexual orientation, rumours of sexual behaviour or objection to gender presentation, with few, if any, consequences for torture or other ill-treatment. Homophobic and transphobic individuals or groups may take these laws as permission to target lesbian, gay, bisexual and transgender people, organizations and events. Publishers of media for lesbian, gay, bisexual and transgender people may face prosecution. Survivors of human rights abuses inflicted on them on the basis of their real or assumed sexual orientation or adult consensual sex, or gender identity or expression may be deprived of access to redress.



Concepts of sexuality and gender are contested in all societies. In the UK and some of its former territories there has been a move to decriminalization of homosexuality and equality for lesbians, gay men and transgender people. Same-sex sexual acts were criminalized in England and Wales until 1967. In Scotland sex between two men was not decriminalized until 1980. However it took the intervention of the European Court to ensure decriminalization in Northern Ireland<sup>5</sup>, the Isle of Man and the Channel Islands.<sup>6</sup> The Australian state of Tasmania decriminalized homosexuality in 1997. In the USA “sodomy” remained illegal in some states until this decade and was only definitively decriminalized in 2003 when the US Supreme Court overturned all remaining state statutes on constitutional grounds.<sup>7</sup> The Netherlands, France and other countries with legal systems based on France’s Napoleonic code removed “homosexual offences” from criminal sanctions centuries earlier.<sup>8</sup> Nicaragua unveiled its new penal code in November 2007, abolishing the prohibition against “sodomy”.<sup>9</sup> There have also been progressive developments enshrining provisions against discrimination on the basis of sexual orientation in the constitutions of Ecuador<sup>10</sup>, Fiji<sup>11</sup>, Portugal<sup>12</sup> and South Africa.<sup>13</sup> After years of campaigning by the Blue Diamond Society and other organizations, the Supreme Court of Nepal in December 2007 issued directive orders to the Government of Nepal to end discrimination on the basis of sexual orientation and gender identity. Also in December 2007, the Bolivian Constituent Assembly approved a clause that would make Bolivia the first country in the world to prohibit in its constitution discrimination on the basis of gender identity. Article 14, paragraph II, of the draft constitution states explicitly that: “[t]he State prohibits and punishes all forms of discrimination based on sexual orientation [and] gender identity.”<sup>14</sup>

Similarly, human rights activists are learning to view lesbian, gay, bisexual and transgender rights as human rights. Since 1991, Amnesty International has committed itself to campaigning for the release of anyone imprisoned solely because of homosexuality, considering it a grave violation of human rights. Amnesty International regards people detained or imprisoned under such laws to be prisoners of conscience and calls for their immediate and unconditional release.

The next two sections continue this introduction to different aspects of the criminalization of homosexuality. Many of the laws criminalizing homosexuality either explicitly apply only to men or are in practice used primarily to target men. *More threatening than the male?* addresses criminalization statutes and women’s sexuality. Laws criminalizing homosexuality focus, often vaguely, on proscribed sex acts, yet are also used against transgender individuals. *Engendering homophobia* explores some of the connections between these laws and gender identity.

Taking its title from the findings of the 1957 Wolfenden report, which concluded that an individual’s private sexual conduct was “*Not the law’s business*”, Section 2 addresses different legal approaches to criminalizing homosexuality.<sup>15</sup> *Mandating morality, provoking panic* explores the links between criminalization and morality and how criminalization of consensual same-sex sexual acts and, increasingly, of same-sex marriage is used by some states to whip up a “moral panic” against lesbian, gay, bisexual and transgender people. *Outlawing human nature* reviews the criminalization of homosexuality as “carnal intercourse against the order of nature”.

There are several less direct approaches which may not criminalize same-sex sexual conduct but instead seek to prevent the “promotion” of homosexuality (*Promoting prejudice*), “protect” children (*For the sake of the children*) or respond to a public health emergency (*Inverting public health*). *Inactive but insidious* addresses those situations where the law criminalizing homosexuality is not enacted, but the continued existence of such a law on the statute books functions to repress those who identify as lesbian, gay or bisexual, those who want to explore same-sex sexuality, and those who defy the strict categorisation and accepted “norms” of two gender categories. Though rarely used in some of the seven countries where men – and four countries where women – may be sentenced to death for homosexuality, the fact that the death penalty applies is a breach of international human rights law. The final sub-section explores this *deadly hate*.

Section 3, *Privileging procreation*, looks at the subtext of many efforts to criminalize homosexuality, namely to favour heterosexual procreation and in doing so, ensure the continued reproduction of society. This is explored in particular in the context of colonialism. *To live in furtiveness and fear* (Section 4) describes some of the errors made by refugee tribunals in failing to recognise the denial of the rights of lesbian, gay, bisexual and transgender people as ground for asylum.

In the 60 years since the adoption of the Universal Declaration of Human Rights, at a time when homosexuality was even more widely criminalized than it is now, the UN has made significant developments in the promotion and protection of human rights and sexual orientation and gender identity. Section 5, *To remain silent is to condone: In search of solutions at the international level*, describes some of the stages in that progress. An emphasis on the right to privacy has been central to many of the cases brought to national and international legal bodies to challenge the criminalization of homosexuality. Undoubtedly the right to privacy has, and continues to be, a crucial legal argument but it is not without its challenges, some of which are explored in Section 6, *The doleful subtext*. Section 7, *New technologies, old hatreds*, looks at how the internet is being used to violate privacy and criminalize people on the basis of sexual orientation.

Criminalization of homosexuality can be seen as a “gateway” to other abuses on the basis of actual or perceived sexual orientation or gender identity. Decriminalization is essential but is not the only barrier to full equality for lesbian, gay, bisexual and transgender people and those perceived as such, as the final section, *A first step*, describes. The paper concludes with 22 recommendations to governments to ensure that we move closer to that goal.

### **MORE THREATENING THAN THE MALE?**

Far fewer countries explicitly criminalize lesbianism than male homosexuality. Often it is not necessary as there exists a raft of legislation to limit, police and control women’s sexual autonomy. Elsewhere the fact that lesbianism is not generally subject to legal sanctions may be attributed to the absence of women from the public sphere and the resulting absence of awareness of lesbianism. In many countries there are not the same sort of public scandals about lesbians as there are about gay men.<sup>16</sup> This “social invisibility” of lesbianism leads to some lawmakers

denying that it even exists. Where there is some awareness, sexual activity between women is often viewed as incomprehensible.

The omission of lesbianism from criminalization is a mixed blessing. The belittling of female sexuality and sexual autonomy means that women do not face the same risks of criminal prosecution as gay men. However, the exclusion “*reflects a deeply entrenched sexism denying women a legal and sexual identity.*”<sup>17</sup> It also leads to a fragmentation of the lesbian, gay, bisexual and transgender “community” and of advocacy strategies, for example where lesbian involvement in campaigns risks the application of laws being extended to include lesbians and women who have sex with women but do not identify as lesbian. In Sri Lanka the law criminalizing homosexuality referred only to men until 1995, when “*a bill aimed at decriminalizing homosexual conduct between men ultimately resulted in a widening of the scope of the original law*” also to criminalize lesbianism.<sup>18</sup>

At the same time, the global movement for the human rights of lesbian, gay, bisexual and transgender people is male-dominated and focused more on the rights of gay men than it is on lesbian human rights. Decriminalization, the repeal of laws that are used more against men than against women, receives comparatively more attention than do efforts to address the means by which women’s sexual autonomy is more frequently affected, including through discriminatory and restrictive marriage and family laws. The result ignores a gender analysis of a rights-based approach to sexuality – an analysis of what it means to be a *gay woman*. It is a dual discrimination that lesbians experience – where experience of discrimination on the basis of gender *changes* the experience of discrimination on the basis of sexual orientation (and vice versa), something that compounds further with discriminations based on other factors, such as race or class.

In some situations, “*[L]esbianism may be even more threatening than male homosexuality as lesbians challenge male ownership of women’s bodies as well as the reproductive bias toward sex.*”<sup>19</sup> Though rare in law, this prejudiced dynamic offers some explanation for violence against lesbians and bisexual women that erupts when the perpetrator’s heterosexual desire is not reciprocated by the woman in question and he acts to remedy this “personal challenge” (lesbianism) to his heterosexual desire and identity.<sup>20</sup> Whilst lesbianism may be seen as less of a “threat” needing explicit criminalization, some states have a stronger prejudice against women’s sexual rights, as they challenge conservative constructions of gender roles. The 1998 Criminal Code of Kyrgyzstan decriminalized homosexual acts between consenting adult men but retained lesbianism as a sexual offence in the Penal Code.<sup>21</sup> This anomaly has since been corrected; the 2004 version of the Criminal Code criminalizes only those sexual acts involving the use of force or the threat of the use of force.<sup>22</sup>

## ENGENDERING HOMOPHOBIA

Explicit criminal provisions against homosexuality are about what people do in private. Yet more often than not, the laws are used to target people in public – making assumptions on the basis of how individuals present themselves – their clothing, hairstyle, speech, manner, the company they keep. These laws are thus

used for far more than criminalizing certain sexual orientations or behaviours – they are used to police gender expression.

Perceptions of lesbians and gay men are often bound up with stereotyped notions of gender and the norms that are derived from those notions about gender expression. In this sense, violence against lesbian, gay, bisexual, same-sex practicing and transgender people is gender-based violence, inflicted on those who challenge or fail to conform to traditionally defined gender roles. Transgender individuals are targeted for violence and discrimination by those who perceive them as somehow “deviant”. Although the laws against consensual same-sex sexual acts need not pertain to transgender people, criminalization also acts as a license to target people on the basis of their gender identity or expression.

More generally, gender identity is closely linked to sexual orientation as a category of experience and as a reason for abuse. State officials or private individuals who discriminate against or are violent towards individuals based on an assumption of their sexual orientation or gender identity do not make distinctions as to whether or not their victims are (or are perceived to be) lesbian, gay, bisexual or transgender. Transgender people may be targeted because their abusers infer sexual conduct from their gender nonconformity. Moreover, transgender activists argue that they are effectively criminalized as a result of the denial of their rights to education, housing and employment, often leading them to work in sectors that are in some countries criminalized, such as sex work.<sup>23</sup> Women and men whose gender presentation does not match societal “norms” or expectations of femininity or masculinity may also be targeted, regardless of sexual orientation or gender identity.

These reactions to transgender people are in part about homophobia – the concern that someone not fitting into conventional understandings of an average body of a woman or a man will turn out to be lesbian or gay. However describing discrimination against and attacks on transgender people to homophobia erases their identities and the truth of what happens to them.

On 10 December 2007 – human rights day – Kuwait adopted a new law criminalizing people who “*imitate the appearance of the opposite sex.*”<sup>24</sup> The new law has so far been used to target transgender people, with at least 14 individuals have already been arrested in Kuwait City, and newspaper reports have suggested that it is part of a new government campaign “*to combat the growing phenomenon of gays and transsexuals.*”<sup>25</sup> Yet Kuwait has recognised the need not to discriminate against transgender individuals. In 2005 the Kuwait government gave assurances to a UN expert in a reply on concerns over a transgender rights case the previous year: “*The Government stated that the decision [confirming an individual’s right to change sex] confirms the fairness of the Kuwaiti judiciary and its independence, allowing a person to exercise their right to change sex and not be subjected to any discrimination.*”<sup>26</sup>

## “NOT THE LAW'S BUSINESS”

In 1957, the 13-member Committee on Homosexual Offences and Prostitution in Great Britain chaired by Lord John Wolfenden submitted the report of a three-year government-sponsored inquiry, with its controversial conclusion that society and the law should respect “*individual freedom of actions in matters of private morality*”. The Committee concluded that private morality or immorality was “*not the law's business*”.<sup>27</sup>

Even with this conclusion and the support of the Church of England, it took another ten years to realise decriminalization of homosexuality in England and Wales.<sup>28</sup> Decades later, individuals still deal daily with the consequences of hatred and ignorance. Gary Reid, a survivor of an April 1999 nail-bomb explosion that killed three people and injured dozens of others at a London gay bar, said, “*The fear, loathing, hatred and ignorance culminating in these bombings is a warning to society and the world as a whole that racism, prejudice, homophobia and fear of difference is out there and we should all challenge it at every opportunity.*”<sup>29</sup> Given the wider connections of English common law, the impact of the review and the legal reform it eventually motivated, the impact of the Wolfenden report was not limited to its geographical jurisdiction.

Today, thousands of lesbian, gay, bisexual and transgender people across the world are still faced with the stark choice of denying their feelings and staying within the law or acting on that most basic human drive – to seek affection, love and intimacy – and risk the censure of the law. In every society, the criminal law regulates the boundaries of permissible sexual behaviour, placing such constraints on individual sexual expression and fulfilment as are necessary to safeguard the rights of others. Such boundaries vary across cultures and shift throughout history as archaic proscriptions are lifted and behaviours, identities and rights are recognised.

Generally, criminal law provisions regulating acts of sexual behaviour address either provisions regulating full sexual intercourse and the procuring of sex, or provisions regulating acts of intimacy that fall short of intercourse such as holding hands or kissing in public. Dozens of states explicitly criminalize sexual relations between men, and in some cases, between women. Individuals have been detained because of their sexual orientation or gender identity or expression on vague charges such as “loitering” (Argentina), “unruly behaviour” (China), “habitual debauchery” (Egypt) or “disorderly conduct” (USA).

Laws criminalizing homosexuality exist on all continents, albeit in different forms. In some countries, consensual sex between adults of the same sex is criminalized as “sodomy”, “the abominable crime of buggery”, “crimes against nature”, “deviate

sexual intercourse”, “corruption on earth”, “outrages on decency”, “unnatural acts” or other such terms. In others, vague provisions such as “immoral acts” or “public scandal” are used to criminalize different expressions of sexuality by, or the imputed sexuality of, lesbians, gay men and same-sex practicing, bisexual or transgender people. Some statutes are prejudiced by the myth of gay hypersexuality and the fear that lesbians and gay men will proselytise “innocent” (that is, heterosexual) individuals into homosexuality, with provisions against “promoting” homosexuality.<sup>30</sup>

In some countries where same-sex relations are not a criminal offence per se, discriminatory age of consent laws may effectively criminalize behaviour that is perfectly legal for heterosexual people. Amnesty International opposes laws that place a higher age of consent for sexual conduct between people of the same sex; anyone imprisoned under such laws is a prisoner of conscience who should be released immediately and unconditionally.<sup>31</sup>

Even where laws are officially rescinded or where rights are protected constitutionally, these protections can coexist with oppressive practices where individuals still face discrimination or even arrest for their sexual orientation or presumed sexual practices.

In a minority of countries, consensual same-sex relations are punishable by corporal punishment or the death penalty, in violation of the right to be free from torture or cruel, inhuman or degrading punishment and the right to life.

#### MANDATING MORALITY, PROVOKING PANIC

Many acts of discrimination and violence against people on the basis of presumptions about their sexual orientation and gender identity or expression stem from viewing the sexual behaviour, and sometimes the very identity, of lesbian, gay, bisexual, same-sex practicing and transgender people as immoral. In many parts of the world, homosexuality is considered a sin and same-sex relations are dubbed “unChristian” or “unIslamic”. Many of the criminalization laws dating back to the Victorian period of the British Empire derive from Christian religious law.<sup>32</sup> Sumit Baudh notes that “[t]he case law from India makes frequent references to bestiality, buggery and Biblical notions of the sin of Gomorrah and the sin of Sodom.”<sup>33</sup> In Kuwait on 22 January 2000, two women writers and their male publisher were fined and sentenced to two months in prison for writings that were said to cause harm to religion and to morality because they mentioned lesbian relationships. In March 2000 the Misdemeanours Appeal Court handed down fines to the two women.<sup>34</sup> The Iranian penal code makes particular types of same-sex sexual relations capital offences under the category of *hodoud* crimes – crimes against divine will, for which the penalty is prescribed by Islamic law.<sup>35</sup>

However, as the US Supreme Court ruled in 2003, “[o]ur obligation is to define the liberty of all, not to mandate our own moral code.”<sup>36</sup> Furthermore, “[t]he condemnation [of homosexuality] has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted

*as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.”<sup>37</sup>*

With specific reference to the human rights of lesbian, gay, bisexual and transgender people, the European Court of Human Rights declared that *“predisposed bias on the part of a heterosexual majority against a homosexual minority . . . cannot, of [itself], be considered by the Court to amount to sufficient justification for the interferences with the applicants’ rights [including their right to sexual identity as repeatedly affirmed] any more than similar negative attitudes towards those of a different race, origin or colour.”<sup>38</sup>*

José Pallais, the president of the Nicaraguan Parliament's Commission of Justice and Legal Issues, made much the same point, explaining, *“We are not creating a Code of the Catholic Church here, we are creating a democratic Code under modern principles and principles of legality.”<sup>39</sup>*

Contrast that with the decision from Botswana in 2002, where High Court Judge Mwaikasu, was of the view that *“the application [of the sections of the penal code criminalizing homosexuality] essentially concerns the place and extent of public morality or moral values in the criminal law of a given society. In his view, the criminal law has as its basis the public morality or moral values or norms as cherished by members of the society concerned, and is influenced by the culture of the moment of such society. Such moral values regulate the conduct of individual members of society for the good of society and provide a conducive environment for the exercise and enjoyment of the individual rights and freedoms of members of such society.”<sup>40</sup>*

Criminalization of same-sex sexual acts – and, increasingly, of same-sex marriage – is used by some states to whip up a “moral panic” against lesbian, gay, bisexual and transgender people and maintain a preferred social order. In Nigeria, draft legislation would prohibit marriage between people of the same sex, even though homosexuality is already criminalized.<sup>41</sup> In August 2007, 18 men were arrested in Bauchi state and charged with belonging to an unlawful society, committing indecent acts and criminal conspiracy because, according to the charge sheet, at the time of arrest *“the suspects were all dressed in female attire organizing a gay wedding which contravenes section 372 subsection 2(e) of the Islamic Sharia penal code.”<sup>42</sup>* The men deny that they were dressed in female clothing or that they were organizing or attending a “gay wedding”.

In the United Arab Emirates in 2005, 26 men arrested at what was alleged to have been a “gay wedding ceremony”. Statements from the Interior Ministry officials suggested that the men would be subjected to psychological and hormone treatment to “cure” their sexual orientation, statements that were subsequently denied.<sup>43</sup>

In Morocco and Senegal, public denunciations over “gay marriages” have led to particularly virulent manifestations of “moral panic” and repression resulting in the

targeting of individuals accused of engaging in adult consensual sex with members of the same sex. Six men were arrested in Ksar El Kebir, a small city in northern Morocco, following public denunciations that a private party held by the men in November 2007 was simulating a “gay marriage”. Hundreds of angry local inhabitants took to the streets and on one occasion marched to the house where the private party had been held, which led the house owner to take refuge at the local police station. An appeal court upheld convictions of “homosexuality” against the men in January 2008, although it lowered the prison sentences against some of them.<sup>44</sup> In Senegal in February 2008, nine men and one woman were arrested, and others were at risk of arrest, following the condemnation in the press of a “gay wedding” at which they some of them were photographed. The newspaper article appealed to “Senegalese values” as being opposed to homosexuality. Commentaries subsequently posted online called for the men to be killed.<sup>45</sup>

Moreover, these pre-emptive efforts against equality in relationships in some cases mask a move towards greater repression of lesbian, gay, bisexual, same-sex practicing and transgender individuals and human rights defenders.<sup>46</sup>

### OUTLAWING HUMAN NATURE

In many countries, sex between individuals of the same sex is criminalized in vague terms. In Malaysia, “*carnal intercourse against the order of nature*” is punishable by up to 20 years’ imprisonment and whipping.<sup>47</sup> Similarly, in Uganda, “*carnal knowledge of any person against the order of nature*” is an offence which can carry a sentence of life imprisonment.<sup>48</sup> Such legislation not only criminalizes lesbian, gay, bisexual and transgender people but creates conditions in which any abuse of their human rights can be justified. For example, Amnesty International has documented the state torture of lesbians and gay men in Uganda on the basis of their sexual orientation.<sup>49</sup> Section 377 of the Indian Penal code criminalizes “*voluntary carnal intercourse against the order of nature*” and, although the “unnatural” acts may include oral sex between a married heterosexual couple, it is only consensual same-sex sexual activity between adults that is prosecuted.<sup>50</sup> “*It is consistently and implicitly held that only penile-vaginal penetration (that bears the potential of procreation) conforms to the stated order of nature.*”<sup>51</sup>

Until it was ruled unconstitutional in 2003, 13 states of the USA and Puerto Rico criminalized “sodomy”, in many cases as a “crime against nature”.<sup>52</sup> In spite of this ruling and similar state-level decisions that preceded it, laws that are no longer in force are reportedly still being utilized against gay men in some areas.<sup>53</sup> In addition, “*unnatural carnal copulation with a person of the same or opposite sex*” remains a crime in the USA for military personnel under the Uniform Code of Military Justice.<sup>54</sup>

The language of “unnatural” offences demonstrates an underlying medical view of homosexuality as a form of mental illness or psychopathology that psychiatric treatment can resolve.<sup>55</sup> This is in spite of clear statements to the contrary from various national psychiatry bodies and the World Health Organization.<sup>56</sup>



## PROMOTING PREJUDICE

Some criminalization legislation focuses on or includes prevention of the “promotion” of homosexuality. Article 204 of the Nicaraguan Penal Code had provided that “*anyone who induces, promotes, propagandizes or practices in scandalous form sexual intercourse between persons of the same sex commits the crime of sodomy and shall incur one to three years’ imprisonment.*” The new penal code was approved on 9 May 2008 and is due to become effective in July 2008.

Similarly, Romania amended its penal code in 1996 to state that “*Inciting or encouraging a person to the practice of sexual relations between persons of the same sex, as well as propaganda or association or any other act of proselytism committed in the same scope, is punishable by imprisonment of one to five years.*”<sup>57</sup> The state portrayed the amendment as a repeal of criminal sanctions for consensual sexual relations between adults of the same sex because on its face, the amendment did not criminalize private consensual conduct. Nevertheless, those who engaged in same-sex sexual relations were arrested and convicted if their conduct became public knowledge. The new law was also used to make illegal any public meeting place for lesbians and gay men; any organizations working on issues of human rights and sexual orientation or gender identity or providing services to lesbian, gay, bisexual and transgender people, and banning magazines and other publications. Deputy Emil Teodor Popescu rationalised this on grounds of protecting individuals: “*If a lesbian were to go out in the streets dressed to protest, it is not certain she would get away alive. This law exists to protect her from doing so.*”<sup>58</sup>

Instead of playing a constructive role in the dismantling of prejudices, in some countries the media shares responsibility for fostering a climate of intolerance which can easily lead to discrimination or violence, indifference about crimes committed against lesbian, gay, bisexual and transgender people and impunity for the perpetrators of those crimes.

In August 1999, in Sri Lanka, where homosexuality is punishable by up to 12 years in prison, *The Island* newspaper published a letter protesting a lesbian conference which was to be held in Colombo. The author called for police to “*let loose convicted rapists among the jubilant but jaded jezebels when their assembly is in full swing so that those who are misguided may get a taste of the real thing.*” Companions on a Journey, a Sri Lankan lesbian and gay organization, lodged a complaint about the letter with the Sri Lankan Press Council. However, the Press Council refused to condemn the newspaper and ruled that the author had the right to offer his point of view, and that his view was justified because lesbianism is an “*act of sadism*” and was an offence under the country’s penal code. The Press Council also stated that lesbianism is “*at least an act of gross indecency*” and “*unnatural*” and that “*misguided and erratic women should be corrected and allowed to understand the true sense and reality of life.*”<sup>59</sup>

In Uganda, where homosexuality and lesbianism are criminalized, an article published in the Ugandan newspaper *Red Pepper* in September 2006 named women alleged to be lesbians and called for people to name other women they suspected in order to “*rid our motherland of the deadly vice*”.<sup>60</sup> Amnesty

International received several reports of harassment by colleagues or relatives ostracizing the alleged lesbians and gay men who had been named in the newspaper.<sup>61</sup>

The mass media can play an important role in shifting social norms. For example in the Lebanon, where homosexuality is illegal, a popular weekly television programme included gay voices, though they have to speak from behind masks.<sup>62</sup> Rescinding prejudicial legislation or enshrining the right to freedom from discrimination in constitutional provisions will not change attitudes overnight. Measures that require the elimination of attitudes which are based on and perpetuate prejudice are a vital first step to abolishing discrimination in people's hearts and minds. Moreover, such measures are a vital first step to respecting, protecting and fulfilling the human rights of lesbians, gay men and bisexual, same-sex practicing and transgender people, which includes not only the right to be free from discrimination and violence but also positive rights including the right to the highest attainable standard of physical and mental health.<sup>63</sup>

### FOR THE SAKE OF THE CHILDREN

Along with provisions against the "promotion" of homosexuality, the other common "public morals" exception to the rights to freedom of expression and freedom of association is that which criminalizes homosexuality under the pretext of the protection of children. This is in spite of expert evidence provided in some human rights cases that sexual orientation is a human development occurring prior to or during adolescence.<sup>64</sup> The UN Committee on the Rights of the Child has recognised that one of the challenges adolescents face is "*developing an individual identity and dealing with one's sexuality*".<sup>65</sup> This aspect of adolescent development is, it seems, precisely the problem for some. Margaret Thatcher, then the British Prime Minister, articulated the concern behind Section 28: "*Children who need to be taught to respect traditional moral values are being taught that they have an inalienable right to be gay.*"<sup>66</sup>

The lack of universally applicable common standards of public morals has been the basis for the endorsement of restrictions on certain rights and freedoms. In a 1979 case, the first on sexual orientation to come before the UN Human Rights Committee, that body found that radio and TV were "*not the appropriate forums to discuss issues related to homosexuality, as far as a programme could be judged as encouraging homosexual behaviour.*"<sup>67</sup> One of the reasons the committee gave was the risk to children: "*As far as radio and TV programmes are concerned, the audience cannot be controlled. In particular, harmful effects on minors cannot be excluded.*"<sup>68</sup>

The views of the UN treaty bodies have progressed in the last three decades. Addressing a provision of the Local Government Act 1988 that stated that local authorities in England and Wales may not "*intentionally promote homosexuality*" or "*promote the teaching of... the acceptability of homosexuality as a pretend family relationship*",<sup>69</sup> the UN Committee on the Rights of the Child expressed concern in 2002 that "*homosexual and transsexual young people do not have access to the appropriate information, support and necessary protection to enable them to live*

*their sexual orientation.*<sup>70</sup> In 2003, the Committee on the Rights of the Child confirmed that the non-discrimination provision in the Convention on the Rights of the Child covers adolescents' sexual orientation.<sup>71</sup>

Yet these advances have not stopped other countries pursuing similar legislation. At time of writing, the Seimas, the Lithuanian parliament, is considering a retrogressive amendment to the "*Law on the Protection of Minors against Detrimental Effect of Public Information*" that would make it illegal to discuss homosexuality in schools and in public information aimed at children. The authors of the proposed amendment have written in an explanatory note that "*the propagation of a non-traditional sexual orientation and exposure to information containing positive coverage of homosexual relations may therefore cause negative consequences for the physical, mental and, first and foremost, moral development of minors.*"<sup>72</sup> A similar proposal announced by the previous Polish Government on 13 March 2007 sought to "*prohibit the promotion of homosexuality and other deviance*" in Polish schools. The purpose of the measure is to "*punish whoever promotes homosexuality or any other deviance of a sexual nature in educational establishments*".<sup>73</sup> Following the general outrage expressed by Amnesty International and different regional and international bodies, including the European Union and the Council of Europe, the proposal was withdrawn.

The UN Committee on the Rights of the Child has clarified that adolescents should have access to sexual health information and services: "*States Parties are urged to (a) develop effective prevention programmes, including measures to change cultural views about adolescents' need for contraception and STI [sexually transmitted infection] prevention, and to address cultural and other taboos surrounding adolescent sexuality; (b) adopt legislation to combat practices that either increase adolescents' risk of infection or contribute to the marginalization of adolescents who are already infected with STIs or HIV; (c) take measures to remove all barriers hindering the access of adolescents to information, preventive measures such as condoms, and care.*"<sup>74</sup>

Where homosexuality is criminalized, teachers and other adults may be reluctant to support or protect children who are or are thought to be lesbian, gay, bisexual or transgender. These children are amongst the most at risk of violence at school or within the family.<sup>75</sup> In addition to the physical and emotional consequences of violent acts, violence in school can have the effect of depriving children and adolescents of their right to education.

In some instances, it is discriminatory acts by the state that deprive children and young people of their right to education. In March 2006, twelve young Cameroonian women students were expelled from a college after being accused of lesbianism. In June, three of the students and one friend, a young woman football player, were sentenced to a three-year suspended prison sentence and ordered them to pay a fine of 25,000 CFA francs (approximately US\$44) each. The court ordered that they would be imprisoned for six months if they were found practising "homosexual acts".

Criminalization of homosexuality is closely linked with ages of consent, as can be seen by the progression of legal reform in Germany. Paragraph 175 of the German Criminal Code prohibited consensual sexual acts between men. In 1969 the government amended the paragraph to limit the provision to sexual relations below the age of consent (21 years), as well as breaches of trust or sex work. The age of consent was lowered to 18 in 1973, and the paragraph was finally repealed and the age of consent lowered to 14 years (the same as for sex between heterosexual adolescents) in 1994. Other states have done the same. A recent example is Hong Kong, which equalised its age of consent laws in 2006 after ruling that a higher age of consent for male same-sex sexual behaviour than for sexual activity between men and women was discriminatory.<sup>76</sup>

Nevertheless, many countries maintain unequal ages of consent for young gay men and lesbians compared to that for heterosexual teenagers.<sup>77</sup> Discriminatory age of consent laws criminalize the sexuality of lesbian and gay youths and hinder their access to sexual health information.<sup>78</sup> The fear that adolescents might give into curiosity and experiment with sexual acts with individuals of the same sex and thus must be protected by prejudicially higher ages of consent neglects the barriers that they must overcome to accept their sexual orientation or gender identity. Given that lesbian, gay, bisexual and transgender adolescents have to live in environments so often full of discrimination, harassment and even violence on the basis of their sexual orientation or gender identity or expression, their decision to accept themselves in spite of that opposition suggests that they may know themselves and be making more informed choices than their heterosexual counterparts who are not questioned over their heterosexuality. Any lack of knowledge merely argues for adequate, balanced sex education, including on various sexualities and gender identities.<sup>79</sup>

Criminalization is not an appropriate response to consensual sexual conduct by children: children should not be subjected to the criminal or juvenile justice system, nor should a child be arrested if he or she has had consensual sex with an adult.

Amnesty International recognizes that states have a duty to protect against the infringement of others' rights, including by proscribing actions such as coercive sex and the sexual abuse of children. However, consensual same-sex sexual relations between adults, or between adolescents of similar ages, should not be associated prejudicially with sexual abuse. Such attitudes hide a failure to protect other rights, such as when laws against same-sex relations are the only legislation against child sexual abuse. India is one such country that has no laws specifically criminalizing child sexual abuse. A study of 46 cases brought under Section 377 of the Indian penal code found that 30 cases (65%) addressed child sexual abuse by men.<sup>80</sup>

## **INVERTING PUBLIC HEALTH**

Amnesty International has repeatedly documented how the criminalization of homosexuality leads to violence – by state actors and individuals. Violence stems from hatred. Hatred stems from fear. Fear so often stems from ignorance. Fears around issues of sexuality increase when they are conflated with fears of disease.

This prejudiced association is often used to manufacture hatred against lesbian, gay, bisexual, same-sex practicing and transgender people. Such sexuality-related fears lead to attacks on individuals on the basis of their presumptive sexual orientation or gender identity, and on their human rights, including on the right of freedom of information – which further stokes the fears. Moreover, such pervasive homophobia, coupled with fear of disease, impedes access to information on HIV prevention, condoms, and health services and results in the targeting of individuals and organizations that provide HIV/AIDS education and services.<sup>81</sup>

The right to the highest attainable standard of physical and mental health encompasses not only access to timely and appropriate health services but also access to health-related education and information, including on sexual health and reproductive health.<sup>82</sup> The UN Committee on Economic, Social and Cultural Rights' general comment on the right to health makes clear that: "*The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom....*"<sup>83</sup>

The International Guidelines on HIV/AIDS and Human Rights include the following call on states: "*Anti-discrimination and protective laws should be enacted to reduce human rights violations against men having sex with men, including in the context of HIV, in order, inter alia, to reduce the vulnerability of men who have sex with men to infection by HIV and to the impact of HIV and AIDS. These measures should include providing penalties for vilification of people who engage in same-sex relationships, giving legal recognition to same-sex marriages and/or relationships and governing such relationships with consistent property, divorce and inheritance provisions. The age of consent to sex and marriage should be consistent for heterosexual and homosexual relationships. Laws and police practices relating to assaults against men who have sex with men should be reviewed to ensure that adequate legal protection is given in these situations.*"<sup>84</sup>

Some statutes criminalizing homosexuality do so ostensibly to address a "public health emergency". For example, in Trinidad and Tobago, (especially male) homosexuality was re-criminalized as a response to the high incidence of HIV and AIDS.<sup>85</sup>

In Uganda, because homosexuality is illegal, state policy funded by the USA under the President's Emergency Plan for AIDS Relief (PEPFAR, which promotes "abstinence-only" HIV/AIDS education)<sup>86</sup> either makes no mention of homosexuality or denigrates it as "immoral behaviour".<sup>87</sup>

Even in countries with a generalized HIV/AIDS epidemic (where transmission is mostly heterosexual), the criminalization of homosexuality puts significant barriers in the path of effective HIV/AIDS prevention efforts.<sup>88</sup> It drives populations already suffering stigma for their sexual conduct still further underground – not only making it more difficult for outreach and education efforts to reach them, but potentially criminalizing organizations and activists engaged in that vital work. It also dissuades heterosexual women and men from seeking sexual health information and services for fear of similarly stigmatised.

In Egypt, where the prevalence of HIV has not been thoroughly assessed or documented, but is believed to be low according to UNAIDS estimates, a prejudicial conflation between presumed homosexuality and serostatus has led to the imprisonment for between one and three years of nine men in 2008.<sup>89</sup> They were convicted of the “habitual practice of debauchery,” a term which in Egyptian law includes consensual sexual acts between men, on the ground that five of the men arrested tested HIV-positive. The attitudes of the Egyptian authorities towards the men have been overtly discriminatory. A prosecutor informed one of the men that he had tested positive for HIV by saying: “*People like you should be burnt alive. You do not deserve to live.*” Before issuing the indictments in March 2008, the lead prosecutor told a lawyer for the defendants that the men should not be allowed to “*roam the streets freely*” because the government considered them “*a danger to public health.*”<sup>90</sup>

The UN Human Rights Committee has noted that the criminalization of same-sex sexual practices “*could not be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS. ...Criminalization of homosexual activity thus would appear to run counter to the implementation of effective education programmes in respect of the HIV/AIDS prevention. Secondly, the Committee notes that no link has been shown between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS virus.*”<sup>91</sup> In India, legal efforts against Section 377 in the context of the criminalization being an obstruction to carrying out HIV/AIDS outreach work amidst men who have sex with men (men who do not identify as gay and may identify as heterosexual but who at times have sex with other men) resulted in a legal challenge brought to the Delhi High Court in 2001, with court hearings scheduled for July 2008.<sup>92</sup>

It is not enough to avoid the negative linking of sexuality and health. States should also be taking positive measures to ensure people’s sexual rights, including their rights to access sexual and reproductive health services; to seek, receive and impart information in relation to sexuality and reproduction and to sexuality education. The UN Commission on Human Rights has affirmed that “*sexual and reproductive health are integral elements of the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*”<sup>93</sup>

## INACTIVE BUT INSIDIOUS

Even where the law criminalizing homosexuality is not enacted, the mere presence of such a law on the statute books is insidious and can create the conditions for discrimination in employment, stigmatization, vilification, threats of physical violence and other human rights abuses.<sup>94</sup> It deters reporting of human rights abuses perpetrated against individuals on the basis of actual or imputed sexual orientation or gender identity, since survivors may face potential criminal prosecution when reporting crimes to the police.

In July 2003 Singapore Prime Minister Goh Chok Tong announced that his government would allow gay men and lesbians to hold government positions as long as they disclosed their sexual orientation, in spite of the provisions against

homosexuality in the Singaporean penal code. Although the laws are rarely enforced, the susceptibility to blackmail and attendant threat of punishment and social stigma had effectively excluded lesbian or gay men from taking posts in the civil service. Commentators have speculated that pressure to be economically competitive led to this move, with the need to appeal to international economic actors and investors probably exerting more influence than the need to cater to the conservative domestic majority.<sup>95</sup> In 2007, however, efforts to decriminalize homosexuality failed, after long discussions in Cabinet and extensive public consultation. Prime Minister Lee Hsien Loong was reported as saying that Singapore had “*to maintain a balance between upholding a stable society with traditional, heterosexual family values and giving gays [sic] space to live their lives.*”<sup>96</sup> In the end, Singapore abolished Article 377 of its Penal Code, which prohibited anal and oral sex between consenting adult heterosexuals, but retained Article 377A – as in India, a legacy of British rule – criminalizing sex between men.<sup>97</sup> Though the law is not proactively enforced, the government have not clearly ruled out also criminalizing lesbianism.<sup>98</sup>

In 1993 the European Court of Human Rights identified some of the effects of having such a law on the statute books even if it is not used, observing that it “*entitles individuals to contend that a law violates their rights by itself...if they run the risk of being directly affected by it ...Moreover, it was found in the national proceedings that one of the effects of criminal sanctions against homosexual acts is to increase the anxiety and guilt of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.*”<sup>99</sup>

Even where there has been no recent prosecution of lesbian, gay, bisexual or transgender people under national law, Amnesty International still calls for the law to be repealed because of the broader effects of such legislation and because a criminal prohibition might be enforced at any time.<sup>100</sup>

And it was a case against laws in Tasmania that had not been implemented for several years that became a landmark in the international recognition of lesbian, gay, bisexual and transgender rights, when Nicholas Toonen brought his case to the UN in 1992. The Human Rights Committee, the expert body established by the International Covenant on Civil and Political Rights to oversee implementation of that treaty, ruled that laws punishing consensual adult same-sex relations violate the rights to privacy and non-discrimination protected by that core human rights standard.<sup>101</sup>

## A DEADLY HATE

Whilst there has been considerable progress in the recognition of the human rights of lesbian, gay, bisexual and transgender people, a few states resolutely maintain official postures of hatred. In a 2006 statement, the Nigerian ambassador to the UN stated, “*The notion that executions for offences such as homosexuality and lesbianism is excessive is judgemental rather than objective. What may be seen by some as disproportional penalty in such serious offences and odious conduct may be seen by others as appropriate and just punishment.*”<sup>102</sup> Yet, Article 6(2) of the

International Covenant on Civil and Political Rights stipulates that the death penalty, if it is to be applied at all, should be reserved for only the most serious crimes.

In seven countries, consensual same-sex relations can incur the death penalty. In Iran, Mauritania, Nigeria (in the 12 states practicing Shar'ia law), Qatar, Saudi Arabia, Sudan and Yemen – men may be sentenced to death for homosexuality. In four countries (Iran, Nigeria – in the states that apply Shar'ia law, Qatar, and Saudi Arabia), women may face the death sentence for lesbianism. See Appendix 1 for more information.

Although these statutes exist as a dire threat to lesbians, gay men, bisexual and same-sex practicing individuals, and often transgender individuals, in most of those countries they are rarely applied. Amnesty International opposes the death penalty in all cases as the ultimate cruel, inhuman and degrading punishment.

The former Special Rapporteur on extrajudicial executions, Asma Jahangir, has condemned as “*unacceptable that in some States homosexual relationships are still punishable by death. It must be recalled that under article 6 of the International Covenant on Civil and Political Rights death sentences may only be imposed for the most serious crimes, a stipulation which clearly excludes matters of sexual orientation.*”<sup>103</sup>

By categorically excluding the criminalization of same-sex relations from the scope of Article 6, the Special Rapporteur conceded no ground to relativist arguments that the perceived gravity of sexual offences will vary from culture to culture. Moreover, she took a clear position against the criminalization of same-sex relations, not on privacy grounds, but by making the link to other violations of the right to life, saying that “*the criminalization of matters of sexual orientation increase[s] the social stigmatization of these persons. This in turn makes them more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity.*”<sup>104</sup>

Even in countries which do not carry the death penalty for homosexuality, discrimination may enter the justice system via the prejudice of the police, jurors, witnesses, judges and lawyers, even for the defence, with the same result – individuals lose their lives because of their actual or imputed identity or conduct. Amnesty International has documented cases where the prosecutors have used the sexual orientation of defendants in an attempt to dehumanize them and so render them unworthy of compassion.

In the US state of Oklahoma in 2001, the prosecuting attorney was so direct in voicing his prejudice that Judge Carlos Lucero of the US Court of Appeals for the 10<sup>th</sup> Circuit in his dissenting opinion said that “*the prosecutor's blatant homophobic hatemongering at sentencing has no place in the courtrooms of a civilized society*” and that the views expressed were “*susceptible of only one possible interpretation: among other factors, [the defendant] should be put to death because he is gay... I cannot sanction – because I have no confidence in – a proceeding tainted by a*



*prosecutor's request that jurors impose a death sentence based, even in part, on who the defendant is rather than what he has done".*<sup>105</sup>

Playing on age-old stereotypes of lesbian relationships – that one woman takes a submissive, “feminine”, gender role and the other, a dominant, “masculine”, role – the prosecution in another Oklahoma case effectively “de-feminized” a lesbian defendant, inciting the jury to call for the death penalty. These stereotypes vilify the sexual orientation and gender expression of the defendant in such a way as to make lesbianism itself seem criminal: “[t]hey are painted as man-hating, overly aggressive and capable of committing murder, in other words, more dangerous than a heterosexual woman accused of the same crime.”<sup>106</sup>

## PRIVILEGING PROCREATION

“What are the ideas and assumptions behind the denial of the right to perform certain sexual acts, even when conducted in private? Fundamentally important are institutionalized (hetero)sexual norms and practices, whereby heterosexuality is established as ‘natural’ and ‘normal’; an ideal form of sexual relations and behaviour by which all forms of sexuality are judged.”

Diane Richardson, *Constructing sexual citizenship*, p.111

Some countries treat homosexuality as an “*offence against society*”,<sup>107</sup> the result of an approach in which the state “*actively sexualizes relationships between men and women and has an active stake in promoting and defending conjugal masculinity*”<sup>108</sup>. This thinking was noted in the US Supreme Court’s striking down of the remaining laws against same-sex sexual relations in 2003: “*Early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally, whether between men and women or men and men.*”<sup>109</sup>

Provisions against non-procreative sex may not specifically target lesbians or gay men but in practice these laws may be applied discriminatorily only on the basis of same-sex sexual orientation or behaviour. This is the situation in Barbados, for example, “[*t*]he buggery laws, as they are known, typically apply in an arbitrary fashion only to homosexuals, reflecting a wider cultural consensus regarding the immorality of non-heterosexual human relationships.”<sup>110</sup> Yet it is the Constitution of Barbados itself that is one of the strongest sources of support for the repeal of that country’s law against consensual same-sex relations. The government itself has described the three basic effects of the relevant section of the constitution,

specifically that it makes unconstitutional (i) any laws which are discriminatory on their face; (ii) any laws which are discriminatory in their effect upon persons; and (iii) any discriminatory action by the state in the exercise of its administrative, judicial and executive functions.<sup>111</sup>

Thus invested in maintaining a culture of heterosexuality, the state gives primacy to procreative sex and the “conjugal bed” by criminalizing lesbian sex and sex between men. In doing so the state rejects claims of the human rights of lesbian, gay, bisexual and transgender individuals and the efforts of women’s human rights defenders to challenge stereotypes of the feminine “ideal” and claim a life beyond the traditional roles of wives and mothers.<sup>112</sup> Thus, lesbian, gay, bisexual or transgender identity is posited as “*alien to nation and religion, a threat to the structures of family, marriage, and reproduction*”.<sup>113</sup> In a May 2007 meeting between British and Iranian MPs the leader of the Iranian delegation “*explained that according to Islam gays and lesbianism were not permitted... He said that if homosexual activity is in private there is no problem, but those in overt activity should be executed [he initially said tortured but changed it to executed]. He argued that homosexuality is against human nature and that humans are here to reproduce. Homosexuals do not reproduce.*”<sup>114</sup>

A clear example of the use of statutes for the protection of “society” can be seen in countries that have retained aspects of English common law received through colonialism. Laws often follow changes in society, where individuals are creating facts on the ground through how they are living their lives. Colonialism spread the laws of the time against homosexuality, but postcolonial states have not, in the main, kept pace with legislative reform in the colonising countries and with changing societal norms. Although laws proscribing homosexuality are defended in the name of local cultural values or against the “foreign import” of homosexuality, such laws in many Caribbean countries and elsewhere are in fact a legacy of the colonial past where “*the very identity and authority of the colonial project rested upon the racialization and sexualization of morality.*”<sup>115</sup> Homosexuality has historically been blamed on the “Other”. For example, in Renaissance England it was linked with Europe or Roman Catholicism.<sup>116</sup> Analysis by Sumit Baudh shows that laws criminalizing homosexuality exist in a larger part of the Commonwealth (77%) than the non-Commonwealth (32%).<sup>117</sup>

Eleven nations in the English-speaking Caribbean have legislation criminalizing consensual same-sex sexual acts: Dominica, Belize, Barbados, Jamaica (for men), Antigua and Barbuda, Grenada (men only), Guyana, Saint Vincent and the Grenadines, Saint Kitts and Nevis (men only), Saint Lucia (men only), and Trinidad and Tobago.

Activists in India working for the repeal of Section 377 of the Indian Penal Code, a British-era law dating to 1861 that criminalizes consensual sexual acts between adults of the same sex, point out that the law is at odds with the ideals on which the nation was founded – a vision of fundamental rights applying equally to all, without discrimination on any grounds.<sup>118</sup>

The UN Committee on the Rights of the Child addressed the issue of UK domestic legislation operating in overseas territories and called for a review “*to ensure full compliance with article 2 of the Convention and to prevent and combat discrimination, especially as regards gender, sexual orientation and birth status. [...] Additionally, the Committee recommends that all appropriate measures be taken to address discrimination arising from the socialization of boys and girls into inappropriate gender roles and the resulting determination of social attitudes concerning children based on gender.*”<sup>119</sup> The UK government has publicly committed itself to the universal decriminalization of homosexuality.<sup>120</sup>

An August 2005 decision by the High Court of Fiji found the country’s colonial-era law against same-sex consensual sexual relations was discriminatory against gay men and deemed it a violation of its constitution. The judgment acknowledges that the origin of these laws “*can be traced to England. They were copied faithfully throughout the old British Empire and inherited by Fiji.*”<sup>121</sup> Judge Gerald Winter noted that “*while members of the public who regard homosexuality as amoral may be shocked, offended or disturbed by private homosexual acts, this cannot on its own validate unconstitutional law.*”<sup>122</sup> However there continues to be pressure to amend the sexual orientation provision of the Bill of Rights in the Fijian Constitution.<sup>123</sup>

Discrimination and other abuses against lesbian, gay, bisexual and transgender people go unchallenged because of the tendency of governments in all continents to justify them in the name of culture, religion or national sovereignty. In human rights debates nationally, regionally and internationally, “culture” is much more frequently invoked in the context of sexuality than in any other area.<sup>124</sup> The former Malaysian Deputy Prime Minister Anwar Ibrahim, prior to his politically motivated conviction in 1998 on the charge of sodomy, noted, “*It is altogether shameful, if ingenious, to cite Asian values as an excuse for autocratic practices and denial of basic rights and civil liberties.*”<sup>125</sup> Furthermore, “[i]t is thus and obvious irony that regulations said to embody and reflect “Asian values” are actually imported from the decadent West itself.”<sup>126</sup>

Together with an appeal to nationalism, this is a potent rejection of lesbian, gay, bisexual, same-sex practicing and transgender people. In 2005, 11 men were held “under preventative detention” in Cameroon, a step that was justified by the Deputy Prime Minister and Minister of Justice on the basis that it was the prerogative of a state to restrict freedom to protect public morality and “*by virtue of the African culture, homosexuality is not a value accepted in the Cameroonian society*”.<sup>127</sup> In a February 2008 news article on the proposed nationwide crackdown against gay men, Bahrain parliamentarian Jalal Fairouz described gay men as “*dangerous*” and a “*threat to our society and Islamic values*”.<sup>128</sup>

Some governments not only declare erroneously that lesbians and gay men do not exist in the local culture, but also deny that they are members of the human race. For example, in 1995 President Robert Mugabe of Zimbabwe branded gays as “*less than human*”.<sup>129</sup> The denial of a person’s basic humanity is the first step towards all manner of human rights abuses.

## TO LIVE IN FURTIVENESS AND FEAR

“If a same sex couple...attempt to live a normal life, that is, go to restaurants, clubs, bars, theatre and make it obvious that they are a unit, they will sooner or later attract the adverse attention of the authorities... Their lives are lived at the level of furtiveness and fear brought about by the intolerance of the state.”

*Nezhadian v MIMA*, asylum case in the Federal Court of Australia, 2001

The oppression instigated by criminalization statutes is such that that lesbian, gay, bisexual and transgender people in those countries face a choice between living “discreetly” and seeking asylum in another country. Some people will have nowhere to go if neighbouring countries also criminalize homosexuality.

The expectation that people should be discreet about fundamental attributes of their being is itself an abuse of their human rights and an inversion of the idea of living in a place of safety. People should be free to make individual choices of how open they are about their sexuality with relatives, friends, co-workers, neighbours, and others. But too often living “discreetly” is not a choice at all but a necessity, a defensive response to the fear of persecution which is visited upon lesbian, gay, bisexual, same-sex practicing and transgender individuals due to their non-conformity to prevailing norms of sexuality or gender. Moreover, the very fact of living as same-sex partners is often the antithesis of “discretion”, given local prejudices.<sup>130</sup>

In an example of official policy that fails to incorporate this understanding, in February 2006 Dutch immigration minister Rita Verdonk declared her intention to end a moratorium on deportations to Iran of lesbian, gay, bisexual and transgender individuals who had not been granted asylum. In the face of reports of executions

for homosexuality in that country, she stated, “*It appears that there are no cases of an execution on the basis of the sole fact that someone is homosexual. ... For homosexual men and women, it is not totally impossible to function in society, although they should be wary of coming out of the closet too openly.*”<sup>131</sup>

A September 2006 decision by the Stockholm Migration Court rejected the appeal of an Iranian asylum-seeker who had sought asylum on the grounds of his sexual orientation. The court had used only one source of country information, a Swedish Ministry for Foreign Affairs report, and concluded that he was not at risk of persecution in Iran solely on these grounds, particularly if he concealed his sexual orientation.<sup>132</sup> Similarly, in 2008, Lord West of Spithead, Home Office minister in the UK House of Lords, said: “*We are not aware of any individual who has been executed in Iran in recent years solely on the grounds of homosexuality, and we do not consider that there is systematic persecution of gay men in Iran.*”<sup>133</sup>

Lesbian, gay, bisexual and transgender people face numerous challenges in being granted asylum.<sup>134</sup> Those who flee their countries of origin because of persecution related to their sexuality or gender may be unlikely to disclose their sexual orientation, gender identity or expression or sexual conduct to immigration officials upon entering another country because, given their experience, they often distrust government agents, expect not to be believed and fear reprisals targeted at their families.

Denials of asylum claims made on the basis of sexual orientation or gender identity by refugee tribunals contradict a well-established principle of interpretation of the 1951 Convention relating to the Status of Refugees. Applicants who claim a well-founded fear of persecution because of political opinion or religious beliefs are not required to refrain from expressing those opinions or beliefs in the future. The UN High Commissioner for Refugees has commented: “*An applicant need not demonstrate that all members of a particular social group are at risk of persecution in order to establish the existence of a particular social group. As with the other grounds, it is not necessary to establish that all persons in the political party or ethnic group have been singled out for persecution.*”<sup>135</sup> The same principles should be upheld to protect the rights of people to express their sexual orientation or gender identity.

Furthermore, the UN High Commissioner for Refugees has stated that, “*Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalized, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harms perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.*”<sup>136</sup>

## **TO REMAIN SILENT IS TO CONDONE: IN SEARCH OF SOLUTIONS AT THE INTERNATIONAL LEVEL**

**“Gender-based violence is also related to the social construct of what it means to be either male or female. When a person deviates from what is considered ‘normal’ behaviour they are targeted for violence. This is particularly acute when combined with discrimination on the basis of sexual orientation or change of gender identity. Violence against sexual minorities is on the increase and it is important that we take up the challenge of what may be called the last frontier of human rights.”**

Radhika Coomaraswamy, then UN Special Rapporteur on violence against women, to the 58th Session of the Commission on Human Rights, 10 April 2002

Frustrated by the impunity, indifference and institutionalised prejudice they encounter in their own countries, lesbian, gay, bisexual and transgender survivors of violence and human rights defenders have increasingly turned to international human rights bodies of the United Nations to assert their human rights. This international pressure is yielding results.

Currently, 185 countries – over 90% of the members of the United Nations – are party to the Convention on the Elimination of All Forms of Discrimination against Women.<sup>137</sup> The convention calls on states to work to eradicate stereotyped conceptions of gender roles – an essential step to gaining equality for lesbians, gay men and bisexual people and, especially, transgender people.<sup>138</sup>

In 1995, the world's governments came together in Beijing for the UN Fourth World Conference on Women. Building on rights enshrined in the core human rights standards and on the 1994 Programme of Action from the International Conference on Population and Development, the Beijing Platform for Action – adopted by consensus – goes further than any human rights document before or since in defining a concept of sexual rights. Influenced by women's human rights activists and by the HIV/AIDS pandemic, governments were starting to recognize that a woman's right to exercise sexual autonomy was essential in and of itself. Paragraph 96 of the Platform for Action seeks to ensure that women can safely exercise their sexual autonomy and control their reproduction: "*The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion, discrimination and violence.*"<sup>139</sup> The Beijing Declaration and Platform for Action was reaffirmed by consensus in 2000 and 2005.

At the UN, what is for some a fear of, and for others an appeal to, a North/South divide over human rights and sexual orientation and gender identity has inhibited the human rights movement from successfully asserting the universal applicability of the human rights of lesbian, gay, bisexual and transgender people. Indeed, the first time human rights and sexual orientation was explicitly put on the table, in a resolution at the UN Commission on Human Rights in 2003, the reaction was so strong and so negative that it threatened the very foundation of human rights – the concept of universality, the principle that these rights apply to all people everywhere.<sup>140</sup> The resolution sought to do no more than reaffirm the human rights firmly established in international standards. The vehement reaction against the resolution, and the lack of support from countries that might have been expected to defend it, represented a retreat from the fundamental premise of the Universal Declaration of Human Rights: that all human beings are equal in dignity and rights, without distinction of any kind. A number of states questioned whether this issue belonged on the human rights agenda at all.<sup>141</sup> Commemorating the 60<sup>th</sup> anniversary of that founding human rights document, the High Commission for Human Rights reaffirmed that just as it is "unthinkable" to exclude persons from human rights protections because of their race, religion or social status, so must we "*reject any attempt to do so on the basis of sexual orientation or gender identity.*"<sup>142</sup>

However, through monitoring states' compliance with the international human rights treaties, the UN treaty bodies have established a growing and comprehensive case law on lesbian, gay, bisexual and transgender rights, including on the harmful effects of discrimination on the grounds of sexual orientation on the enjoyment of other rights, such as the right to privacy, equality before the law or equal protection of the law.<sup>143</sup>



In the landmark *Toonen* case, the UN Human Rights Committee considered that the provisions of the Tasmanian Criminal Code criminalizing same-sex sexual relations constituted an arbitrary interference with the complainant's right to privacy and amounted to discrimination. The Human Rights Committee affirmed for the first time that no individual can be denied the enjoyment of the rights protected by the International Covenant on Civil and Political Rights, including equality before the law and equal protection of the law, because of their sexual orientation and called for the repeal of the offending law, which was subsequently abolished in April 1997. Similar affirmations that the principle of non-discrimination includes discrimination on the basis of sexual orientation have been made by the Committee on Economic, Social and Cultural Rights, the Committee on the Rights of the Child and the Working Group on Arbitrary Detention.<sup>144</sup>

The Human Rights Committee now routinely requests information regarding the steps taken by states to prevent, address, and prohibit discrimination on grounds of sexual orientation. It urges states not only to repeal laws criminalizing homosexuality but also to enshrine the prohibition of discrimination based on sexual orientation into their constitutions or other fundamental laws.

Treaty bodies, the Commission on Human Rights (the precursor of the current Human Rights Council) and the special procedures of the UN call on states to repeal laws criminalizing same-sex sexual relations. They also urge those states that retain the death penalty not to impose it for sexual relations between same-sex consenting adults.<sup>145</sup> In 2006, Norway delivered a statement on behalf of 54 states calling for action on human rights violations on the basis of sexual orientation or gender identity, stating that “[t]he principles of universality and non-discrimination require that these issues be addressed.” This built on a statement delivered the previous year in which 31 states had declared that “[t]hese human rights violations have been brought to our attention, and we must respond. To remain silent, is to condone some of the worst forms of discrimination.”<sup>146</sup>

In November 2006, a group of 29 international human rights experts, including a former United Nations High Commissioner for Human Rights, UN independent experts, current and former members of human rights treaty bodies, judges, academics and human rights defenders, met in Yogyakarta, Indonesia, and affirmed a set of principles drawing on legally binding international human rights law to address the application of a broad range of international human rights standards to issues of sexual orientation and gender identity.<sup>147</sup>

And it will not stop there. Human rights defenders have submitted information detailing concerns about the human rights of lesbian, gay, bisexual, same-sex practicing and transgender people – including those living under criminalization – in 15 of the 16 states under review in the first round of the new “Universal Periodic Review” mechanism of the UN Human Rights Council.<sup>148</sup>

## THE DOLEFUL SUBTEXT

“There is no good reason why the concept of privacy should [...] be restricted simply to sealing off from state control what happens in the bedroom, with the doleful sub-text that you may behave as bizarrely or shamefully as you like, on the understanding that you do so in private.”

Justice Albie Sachs, concurring in the South African Constitutional Court's decision in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, 1998.

To date, many cases brought to national and international legal bodies to challenge criminalization of homosexuality or of individuals for consensual same-sex sexual activities have been based on an argument that sexual relations between consenting adults in the privacy of their homes should not be regulated by the state. Whilst this has proven a persuasive argument in legal forums (such as in Wolfenden, *Toonen* and *Lawrence*), it is limited in scope.

Justice Albie Sachs explored this issue in some depth in his comments on the 1998 case that invalidated South Africa's anti-“sodomy” laws, noting that privacy must be regarded as “*suggesting some responsibility on the state to promote conditions in which personal self-realisation can take place.*”<sup>149</sup> That is not to say that people should be allowed to do anything they like in private; states are obliged to act to prevent harm.

The emphasis on privacy has difficult consequences for women given the gendered concept of the public and private sphere which speaks to assumptions about gender and the role of the state, with the construction of a realm of privacy to which women are restricted, where men are in control and from which the state is usually prohibited to enter.<sup>150</sup> State-tolerated or state-enforced policies and practices construct gender-segregated spheres, with the result that as women, lesbians and

bisexual women often have a different relationship to the family and to 'the home', and certainly to public sexuality and freedom of movement.

Privacy is closely related to personal autonomy. The discriminatory way in which groups or individuals are targeted for invasions of privacy undermines any possible justification for such invasions.<sup>151</sup> Criminalization of certain consensual sexual acts on the basis of sexual orientation is a violation of equality: "*The expression of sexuality requires a partner, real or imagined. It is not for the state to choose or to arrange the choice of partner, but for the partners to choose themselves.*"<sup>152</sup>

Arguments based not on privacy but against discrimination and for an acknowledgement and acceptance of difference and affirming rights to equality and autonomy would have more far-reaching effects for the lives of the many lesbian, gay, bisexual, same-sex practicing and transgender people currently living under criminalization.

A July 2007 ruling in Hong Kong ruled that the law against gay sex in public was unconstitutional. Chief Justice Andrew Li said in the ruling that the law targets gay men and "*does not criminalize heterosexuals for the same or comparable conduct.*"<sup>153</sup> Amnesty International considers people detained or imprisoned having been prosecuted for having sex in circumstances which would not be criminal for heterosexuals to be prisoners of conscience and calls for their immediate and unconditional release. Such discrimination violates equal treatment under the law.<sup>154</sup>

Recognizing and respecting difference between individuals, and an individual's personal and sexual autonomy, does not mean that the state is without morality or disrespectful of social standards.<sup>155</sup> What it does is break the use of "morality" as a euphemism for "sex" and the use of that euphemism as "*mechanism for disciplining and regulating the social*"<sup>156</sup> and ruling on acceptable ways of being sexual. Time and again, legal consideration of the criminalization of homosexuality has concluded that even if the majority dislike a particular practice, or consider it immoral, that is not sufficient reason for upholding a law prohibiting the practice.<sup>157</sup>

## NEW TECHNOLOGIES, OLD HATREDS

**“Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”**

Universal Declaration of Human Rights, Article 19

The internet is viewed by many as a symbol of freedom and a tool for change. Use of the internet in private by lesbians, gay men and bisexual, same-sex practicing and transgender people can be used in prosecutions against them. In Egypt in 2002 and 2003, there were several cases of men alleged to be gay who were detained and tried after having agreed to meet people contacted through the internet who turned out to be security officers or police informants. The men were arrested and charged with “habitual debauchery” after electronic conversations they had exchanged over the internet in private were used as evidence against them. The government deemed the men’s use of the internet to be “*a blunt invitation to practice debauchery with them – which harms the country’s reputation on the international level...*”<sup>158</sup> Multiplying the harm done to the men, their names were then published in the media.

Similar cases have been reported in India where in January 2006, four men were arrested in Lucknow after the police traced the phone number of one of the accused on a gay website and met him undercover. The police then forced him to call several of his friends, three of whom actually turned up. All four were arrested on charges of operating a “gay racket” on the internet, as well as of belonging to and an “international gay club” and of engaging in “unnatural” sex.<sup>159</sup>

Not only are web users are locked up and chat rooms policed, but websites are blocked and search engines filter out “sensitive” results. Amnesty International considers anyone arrested following such entrapment to be a prisoner of conscience and calls on governments to cease harassment and threats against people seeking

to express, impart or receive information on the internet and to neither restrict nor arbitrarily interfere with the operation and usage of the internet in ways that violate the fundamental rights to information, freedom of expression and privacy. This includes prior censorship, monitoring and surveillance that does not conform with countries' human rights obligations.

## A FIRST STEP

**“The acceptance of difference celebrates diversity. The affirmation of individual dignity offers respect to the whole of society. The promotion of equality can be a source of interactive vitality. The State that embraces difference, dignity and equality does not encourage citizens without a sense of good or evil but rather creates a strong society built on tolerant relationships with a healthy regard for the rule of law.”**

Judge Gerald Winter in the Fiji High Court’s decision in *McCoskar v. The State* (2005)

Criminalization of homosexuality does not prevent the proscribed sexual acts. It does portray lesbian, gay, bisexual, same-sex practicing and transgender people as somehow contagious or likely to corrupt others. It sends a message that they can be reviled. As a consequence, many people choose to remain invisible. This results in a very different situation than faces other individuals who are often subject to discrimination, for example on the basis of race or religion.<sup>160</sup> Decriminalization is not the whole answer, but it is a key step towards respecting, protecting and fulfilling the human rights of lesbian, gay, bisexual, same-sex practicing and transgender people. Liberalisation of the law does not equate to state recognition of the right to be lesbian, gay or bisexual, have adult consensual sex with someone of the same sex, or be transgender.<sup>161</sup> The legacy of criminalization can last for years.

This legacy can be seen in a number of East European countries where some Pride events are banned outright, in violation of international law. Authorities breach their

obligations claiming security concerns and the violation of what they perceive as spiritual and moral values. When activists do secure official permission to hold the march, participants too often still face threats and official hostility. They are jeered, spat at, and pummelled with bottles, eggs, excrement, and fists by protesters, sometimes while police look on.<sup>162</sup>

In many countries there is a lack of explicit legislative initiatives to provide criminal and disciplinary sanctions for discrimination against people based on their sexual orientation or gender identity. In South Korea in 2007, a proposal to include sexual orientation as one of the categories that might be the basis of discrimination in the Anti-Discrimination Bill failed. Gender identity was not even included in the final draft because the clause defining “gender” had been deleted from an earlier draft. Responding to activists’ queries as to why “sexual orientation” had been deleted from the draft bill, the Ministry of Justice stated that the original list of protected categories had been “too numerous” and “[t]herefore, we reduced the categories to stipulate representative grounds of discrimination.”<sup>163</sup> They based their assessment of “representative grounds” on what was already “stipulated in two or more existing domestic laws” or included in international human rights law.

In most parts of the world, lesbians and gay men are denied legal recognition of their partnerships and are not permitted to marry. Amnesty International opposes discrimination in civil marriage laws on the basis of sexual orientation or gender identity and calls on states to recognise families of choice, across borders where necessary.

Lesbians and single women may not be able to realise their reproductive rights, with some countries ruling that they have no right to use donor insemination or in-vitro fertilisation services. In most parts of the world, legal recognition of non-biological parents is denied to lesbian, gay, bisexual and transgender people and same-sex couples may not be allowed to adopt children.<sup>164</sup>

In some countries, sex reassignment surgery is illegal; in others it is not provided or may be prohibitively expensive. Even in countries where transgender people can have official documents reflecting their gender choice they often experience difficulties in changing or obtaining such identification. Individuals who are transitioning, undocumented immigrants, homeless people or those who do not meet the requirements for altering the gender listed on their identification because, for example, they cannot afford hormones, or cannot afford or do not wish to undergo sex reassignment surgery, may not be able to obtain identification consistent with their gender expression.

In most parts of the world, lesbian, gay, bisexual and transgender people are systematically denied housing. Transgender individuals in particular can experience huge obstacles in finding paid employment and are thus likely to live in poverty.<sup>165</sup>

Rights of freedom of association and expression are denied to lesbian, gay, bisexual and transgender individuals and organizations via anti-propaganda laws, censorship and other discriminatory bans and practices. Claims by lesbian, gay, bisexual,

same-sex practicing and transgender people to their human rights may be brooked, but only up to a point. For example, in 2003 the Prime Minister of Singapore stated, “[g]ays must know that the more they lobby for public space, the bigger the backlash they will provoke from the conservative mainstream. Their public space may then be reduced.”<sup>166</sup>

Without the fundamental protection of legality, it is impossible for lesbian, gay, bisexual and transgender people to form organizations and campaign for their rights or even to meet in public. Even where homosexuality is not criminalized, the authorities may seek to limit the freedom of association for organizations working on the human rights of lesbian, gay, bisexual, same-sex practicing and transgender people. For example, in 2000, the Honduran organization *Grupo Prisma* submitted a request for *personería jurídica*, official registration, and approval of the statutes of the organization to the Ministry of the Interior and Justice, as required by law. This was rejected because “*the Statutes breach morality, public order, proper behaviour...*” (*los Estatutos violentan la moral, el orden público, las buenas costumbres...*).<sup>167</sup>

The new NGO law in Russia, possibly together with the law on combating extremist activities, has been used to prevent the registration of the NGO Rainbow House (Raduzhnii Dom), an organization of lesbian, gay, bisexual and transgender rights activists from Tiumen, Siberia. Their registration as an NGO has been repeatedly denied by the Federal Registration Service (FRS). Without registration, the organization’s activities, including cooperation and dialogue with other NGOs and state bodies, are severely hampered. It also prevents the organization opening a bank account. One reason not to register the organization given by the regional department of the FRS in Tiumen in December 2006 was that the charter of the organization listed activities which amounted to propaganda for a non-traditional sexual orientation, which could constitute “extremist activities”. The FRS also allegedly argued that the aims of the organization were in conflict with the spiritual values of Russian society, were directed towards reducing the population and were therefore considered to be a threat to state security. In Amnesty International’s view, nothing in the organization’s charter indicates “extremist” views or could be said to be a threat to state security.<sup>168</sup>

Turkish authorities have regularly targeted organizations working on human rights and sexual orientation and gender identity in recent years. In September 2005, the Ankara Governor’s Office accused the Ankara-based group KAOS-GL of “establishing an organization that is against the laws and principles of morality.” Similarly, the Ankara Governor’s Office attempted in July 2006 to close the human rights group Pembe Hayat (Pink Life), which works with transgender people, claiming that the association opposed “morality and family structure.” In both cases, prosecutors dropped the charges. In May 2008 Lambda Istanbul was ordered to close after the Civil Court of First Instance in the Beyoglu district of Istanbul ruled in favour of a complaint brought by the Istanbul Governor’s Office in early 2007, claimed that the objectives of the organization were offensive to Turkish “moral values and its family structure”.



Amnesty International believes that human rights of freedom of association cannot be limited on such subjective and discriminatory grounds and that the authorities must allow the registration and functioning of organizations working on human rights and sexual orientation and gender identity and must respect the work of human rights defenders. At the international level, organizations have faced resistance from states in their efforts to obtain the necessary accreditation to work at the UN, with some states repeatedly conflating organizations' human rights work with paedophilia.<sup>169</sup>

Organizing has benefits beyond solidarity and support. Comparative research has shown that the prompt response from gay men to the prevention of HIV/AIDS in developed countries in the early 1980s owed much to the pre-existence of non-governmental organizations and to the visibility and mobilisation of gay men.<sup>170</sup> Decriminalization is the first step to achieving social acceptance of the right of lesbian, gay, bisexual and transgender people to be open about their sexuality and gender identity or expression without fear of criminal prosecution, where they know that they can obtain recourse to justice when they are the victims of violence by other individuals and where individuals can form associations and peacefully assemble to campaign for their human rights.<sup>171</sup>

As Hina Jilani, UN Special Representative to the Secretary General on Human Rights Defenders, has noted, *"Of special importance will be women's human rights groups and those who are active on issues of sexuality, especially sexual orientation and reproductive rights. These groups are often very vulnerable to prejudice, to marginalization and public repudiation, not only by State forces but by other social actors."*<sup>172</sup>

Dismantling the prejudices against people on the basis of sexual orientation or gender identity will also impact the lives of heterosexual women and men: *"The fear of being labelled lesbian or gay keeps women and men in their "places" with respect to sex role behaviour and also maintains the inequities in the power balance within both interpersonal relationships and the structure of society."*<sup>173</sup>

In defiance of the intended effect, time and again criminalization has proven to be basis for mobilisation by lesbian, gay, bisexual and transgender human rights defenders. By legislating against certain consensual sexual behaviours or identities, the state effectively creates new political constituencies, such as categories of people called "homosexual" or "lesbians". This starts to erode the invisibility of lesbian, gay, bisexual and transgender people and brings people together at the local, national and international level to demand equality.<sup>174</sup> Combined with the power to be gained from working in community with others as a way of obtaining a sense of belonging and affirm a sense of self, mobilising against decriminalization and other human rights abuses against lesbian, gay, bisexual, same-sex practicing and transgender people, far from destroying identities and behaviours, is ensuring them and increasing claims for citizenship.<sup>175</sup>

# RECOMMENDATIONS

Amnesty International calls on states to reaffirm that exceptions to the universality of rights protections are unacceptable; to condemn human rights abuses on the basis of sexual orientation and gender identity or expression; and to respect, protect, and fulfil the human rights of all persons, without discrimination of any kind.<sup>176</sup>

## **Decriminalize homosexuality**

Review all legislation which could result in the discrimination, prosecution and punishment of people solely for their sexual orientation or gender identity. This includes laws explicitly criminalizing consensual sexual conduct between people of same-sex or transgender individuals; discriminatory age-of-consent legislation; public order legislation used as a pretext for prosecuting and punishing people solely for their sexual orientation or gender identity; and laws banning the “promotion” of homosexuality which can be used to imprison lesbian, gay, bisexual, same-sex practicing and transgender individuals and human rights defenders. All such laws should be repealed or amended;

Immediately impose a moratorium on executions with a view to abolishing the death penalty, in line with the UN General Assembly resolution for a moratorium on executions, including for those currently awaiting execution for crimes relating to consensual same-sex sexual activity;<sup>177</sup>

Flogging, all other corporal punishments and all other cruel, inhuman and degrading punishments should be abolished in law;

Immediately and unconditionally release all prisoners of conscience who are held solely on the basis of their actual or imputed sexual orientation or gender identity. Such individuals include those detained for same-sex sexual relations between consenting adults in private, those held for advocating the human rights of lesbian, gay, bisexual, same-sex practicing and transgender people, and those detained for on politically motivated charges related to sexual orientation, conduct or gender identity;

Review all legislation that uses heterosexual norms and practices to judge forms of sexuality and is used to criminalize individuals who engage in consensual sexual relations with persons of the same sex. Immediately and unconditionally release all prisoners of conscience who have been detained or imprisoned under such laws;

Ensure that an equal age of consent applies to both same-sex and different-sex sexual activity;

Repeal any law that prohibits or criminalizes the expression of gender identity or expression, including through dress, speech or mannerisms, or that denies to individuals the opportunity to change their bodies as a means of expressing their gender identity;

### **Administration of justice**

Take all necessary legislative, administrative and other measures to ensure that actual or imputed sexual orientation, consensual sexual relations or gender identity may under no circumstances be the basis for arrest or detention. Amend vaguely worded criminal law provisions that lend themselves to discriminatory application or otherwise provide scope for arrests based on prejudice so that they specifically describe the conduct prohibited. Ensure monitoring and oversight of enforcement practices in order to prevent selective enforcement;

Take all necessary legislative, administrative and other measures to prohibit and eliminate prejudicial treatment on the basis of sexual orientation, consensual sexual relations or gender identity at every stage of the administration of justice;

Ensure that all allegations of crimes perpetrated on the basis of the actual or perceived sexual orientation or gender identity or assumptions as to their engagement in consensual same-sex practices of the victim are investigated promptly and thoroughly, and that, where appropriate evidence is found, those responsible are prosecuted, judged in a fair trial and duly punished in a manner that conforms to international human rights standards;

Ensure that all allegations and reports of human rights violations based on sexual orientation, gender identity or assumptions as to individuals' engagement in consensual same-sex practices are promptly and impartially investigated and perpetrators held accountable and brought to justice;

### **Effects of criminalization**

Review, amend, or enact legislation to recognise that lesbian, gay, bisexual and transgender persons, and those who engage in consensual same-sex sexual conduct, are members of a particular social group as that term is used in the 1951 Refugee Convention and its 1967 Protocol and that a well-founded fear of persecution on the basis of being part of such a social group may be established by the need to hide one's sexual orientation, gender identity, or same-sex sexual conduct;

Take all necessary legislative, administrative and other measures to eliminate and prohibit discrimination on the basis of sexual orientation, assumptions as to consensual same-sex practices and gender identity in public and private employment, including in relation to vocational training, recruitment, promotion, dismissal, conditions of employment and remuneration;

Take all necessary legislative, administrative and other measures to ensure security of tenure and access to affordable, habitable, accessible, culturally appropriate and safe housing, including shelters and other emergency accommodation, without

discrimination on the basis of sexual orientation, engagement in consensual same-sex practices, gender identity or marital or family status;

Take all necessary legislative, administrative and other measures to ensure equal access to education, and equal treatment of students, staff and teachers within the education system, without discrimination on the basis of sexual orientation, engagement in consensual same-sex practices or gender identity;

Ensure that laws and policies provide adequate protection for students, staff and teachers of different sexual orientations and gender identities against all forms of social exclusion and violence within the school environment, including bullying and harassment;

Ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations, consensual practices and gender identities, and are equally available to all without discrimination;

End the practice of considering people living with HIV as criminals and prejudicially linking HIV status and possible sexual orientation or engagement in consensual same-sex practices. Immediately stop arbitrary arrests based on assumptions about or knowledge of HIV status. Do not test detainees for HIV without their informed consent. Ensure that all persons who test positive for HIV receive appropriate and immediate counselling as well as treatment. Provide training to all criminal-justice officials on medical facts and international human rights standards in relation to HIV. Take action to counter stigma and discrimination against people living with HIV and against people who engage in consensual same-sex sexual activity. Avoid policies which undermine attempts to ensure that people have access to voluntary counselling and testing, information about prevention of infection and access to treatment where needed;

Undertake a comprehensive programme of non-discriminatory sex education to address cultural and other taboos surrounding adolescent sexuality and gender expression and provide adolescents with access to the appropriate information, support and necessary protection to enable them to live their sexual orientation or gender identity or expression;

Cease harassment and threats against people seeking to express, impart or receive information on the internet; neither restrict nor arbitrarily interfere with the operation and usage of the internet in ways that violate the fundamental rights to information, freedom of expression and privacy. This includes prior censorship, monitoring and surveillance that does not conform with countries' human rights obligations;

End discrimination in civil marriage laws on the basis of sexual orientation or gender identity and recognise families of choice, across borders where necessary;

Ensure adequate protection of human rights defenders at risk because of their work on issues of sexual orientation and gender identity. Their work should be supported and they should be consulted on policy initiatives to respect, protect and fulfil the human rights of lesbian, gay, bisexual and transgender people. Governments should remove legal and administrative obstacles which prevent human rights defenders from carrying out their work; they should implement provisions of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms and the recommendations of the Special Representative of the UN Secretary-General on human rights defenders.

# APPENDIX 1: THE APPLICATION OF THE DEATH PENALTY FOR CONSENSUAL SAME-SEX SEXUAL RELATIONS

Article 6(2) of the International Covenant on Civil and Political Rights stipulates that the death penalty, if it is to be applied at all, should be reserved for only the most serious crimes.

**Article 6(2) of the International Covenant on Civil and Political Rights:**

“In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court.”

Similarly, the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty in paragraph 1 states “*In countries which have not abolished the death penalty, capital punishment may be imposed only for the most serious crimes, it being understood that their scope should not go beyond intentional crimes with lethal or other extremely grave consequences.*”

The Human Rights Committee, in its General Comment 6, paragraph 7, has stated, “*the expression ‘most serious crimes’ must be read restrictively to mean that the death penalty should be a quite exceptional measure.*”

In December 2007 the UN General Assembly endorsed the call for a worldwide moratorium on executions by an overwhelming majority. The resolution enjoyed strong cross-regional support and was adopted by 104 countries voting in favour, 54 against and 29 abstentions. This landmark decision by the UN’s highest political body is a clear recognition by states of the growing international trend towards abolition of the death penalty.<sup>178</sup>

In spite of these human rights obligations, in seven countries – Iran, Mauritania, the Nigerian states that apply Shar’ia law, Qatar, Saudi Arabia, Sudan and Yemen – consensual sexual relations between men can incur the death penalty. In four

countries – Iran, the Nigerian states that apply Shar’ia law, Qatar and Saudi Arabia – women may face the death sentence for lesbianism.

## IRAN

The Iranian penal code makes particular types of same-sex sexual relations capital offences – consensual “sodomy” between men (Articles 110 and 111); same-sex sexual relations between men without penetration (*tafhiz*) for the fourth time (Article 121), having been punished for each previous offence, and in Article 131, for lesbianism for the fourth time, having been punished for each previous offence. In addition, false accusation of “sodomy” for a fourth time, having been punished for each previous offence, is also a capital crime. The punishment for non-penetrative sex between men and for lesbianism, on first three occasions, is flogging, which constitutes torture or other cruel, inhuman or degrading treatment. The laws are also discriminatory on the basis of religion, in that if a non-Muslim is prosecuted for having consensual sex with a Muslim, the non-Muslim gets the death penalty straight away.

## MAURITANIA

Article 308 of the penal code of Mauritania states that Muslim adult men who commit an act “against nature” with an individual of the same sex may be sentenced to death. To Amnesty International’s knowledge, no one has ever been sentenced to death under this provision. Lesbianism is not punishable by death but by three months to two years imprisonment. Accusing someone of being homosexual is punishable by flogging under Article 341.<sup>179</sup>

## NIGERIA

In the 12 northern states of Nigeria where Shar’ia penal code law applies the death penalty by stoning if the accused is married and convicted of consensual same-sex sexual relations outside of marriage (*zina*). The details vary between states; for example, in Kano State, the Shar’ia penal code stipulates that “*lesbianism [defined as] whoever, being a woman, engages another woman in carnal intercourse through her sexual organ or by means of stimulation or sexual excitement of one another commits the offence of lesbianism*” and is sanctioned in the same way as for male homosexuality.

## QATAR

*Zina* (a sexual act by a married party outside of marriage) is punishable by death. This applies to men and women and to both same-sex and heterosexual acts. If the offenders (male or female) are not married, then any sexual act (including same-sex sexual acts) are punishable by flogging. Shar’ia law in Qatar applies to Muslim offenders only. Executions for *zina* are extremely rare in Qatar and Amnesty International knows of no executions for convictions of sexual offences in recent years. For non-Muslims, the penalty is up to seven years imprisonment.

## SAUDI ARABIA

Saudi Arabia does not have a penal code and therefore the death penalty and homosexuality is not clear cut. However, under the rules of Shar’ia applicable in

Saudi Arabia, any sexual act outside marriage is an offence. There are two instances where the death penalty is relevant to homosexuality:

- Sexual offences outside marriage or *zina*: a sexual act (including same-sex sexual acts) by a married party (male or female) outside marriage is punishable by death. If the offenders (male or female) are not married, then any sexual act (including same-sex sexual acts) are punishable by flogging.
- The offence of “corruption on earth”: “Corruption on earth” is a catch-all phrase as it can apply to any offence, including heterosexual or same-sex sexual acts if the Judge sees fit. It invariably carries the death penalty.

The method of execution in Saudi Arabia is by beheading.

## SUDAN

Under the 1991 Penal Code Article 148, anyone convicted for the third time for anal sex, whether between two men or heterosexual couple, may face the death penalty or life imprisonment. On the first conviction, the individual may be punished with a hundred lashes and may also be punished with up to five years' imprisonment. The second conviction may incur a hundred lashes and up to five years' imprisonment. Lesbianism is not explicitly mentioned in the current penal code.

## YEMEN

The Yemen penal code differentiates between three situations: adultery, sodomy, and sex between females. Adultery is punishable by death by stoning for the married party, male or female. The assumption here is that the act is a heterosexual act. Sodomy is punishable by death by stoning for the married party, male or female. Therefore this applies for consensual same-sex sexual acts where one or both of those involved are married. Sex between women is not punishable by death. The method of execution in Yemen can be beheading or firing squad, but in general it is by firing squad.

## A NOTE ON THE UNITED ARAB EMIRATES

The United Arab Emirates (UAE) does not carry the death penalty for same-sex consensual sexual relations.

The UAE is a federal system in which Dubai has a full range of its own courts (if not, in some areas, its own laws); Ras al-Khaimah also has its own court system up to the level of cassation, which is assumed by the Federal system based in Abu Dhabi. Article 354 of the Penal Code ‘Union law No. 3 of 1987’ (*Qanoun al-'Uqubat*) provides for the death penalty in a context of force, or coercion, whereby a male or female forces another female or a male coerces another male to take part in the sexual act: Amnesty International therefore considers this article to address rape, not consensual same-sex sexual relations.



As in other nearby countries, it is theoretically possible that *zina* (a sexual act by a married party outside of marriage) is punishable by death and that these could be used to prosecute consensual same-sex sexual acts, depending on the facts of the cases. Amnesty International is not aware of any case in which the use of *zina* laws against consensual same-sex sexual conduct has resulted in a death sentence in the UAE.

## ENDNOTES

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<sup>1</sup> Concluding Observations of the UN Human Rights Committee: United States of America. 03/10/95. CCPR/C/79/Add.50; A/50/40, para.287.

<sup>2</sup> Sexual orientation refers to a person's emotional and sexual attraction to individuals of a different, same or more than one sex.

<sup>3</sup> See Christine Browning, "Changing Theories of Lesbianism: Challenging the Stereotypes", in Trudy Darty and Sandee Potter (eds.), *Women-identified women*, Mayfield, Palo Alto, California, 1984, p.26 (C. Browning, *Changing Theories of Lesbianism*); Diane Richardson, "Constructing Lesbian Sexualities", in Ken Plummer (ed.), *Modern Homosexualities: Fragments of Lesbian and Gay Experience*, Routledge, London and New York, 1992, pp.187-199.

<sup>4</sup> See Amnesty International, Possible prisoners of conscience/Fear of torture or ill-treatment, UA 120/07 (Index: MDE 13/057/2007), 18 May 2007, and update (Index: MDE 13/065/2007), 6 June 2007; Human Rights Watch, *Iran: Private Homes Raided for 'Immorality'; Authorities Escalate Arbitrary Arrests, Harassment*, 28 March 2008.

<sup>5</sup> *Dudgeon v. UK*, (1981) 4 EHRR 149.

<sup>6</sup> Following the judgement by the European Court of Human Rights in *Dudgeon* the provisions of the 1967 Sexual Offences Act (England and Wales) were finally extended to the Channel Islands in 1990 and to the Isle of Man in 1992. In 2006 the Channel Island of Jersey undertook to review equalising the age of consent for lesbians and gay men with heterosexual young people and the Isle of Man repealed Section 28 of the Local Government Act 1988 (England and Wales). See [http://www.stonewallscotland.org.uk/information\\_bank/history\\_\\_lesbian\\_\\_gay/89.asp](http://www.stonewallscotland.org.uk/information_bank/history__lesbian__gay/89.asp), accessed 19 May 2008. As yet the Isle of Man has no equal opportunities legislation which would prohibit discrimination on the grounds of race, gender or sexuality. See <http://www.isleofman.com/tourism/factfile/government.asp>, access 19 May 2008.

<sup>7</sup> *Lawrence v. Texas*, 539 U.S. at 18.

<sup>8</sup> Jeffrey Weeks, *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*, Quartet Books Limited, London, 1977. (J. Weeks, *Coming Out*)

<sup>9</sup> Article 204 of the old Nicaraguan penal code had stated, "Anyone who induces, promotes, propagandizes or practices in scandalous form sexual intercourse between persons of the same sex commits the crime of sodomy and shall incur 1 to 3 years' imprisonment."

<sup>10</sup> "Sin perjuicio de los derechos establecidos en esta Constitución y en los instrumentos internacionales vigentes, el Estado reconocerá y garantizará a las personas los siguientes: [...] 2. La integridad personal. Se prohíben las penas crueles, las torturas; todo procedimiento inhumano, degradante o que implique violencia física, psicológica, sexual o coacción moral, y la aplicación y utilización indebida de material genético humano. El Estado adoptará las medidas necesarias para prevenir, eliminar y sancionar, en especial, la violencia contra los niños, adolescentes, las mujeres y personas de la tercera edad. Las acciones y penas por genocidio, tortura, desaparición forzada de personas, secuestro y homicidio por razones políticas o de conciencia, serán imprescriptibles. Estos delitos no serán susceptibles de indulto o amnistía. En estos casos, la obediencia a órdenes superiores no eximirá de

*responsabilidad.*” Constitution of Ecuador, art. 23,  
<http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html>, accessed 19 May 2008.

<sup>11</sup> Section 37 of the Fijian Constitution safeguards rights to privacy, while Section 38 (2) specifically provides for non discrimination including on grounds of sexual orientation:

*“Section 38 Equality: (1) Every person has the right to equality before the law. (2) A person must not be unfairly discriminated against, directly or indirectly, on the ground of his or her: (a) actual or supposed personal characteristics of circumstances, including race, ethnic origin, colour, place of origin, gender, sexual orientation, birth, primary language, economic status, age or disability; or (b) opinions or beliefs, except to the extent that those opinions or beliefs involve harm to others or the diminution of the rights or freedoms of others; or on any other ground prohibited by this Constitution.”*

Section 43(2) of the Constitution requires that the rights enshrined in the Fijian Constitution are construed in light of public international law: *“In interpreting the provisions of this Chapter, the courts must promote the values that underlie a democratic society based on freedom and equality and must, if relevant, have regard to public international law applicable to the protection of the rights set out in this Chapter.”* See [http://www.servat.unibe.ch/law/icl/fj00000\\_.html](http://www.servat.unibe.ch/law/icl/fj00000_.html), accessed 19 May 2008.

<sup>12</sup> Article 13 (Principle of equality) 2. *“No one shall be privileged, favoured, prejudiced, deprived of any right or exempted from any duty on the basis of ancestry, sex, race, language, place of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation.”*  
[http://www.portugal.gov.pt/Portal/EN/Portugal/Sistema\\_Politico/Constituicao/](http://www.portugal.gov.pt/Portal/EN/Portugal/Sistema_Politico/Constituicao/), accessed 19 May 2008.

<sup>13</sup> Section 9. Equality: 3. *“The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”*  
<http://www.info.gov.za/documents/constitution/index.htm>, accessed 19 May 2008.

<sup>14</sup> *“Artículo 14 Todo ser humano tiene personalidad y capacidad jurídica con arreglo a las leyes y goza de los derechos, libertades y garantías reconocidas por esta Constitución, sin distinción alguna. El Estado prohíbe y sanciona toda forma de discriminación fundada en razón de sexo, color, género, edad, orientación sexual e identidad de género, origen, cultura, nacionalidad, ciudadanía, idioma, credo religioso, ideología, filiación política o filosófica, estado civil, condición económica o social, tipo de ocupación, grado de instrucción, discapacidad, estado de embarazo, u otras que tenga por objetivo o resultado anular o menoscabar el reconocimiento, goce o ejercicio en condiciones de igualdad de derechos y libertades de toda persona.”*

Also, Article 66 of the new constitution says that, *“Men and women are guaranteed the exercise of their sexual and reproductive rights.”* See, International Gay And Lesbian Human Rights Commission, *Support the Proposal for the New Bolivian Constitution*, 21 December 2007.

- <sup>15</sup> John Wolfenden, *Report of Departmental Committee on Homosexual Offences and Prostitution, Cmnd 247*, HMSO, London, 1957. (J. Wolfenden, *Report*)
- <sup>16</sup> J. Weeks, *Coming Out*, p.88.
- <sup>17</sup> Meredith Gould, "Lesbians and the Law: Where Sexism and Heterosexism Meet", in Trudy Darty and Sandee Potter (eds.), *Women-identified women*, Mayfield, Palo Alto, California, 1984, p.152.
- <sup>18</sup> United Nations Development Programme, *Law, Ethics and HIV/AIDS in South Asia: A study of the legal and social environment of the epidemic in Bangladesh, India, Nepal and Sri Lanka*, UNDP, p. 19, available online at <http://www.undp.org/hiv/docs/alldocs/Asia%20-%20Law,%20Ethics%20and%20HIV-AIDS%20-%20Study%20of%20the%20Legal,%20Social%20Environment%20of%20Epidemic%20in%20Bangladesh,%20India,%20Nepal%20and%20Sri%20Lanka.pdf>, accessed 19 May 2008.
- <sup>19</sup> Sherifa Zuhur, *Gender, Sexuality and the Criminal Laws in the Middle East and North Africa: A Comparative Study*, Women for Women's Human Rights (WWHR) – New Ways, Turkey, 2005, p.47 (S. Zuhur, *Gender, Sexuality and the Criminal Laws*).
- <sup>20</sup> Gail Mason, *The Spectacle of Violence: Homophobia, Gender and Knowledge*, Routledge, London, 2002, pp. 47-8.
- <sup>21</sup> See UN Committee for the Elimination of Discrimination Against Women, Concluding Observations: Kyrgyzstan, A/54/38, 20 August 1999, paras.127-8, where the Committee expressed concern that lesbianism is classified as a sexual offence in the Penal Code and recommended that "*lesbianism be reconceptualized as a sexual orientation and that penalties for its practice be abolished*". See also UN Committee on Economic, Social and Cultural Rights, Concluding Observations: Kyrgyzstan, E/C.12/1/Add.49, 1 September 2000, paras.17 and 30; Report of the Special Representative of the Secretary-General on the situation of human rights defenders, E/CN.4/2002/106/Add.1, 12 March 2002, Mission to Kyrgyzstan, para.154.
- <sup>22</sup> Articles 130 and 131.
- <sup>23</sup> See for example, *Rights for All: Ending Discrimination against Queer Desire under Section 377*, A compilation by Voices Against 377, 2004. (Voices Against 377, *Rights for All*).
- <sup>24</sup> Article 199*bis* of the Criminal Code.
- <sup>25</sup> See, for example, the newspaper *Al Arabiya*, September 2007, quoted in Human Rights Watch, *Kuwait LGBT Transgender Arrests: Repressive Dress-Code Law Encourages Police Abuse; Arrests Target Transgender People*, 17 January 2008, <http://hrw.org/english/docs/2008/01/17/kuwait17800.htm>, accessed 19 May 2008.. Arrests continued in March 2008. See Human Rights Watch, *Kuwait: Halt Dress-Code Crackdown. Authorities Should Repeal Repressive Law, Free Detainees*, 31 March 2008, <http://hrw.org/english/docs/2008/03/31/kuwait18384.htm>, accessed 19 May 2008.
- <sup>26</sup> Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, Addendum: Communications to and from Governments, E/CN.4/2005/72/Add.1, 18 March 2005, para.233.

<sup>27</sup> J. Wolfenden, *Report*, p.165.

<sup>28</sup> The Sexual Offences Act 1967 decriminalized male homosexual activities in private for adults over the age of twenty-one but did not legalize homosexuality. The number of prosecutions actually increased over the next few years. See J. Weeks, *Coming Out*, p.176. See also Geraldine Bedell, "Coming out of the dark ages", *The Observer*, 24 June 2007 <http://observer.guardian.co.uk/review/story/0,,2109769,00.html>, accessed 19 May 2008.

<sup>29</sup> From Amnesty International, *Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity*, Index: ACT 40/016/2001.

<sup>30</sup> Phil C. W. Chan, "No, it is not just a phase: An adolescent's right to sexual minority identity under the United Nations Convention on the rights of the child", *The International Journal of Human Rights*, 10:2, 2006, p.169 (P.C.W. Chan, "No, it is not just a phase").

<sup>31</sup> See for example, Amnesty International, *Austria: Restrictions on consensual sexual activity*, Index: EUR 13/001/2001, 26 February 2001. On 9 January 2004 the European Court of Human Rights ruled in favour of three gay men who had filed complaints against Austria after being convicted under Article 209 of the Austrian Criminal Code in the period 1996-1997. The article, which was repealed in July 2002, set the age of consent for gay men at 18 years of age as opposed to 14 for heterosexuals and lesbians. Gay men convicted of violating Article 209 faced up to five years' imprisonment. In the cases of *L. and V. v. Austria and S.L. v. Austria* the European Court of Human Rights ruled that in convicting all three men under Article 209 Austria had violated Articles 14 and 8 of the ECHR, namely the prohibition of discrimination and the right to respect for private life.

<sup>32</sup> Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change*, Books for Change, Bangalore, 2005, pp.49-55 (A. Narrain, *Queer*).

<sup>33</sup> Sumit Baudh, *Human Rights and the Criminalization of Consensual Same-Sex Sexual Acts In the Commonwealth, South and Southeast Asia*, Working Paper, The South and Southeast Asia Resource Centre on Sexuality, 2008, p.4 (S. Baudh, *Human Rights*).

<sup>34</sup> Amnesty International, *Freedom of expression in Kuwait remains under threat*, Index: MDE 17/01/00, 27 March 2000; Amnesty International, *Annual Report 1999: Kuwait*, Index: POL 10/001/2000; Amnesty International, *Annual Report 2000: Kuwait*, Index: POL 10/001/2001; Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, E/CN.4/2001/64, 13 February 2001, para.176.

<sup>35</sup> As *hodoud* crimes are regarded as a crime against God, they are not open to pardon by the Supreme Leader on the recommendation of the Head of the Judiciary in the same way as are *ta'zir* or discretionary punishments. However, if the person has confessed and repented (publicly sought forgiveness from God), then the judge in the case has the power to seek a pardon from the Supreme Leader or to insist on the implementation of the verdict. (Articles 81, 126 and 133 of the Islamic Penal Code.) See Appendix 1.

<sup>36</sup> *Lawrence v. Texas* (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833, 850 (1992)).

<sup>37</sup> *Lawrence v. Texas*, p.10.

<sup>38</sup> *Smith and Grady v. United Kingdom*, (2000) 29 EHRR 493 (European Court of Human Rights), para.97.

<sup>39</sup> "Nicaragua: Sodomy statute disappears from the books", 14 November 2007, <http://blabbeando.blogspot.com/2007/11/nicaragua-sodomy-statute-disappears.html>, accessed 19 May 2008.

<sup>40</sup> E.K. Quansah, "Same-sex relationships in Botswana: Current perspectives and future prospects", *African Human Rights Law Journal*, 4(2), 2004, p.204, [http://www.chr.up.ac.za/centre\\_publications/ahrlj/journals/ahrlj\\_vol04\\_no2\\_2004.pdf](http://www.chr.up.ac.za/centre_publications/ahrlj/journals/ahrlj_vol04_no2_2004.pdf), accessed 19 May 2008.

<sup>41</sup> See Nigeria – joint NGO letter to President Obasanjo, *Letter to President Obasanjo Regarding Bill to Criminalize Gay Rights*, 22 March 2006, available at <http://hrw.org/english/docs/2006/03/23/nigeri13064.htm>, accessed 19 May 2008, (Nigeria – joint letter to President Obasanjo).

<sup>42</sup> Dispatch from Bauchi, Nigeria, 15 February 2008, International Lesbian and Gay Human Rights Commission, <http://www.iglhc.org/site/iglhc/section.php?id=5&detail=831>, accessed 19 May 2008.

<sup>43</sup> Amnesty International, *United Arab Emirates: Amnesty International seeks clarification of the fate of 26 men arrested at a "gay wedding ceremony"*, Index: MDE 25/008/2005, 5 December 2005.

<sup>44</sup> Article 489 of the Moroccan Penal Code punishes "lewd or unnatural acts with an individual of the same sex" with up to three years' imprisonment and a fine of up to 1,200 dirhams (about US\$ 150). For information see Amnesty International, *Morocco/Western Sahara: Drop charges of homosexuality against six men and ensure their safety*, 16 January 2008.

<sup>45</sup> For comment on this case see, *Sénégal: L'homosexualité ne doit plus être un crime*. Communiqué, Fédération internationale des ligues des droits de l'Homme (FIDH), Rencontre africaine pour la défense des droits de l'Homme (RADDHO), Organisation nationale des droits de l'Homme (ONDH), L'Union interafricaine des droits de l'Homme (UIDH), Amnesty International Sénégal (AI), Pan Africa ILGA, la région africaine de l'Association Internationale Gay et Lesbienne L'Association Internationale Gay et Lesbienne (ILGA), 8 February 2008.

<sup>46</sup> See Nigeria – joint letter to President Obasanjo.

<sup>47</sup> Penal Code, Section 377A and 377B.

<sup>48</sup> Amnesty International, *Uganda: Lesbian, gay, bisexual and transgender people targeted*, Index: AFR 59/006/2006, 29 August 2006.

<sup>49</sup> Amnesty International, *Crimes of hate, conspiracy of silence*.

<sup>50</sup> *Voices Against 377, Rights for All*.

<sup>51</sup> S. Baudh, *Human Rights*, p.5

<sup>52</sup> At the time of the *Lawrence v Texas* decision, sodomy was a misdemeanour offence in Alabama (Alabama's law did not apply to married couples), Florida, Kansas (between

individuals of the same sex only), Texas (between individuals of the same sex only) and Utah and a felony offence in Idaho, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Oklahoma (between individuals of the same sex only), South Carolina and Virginia – carrying a maximum penalty of life in prison (Idaho). In Puerto Rico the law stated that anyone who “has sexual intercourse with people of the same sex or commits the crime against nature with a human being” may face 10 years’ imprisonment.

<sup>53</sup> See Amnesty International, *Stonewalled – still demanding respect. Police abuses against lesbian, gay, bisexual and transgender people in the USA*, Index: AMR 51/001/2006, p.46 and note 83, p.80.

<sup>54</sup> Section 925, Article 125. The policy operating in the military – “Don’t Ask, Don’t Tell, Don’t Pursue, Don’t Harass” – is a federal law (Public Law 103-160, 10 USC § 654). It would take an act of Congress to change it. For more detail see the Servicemembers Legal Defense Network, [www.sldn.org/](http://www.sldn.org/), and the resources available at the Michael D. Palm Center, at the University of California, Santa Barbara, <http://www.palmcenter.org/>, accessed 19 May 2008 and the Stanford University Page on “Don’t Ask, Don’t Tell”, <http://dont.stanford.edu/>, accessed 19 May 2008.

<sup>55</sup> Deborah Cameron and Don Kulick, *Language and Sexuality*, Cambridge University Press, 2003.

<sup>56</sup> The American Psychiatric Association had removed homosexuality as a disorder from the “Sexual Deviancy” section of the *Diagnostic and Statistical Manual of Mental Disorders* in 1973 (2<sup>nd</sup> edition). In 1992, the World Health Organization replaced its categorization of homosexuality as a mental illness. Several states then followed suit.

<sup>57</sup> Article 200, paragraph 5.

Article 200, paragraph 1(1), of the Romanian Penal Code adopted in 1968, was reviewed by the Constitutional Court of Romania in 1994 and modified to read, “Sexual relations between persons of the same sex committed in public are punishable by one to five years’ imprisonment.” The court ruling allowed for the prosecution of only those acts which were “committed in public or produced public scandal”. However, the ruling did not provide guidelines for applying these standards, nor did it define “public scandal”. Therefore the enforcement of the law continued to lead to imprisonment of adults solely for engaging in consensual same-sex relations in private.

In October 1993, Romania was accepted as a member of the Council of Europe on condition that it brought several aspects of domestic law and practice into line with the European Convention for the Protection of Human Rights and Fundamental Freedoms. One of the conditions stipulated that the Penal Code should be amended so that homosexual acts in private between consenting adults were no longer penalized. A revision of the Penal Code, including Article 200, paragraph 1, began in the autumn of 1993.

Article 200 was repealed in 2001.

<sup>58</sup> Human Rights Watch and the International Gay and Lesbian Human Rights Commission, *Public Scandals: Sexual Orientation and Criminal Law in Romania*, HRW and IGLHRC, New York, 1998, p.60, <http://www.hrw.org/reports97/romania/>, accessed 19 May 2008.

- <sup>59</sup> “Sri Lanka’s Press Council Attacks Lesbianism”, *BBC Online News*, 2 June 2000.
- <sup>60</sup> “Kampala’s notorious lesbians unearthed”, *Red Pepper*, 8 September 2006.
- <sup>61</sup> See also, Human Rights Watch, *Uganda: State Homophobia Threatens Health and Human Rights. Government Persecution Contributing to HIV Pandemic*, 23 August 2007, <http://hrw.org/english/docs/2007/08/22/uganda16729.htm>, accessed 19 May 2008, and *Uganda: Rising Homophobia Threatens HIV Prevention, Uganda: Rising Homophobia Threatens HIV Prevention. US Should Halt Role in Funding Prejudice and Fear*, 11 October 2007, <http://hrw.org/english/docs/2007/10/11/uganda17081.htm>, accessed 19 May 2008.
- <sup>62</sup> Anissa Hélie, “Holy Hatred”, *Reproductive Health Matters* 12(23), 2004, pp.120–124.
- <sup>63</sup> Committee on Economic, Social and Cultural Rights (CESCR), General Comment 14, The right to the highest attainable standard of health, U.N. Doc. E/C.12/2000/4 (2000); Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2004/49, 16 February 2004.
- <sup>64</sup> See for example, *Sutherland v. United Kingdom*, (1997) 24 EHRR CD22 (European Commission of Human Rights).
- <sup>65</sup> United Nations, Committee on the Rights of the Child, General Comment No. 4 (2003) on Adolescent Health and Development, para.2.
- <sup>66</sup> D. Evans 1995, 126, quoted in Diane Richardson, “Constructing sexual citizenship: theorizing sexual rights”, *Critical Social Policy* 20(1), 2000, p.119 (D. Richardson, *Constructing sexual citizenship*).
- <sup>67</sup> Human Rights Committee, Communication No. 61/1979, Finland, CCPR/C/15/D/61/1979, 2 April 1982, para.10.4 (*SETA v Finland*).
- <sup>68</sup> *SETA v Finland*, para.10.4.
- <sup>69</sup> Section 28 stated that — “(1) A local authority shall not— (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality; (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.” [http://www.opsi.gov.uk/acts/acts1988/Ukpga\\_19880009\\_en\\_1.htm](http://www.opsi.gov.uk/acts/acts1988/Ukpga_19880009_en_1.htm), accessed 19 May 2008. Following campaigning by Amnesty International and other organizations, the section was finally taken off the statute books in September 2003.
- <sup>70</sup> Committee on the Rights of the Child, Concluding observations: United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.188, October 9, 2002, para.43.
- <sup>71</sup> Committee on the Rights of the Child, General Comment No. 4, para.6.
- <sup>72</sup> Amnesty International, *Lithuania must respect, protect and fulfil the human rights of lesbian, gay, bisexual and transgender people*, Index: EUR 53/002/2007, 1 November 2007.
- <sup>73</sup> Amnesty International, *Poland: School bill would violate students’ and teachers’ rights and reinforce homophobia*, Index: EUR 37/001/2007, 20 March 2007.
- <sup>74</sup> Committee on the Rights of the Child, General Comment No. 4, para.23.



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<sup>75</sup> Human Rights Watch, *Hatred in the Hallways: Discrimination and Violence Against Lesbian, Gay, Bisexual and Transgender Students in U.S. Public Schools*, HRW, New York, 2001; Michel Dorais, *Mort ou fif: La face cachée du suicide chez les garçons*, 2001. [Michel Dorais with Simon Louis Lajeunesse, trans. Pierre Tremblay, *Dead boys can't dance: sexual orientation, masculinity, and suicide*. McGill-Queen's University Press, Montréal, 2004.]

<sup>76</sup> *Leung T C William Roy v. Secretary for Justice*, CACV No. 317 of 2005, 20 September 2006, [http://legalref.judiciary.gov.hk/lrs/common/ju/ju\\_body.jsp?DIS=54227&AH=&QS=&FN=&currpage](http://legalref.judiciary.gov.hk/lrs/common/ju/ju_body.jsp?DIS=54227&AH=&QS=&FN=&currpage), accessed 19 May 2008.

<sup>77</sup> See, for example: Human Rights Committee, Concluding observations: Greece, CCPR/CO/83/GRC, March 31, 2005, para. 19; Poland, CCPR/CO/82/POL, December 2, 2004, para. 18; Namibia, CCPR/CO/81/NAM, July 30, 2004, para. 22; Philippines, CCPR/CO/79/PHL, December 1, 2003, para.18; El Salvador, CCPR/CO/78/SLV, July 22, 2003, para. 16; Trinidad and Tobago, CCPR/CO/70/TTO, November 3, 2000, para. 11; United Kingdom of Great Britain and Northern Ireland, CCPR/C/79/Add.119, March 27, 2000, para. 14; Hong Kong, CCPR/C/79/Add.117, November 12, 1999, para. 15; Austria, CCPR/C/79/Add.103, November 9, 1998, para. 13; Zimbabwe, CCPR/C/79/Add.89, April 6, 1998, para. 24. Committee on Economic, Social and Cultural Rights, Concluding observations: Trinidad and Tobago, E/C.12/1/Add.80, 5 June 2002, para. 14; Hong Kong, E/C.12/1/Add.58, May 21, 2001, para. 15 (c). Committee on the Rights of the Child, Concluding observations: Overseas Territories, United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.135, October 16, 2000, paras. 25-26; Isle of Man, United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.134, October 16, 2000, paras. 22-23. See generally International Commission of Jurists, *International Human Rights References to Human Rights Violations on the Grounds of Sexual Orientation and Gender Identity*, 2d updated ed., October 2006, p.5, (ICJ, *International Human Rights References*).

<sup>78</sup> For example, Amnesty International, *United Kingdom: "Bolton 7" – prisoners of conscience if imprisoned*, Index: EUR 45/02/98, 18 February 1998; Amnesty International, *United Kingdom: Time to repeal anti-gay criminal laws*, Index: EUR 45/011/1998, 1 May 1998.

<sup>79</sup> P.C.W. Chan, "No, it is not just a phase", p.166.

<sup>80</sup> A. Narrain, *Queer*, p.55.

<sup>81</sup> Human Rights Watch, *Hated to Death: Homophobia, Violence and Jamaica's HIV/AIDS Epidemic*, HRW, New York, November 2004, <http://www.hrw.org/reports/2004/jamaica1104/jamaica1104.pdf>, accessed 19 May 2008.

<sup>82</sup> CESCR General Comment no. 14: The right to the highest attainable standard of health, 2000, para.11; Commission on Human Rights, Resolutions on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, 2003/28, 2004/27, 2005/24 (Resolution on the right to health).

<sup>83</sup> CESCR General Comment no. 14, para 8.

<sup>84</sup> *International Guidelines on HIV/AIDS and Human Rights*, 2006 consolidated version, Guideline 5, para. 22(h), [http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines\\_en.pdf](http://data.unaids.org/Publications/IRC-pub07/jc1252-internguidelines_en.pdf), accessed on 6 June 2008.

<sup>85</sup> M. Jacqui Alexander, "Redrafting Morality: The Postcolonial State and the Sexual Offences Bill of Trinidad and Tobago", in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds), *Third World Women and the Politics of Feminism*, Indiana University Press, Bloomington, 1991, pp. 133-152 (M.J. Alexander, *Redrafting Morality*). See also Dennis Altman, *Global Sex*, University of Chicago Press, Chicago, 2001 (D. Altman, *Global Sex*)

<sup>86</sup> See <http://www.pepfarwatch.org/>, accessed 19 May 2008.

<sup>87</sup> See, amongst others, "Stuck in the closet – gays left out of HIV/AIDS strategy", *Behind the Mask*, 17 March 2006, <http://www.mask.org.za/printpage.php?id=941>; Human Rights Watch, *The Less They Know, the Better: Abstinence-Only HIV/AIDS Programs in Uganda*, HRW, New York, March 2005, <http://www.hrw.org/reports/2005/uganda0305/uganda0305.pdf>

<sup>88</sup> Cary Alan Johnson, *Off The Map: How HIV/AIDS Programming Is Failing Same-Sex Practicing People In Africa*, International Gay and Lesbian Human Rights Commission, New York, 2007. For an overview of the global AIDS epidemic, see UNAIDS, *Report on the global AIDS epidemic 2006*, [http://www.unaids.org/en/HIV\\_data/2006GlobalReport/default.asp](http://www.unaids.org/en/HIV_data/2006GlobalReport/default.asp), accessed 19 May 2008.

<sup>89</sup> UNAIDS 2006 *Report on the Global AIDS Epidemic*, [http://data.unaids.org/pub/GlobalReport/2006/2006\\_GR\\_ANN1A-L\\_en.pdf](http://data.unaids.org/pub/GlobalReport/2006/2006_GR_ANN1A-L_en.pdf), accessed 19 May 2008.

<sup>90</sup> Amnesty International and Human Rights Watch, *Egypt: Spreading Crackdown on HIV Endangers Public Health Rights Violations Drive Those in Need Underground*, Index: MDE 12/001/2008, 15 February 2008, and *Egypt: New Indictments in HIV Crackdown; Persecuting People Living with HIV/AIDS Feeds the Epidemic*, Index: MDE 12/003/2008, 11 March 2008.

<sup>91</sup> UN Human Rights Committee, Communication No. 488/1992: Australia. CCPR/C/50/D/488/1992, 4 April 1994, para. 8.5 (*Toonen v. Australia*)

<sup>92</sup> S. Baudh, *Human Rights*, p.8

<sup>93</sup> Commission on Human Rights, Resolution 2003/28 on the right to health, preamble and para. 6. See also resolutions 2004/27 and 2005/24 and the Commission on Human Rights resolution 2004/46, Elimination of violence against women, paras.7, 8 and 10.

<sup>94</sup> See *Toonen v. Australia*, especially paras. 2.3-2.6.

<sup>95</sup> Meredith L. Weiss, "'We know who you are. We'll employ you': Non-discrimination and Singapore's bohemian dreams", in M.V. Lee Badgett and Jefferson Frank (eds), *Sexual Orientation Discrimination: An International Perspective*, Routledge, Abingdon, 2007, pp.164-176 (M.L. Weiss, "We know who you are").

<sup>96</sup> Li Xueying, "Traditional values rule but with space for gays", *The Straits Times*, 24 October 2007.

<sup>97</sup> The Singapore Penal Code criminalizes: "*Outrages on decency. 377A. Any male person who, in public or private, commits, or abets 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 punished with imprisonment for a term which may extend to 2 years.*"

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<http://www.repeal377a.com/>, accessed 19 May 2008. See also, International Gay and Lesbian Human Rights Commission, *Singapore Update: Law Against Homosexuals To Remain*, 24 October 2007, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=792>, accessed 19 May 2008

<sup>98</sup> *Women's Anti-Discrimination Committee Commends Singapore on Progress, but Presses it to Withdraw Reservations to Convention, Strengthen Domestic Legal Framework*, UN Press Release, 1 August 2007, <http://www.un.org/News/Press/docs/2007/wom1647.doc.htm>, accessed 19 May 2008.

<sup>99</sup> Amnesty International, *Republic of Ireland: Legislation decriminalizing homosexuality*, Index: EUR 29/05/93, 23 June 1993; *Norris v. Ireland* (Application no. 10581/83), Judgment, 26 October 1988, <http://cmiskp.echr.coe.int//tkp197/viewhbk.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=129&sessionId=10494826&skin=hudoc-en&attachment=true>, accessed 19 May 2008.

<sup>100</sup> See *Modinos v. Cyprus* (1993), Ser.A, No.259.

<sup>101</sup> *Toonen v. Australia*.

<sup>102</sup> Response by Ambassador/Permanent Representative of Nigeria, Mr. Joseph U. Ayalogu, to the Oral Report delivered by Philip Alston, Special Rapporteur on extrajudicial, summary or arbitrary executions at the Human Rights Council, dated 19 September 2006.

<sup>103</sup> Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Ms. Asma Jahangir, E/CN.4/2001/9, 11 January 2001, para.50.

<sup>104</sup> E/CN.4/2001/9, para.50.

<sup>105</sup> Amnesty International, USA (Oklahoma): Death penalty/Legal concern: Jay Wesley Neill. Index: AMR 51/175/2002, Urgent Action, 22 November 2002. The 10th Circuit panel agreed to reconsider its decision, but in December 2001 again upheld the death sentence by two votes to one. This time the two in the majority acknowledged that the prosecutor's comments had been "improper" and without "any legitimate justification", but decided that the outcome of the trial had not been affected. Judge Lucero again dissented, asking "*what is it that makes the comments more than merely improper? As prosecutors know, gays and lesbians are routinely subject to invidious bias in all corners of society...The openly gay defendant thus finds himself at a disadvantage from the outset of his prosecution. When a prosecutor directs the jury to make its guilt-innocence or life-death determination on the basis of anti-homosexual bias, that disadvantage is magnified exponentially and raises constitutional concerns. This is so because prosecutors occupy a position of trust, and their exhortations carry significant weight with juries... Justification for these remarks was unquestionably illegitimate. Exploiting his position of trust and spinning the reality of anti-gay prejudice to a pivotal position in the capital-sentencing phase, the prosecutor undermined the possibility that petitioner's sentence would be based on reason rather than emotion*". *Wesley v. Gibson*, No. 00-6024, slip op. at 5-10 (10th Cir. filed Dec. 7, 2001) (Lucero, J., dissenting). <http://www.ck10.uscourts.gov/opinions/00/00-6024.pdf>, accessed 19 May 2008.

<sup>106</sup> Tonya McClary, "Sexuality and capital punishment: the execution of Wanda Jean Allen", *AIUSA OUTfront Newsletter*, Winter 2002.

<sup>107</sup> S. Zuhur, *Gender, Sexuality and the Criminal Laws*.

<sup>108</sup> M.J. Alexander, *Redrafting Morality*, p.147.

<sup>109</sup> *Lawrence v. Texas*.

<sup>110</sup> Global Rights, *Violations of the Rights of lesbian, gay, bisexual and transgender persons in Barbados: A Shadow Report*, Global Rights, Washington DC, 2007.

<sup>111</sup> The description of section 23(1) of the Constitution, given in the State Party Report submitted to the Human Rights Committee by Barbados on 10 July 2006. See Consideration of Report Submitted by Barbados to the Human Rights Committee, UN Doc. CCPR/C/BRB/3, September 25, 2006, para. 91. In their concluding observations, the Human Rights Committee stated that "[t]he Committee expresses concern over discrimination against homosexuals in the State party, and in particular over the criminalizing of consensual sexual acts between adults of the same sex. (art. 26)" and recommended that "[t]he State party should decriminalize sexual acts between adults of the same sex and take all necessary actions to protect homosexuals from harassment, discrimination and violence." UN Doc. CCPR/C/BRB/CO/3/CRP.1, 26 March 2007, para.13.

<sup>112</sup> M.J. Alexander, *Redrafting Morality*, especially pp.138 and 145; Voices Against 377, Rights for All.

<sup>113</sup> Cynthia Rothschild, with Scott Long and Susana T. Fried, *Written Out: How sexuality is used to attack women's organizing*, International Gay and Lesbian Human Rights Commission (IGLHRC) and the Center for Women's Global Leadership (CWGL), New York, 2005, p.134. See also Robert Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights?", *Journal of Law and Equality* 1(2), 2002, pp. 125-154.

<sup>114</sup> From minutes taken by an official describe a meeting between British and Iranian MPs at the Inter-Parliamentary Union in May 2007, in Dominic Kennedy, "Gays should be hanged, says Iranian minister", *The Times (London)*, 13 November 2007, [http://www.timesonline.co.uk/tol/news/world/middle\\_east/article2859606.ece](http://www.timesonline.co.uk/tol/news/world/middle_east/article2859606.ece), accessed 19 May 2008.

<sup>115</sup> M.J. Alexander, *Redrafting Morality*, p.133.

<sup>116</sup> See Alan Bray, *Homosexuality in Renaissance England*, Gay Men's Press, London, 1982, cited in Emma Donoghue, *Passions Between Women: British Lesbian Culture 1668-1801*, HarperCollins, New York, 1993, p.274 note 75.

<sup>117</sup> S. Baudh, *Human Rights*, pp. 2 and 23.

<sup>118</sup> See <http://www.openletter377.com/>, accessed 21 September 2006.

<sup>119</sup> Committee on the Rights of the Child Concluding Observations: Overseas Territories, United Kingdom of Great Britain and Northern Ireland, CRC/C/15/Add.135, 16 October 2000, para.26. Article 2 of the Convention on the Rights of the Child, to which these concluding observations referred, states: "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without

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discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

<sup>120</sup> *Britain's Commitment to the Decriminalization of Homosexuality*, statement by Foreign Office Minister Ian McCartney, 17 May 2007, <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1179390975119&year=2007&month=2007-05-01>, accessed 19 May 2008.

<sup>121</sup> *McCoskar v The State* [2005] FJHC 500; HAA0085 & 86.2005 (26 August 2005), <http://www.paclii.org/fj/cases/FJHC/2005/500.html>, accessed 19 May 2008.

<sup>122</sup> *McCoskar v The State*.

<sup>123</sup> "Fiji: Pressure to amend Bill of Rights", 4 October 2006, <http://www.fijilive.com/news/show/news/2006/10/04/fijilive1.html>, accessed 21 November 2006.

<sup>124</sup> Ignacio Saiz, "Bracketing sexuality: human rights and sexual orientation – a decade of development and denial at the UN", *Health and Human Rights* 7(2), 2004, pp.49-80.

<sup>125</sup> Anwar Ibrahim, *The Asian Renaissance*, Times Books, Singapore, 1996, p.28, quoted in D. Altman, *Global Sex*, p. 129. Anwar Ibrahim was finally released in 2004 when Malaysia's Federal Court upheld the final appeals of the former deputy prime minister and his adopted brother, Sukma Darmawan, see Amnesty International, *Malaysia: Anwar Ibrahim's release renews confidence in judicial independence*, Index: ASA 28/013/2004, 2 September 2004.

<sup>126</sup> M.L. Weiss, "We know who you are", p.165.

<sup>127</sup> See International Gay and Lesbian Human Rights Commission, *Cameroon: Public Homophobia Increases on the Eve of Sodomy Trial*, 2 March 2006, <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=633>, accessed 19 May 2008.

<sup>128</sup> Mohammed Al A'ali, "Gays to face new clamp", *Gulf Daily News*, 14 February 2008, <http://www.gulf-daily-news.com/Story.asp?Article=208647&Sn=BNEW&IssueID=30331>, accessed 19 May 2008.

<sup>129</sup> Amnesty International, *Crimes of hate, conspiracy of silence*.

<sup>130</sup> See discussion in Catherine Dauvergne and Jenni Millbank, "Applicants S396/2002 and S395/2002, a gay refugee couple from Bangladesh", *Sydney Law Review* 6, 2003, <http://www.austlii.edu.au/au/journals/SydLRev/2003/6.html>, accessed 19 May 2008.

<sup>131</sup> Human Rights Watch, *Netherlands, Sweden Must Not Return Gay and Lesbian Asylum Seekers to Iran*, 10 October 2006. Despite those comments by then Immigration Minister Rita Verdonk, the Dutch government subsequently granted special asylum rights to all lesbian and gay Iranians, treating them as a special group – meaning, no deportations and no

obligation to prove that they left their country because of the government. See “Dutch Grant Special Asylum Rights to Gay Iranians”, *Reuters*, 18 October 2006.

<sup>132</sup> In December the Migration Court of Appeal declined to hear an appeal against the lower court's decision, which therefore became final. See Amnesty International, *Annual Report 2007*, Sweden.

<sup>133</sup> House of Lords Hansard records for 18 March 2008, <http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldhansrd/text/80318-0002.htm>, accessed 19 May 2008.

<sup>134</sup> See for example, National Center for Lesbian Rights, *The Challenges to Successful Lesbian Asylum Claims*, 2007, [http://www.nclrights.org/site/DocServer/challenges\\_lesbian\\_asylum\\_cases.pdf?docID=1142](http://www.nclrights.org/site/DocServer/challenges_lesbian_asylum_cases.pdf?docID=1142), accessed 19 May 2008.

<sup>135</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention, and/or Its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002, p. 17.

<sup>136</sup> United Nations High Commissioner for Refugees, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HRC/GIP/02/01, 7 May 2002, p. 18.

<sup>137</sup> Convention on the Elimination of All Forms of Discrimination against Women – States Parties as of 1 June 2007, <http://www.un.org/womenwatch/daw/cedaw/states.htm>, accessed 19 May 2008.

<sup>138</sup> Article 5: “States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;”

<sup>139</sup> The outcome document of the Fourth World Conference on Women, A/CONF.177/20, 17 October 1995.

<sup>140</sup> Amnesty International, *UN Commission on Human Rights: Universality under threat over sexual orientation resolution*, Index: IOR 41/013/2003, 22 April 2003.

<sup>141</sup> Amnesty International, *UN Commission on Human Rights: Sexual rights are human rights*, Index: POL 30/020/2004, 21 April 2004.

<sup>142</sup> Statement of Louise Arbour, High Commissioner for Human Rights, delivered at a parallel event launching the Yogyakarta Principles, hosted by the missions of Brazil, Argentina and Uruguay during the Third Committee of the UN General Assembly, New York, 7 November 2007.

<sup>143</sup> See for example: Concluding observations by the Human Rights Committee: Chile (CCPR/C/79/Add.104), 1999, para.20; Romania (CCPR/C/79/Add.111), 1999, para.16.

<sup>144</sup> See for example: Concluding observations by the Human Rights Committee: Poland (CCPR/C/79/Add.110), 1999, para.23; Concluding observations by the Committee on Economic, Social and Cultural Rights: China (Hong Kong Special Administrative Region) (E/C.12/1/Add.58), 2001, paras.15(c) and 31; Ireland (E/C.12/1/Add.35), 1999, para.5; Algeria (CCPR/C/DZA/CO/3/CRP.1) 2007, para.26; Committee on Economic, Social and Cultural Rights, General Comment No 15, E/C.12/2002/11, January 20, 2002, para.13; General Comment No 14, E/C.12/2000/4, August 11, 2000, para.18. Committee on the Rights of the Child, General Comment No 4, CRC/GC/2003/4, July 1, 2003, para.6; General Comment No 3, CRC/GC/2003/3, March 17, 2003, para.8. Reports of the Working Group on arbitrary detention E/CN.4/2004/3, December 15, 2003, para.73; E/CN.4/2003/8, December 16, 2002, paras.68-69 and 76. Opinions adopted by the Working Group on arbitrary detention No 7/2002, Egypt, E/CN.4/2003/8/Add.1, January 24, 2003. See also Study on non-discrimination as enshrined in article 2, paragraph 2, of the International Covenant on Economic, Social and Cultural Rights, Working paper prepared by Emmanuel Decaux, E/CN.4/Sub.2/2004/24, June 18, 2004, para. 22.

<sup>145</sup> See for example: Human Rights Committee, Concluding observations, Ecuador, CCPR/C/79/Add.92, August 18, 1998, para.8, and CCPR/C/84/Add.8, January 19, 1999, paras.182-183; Kenya, CCPR/CO/83/KEN, March 28, 2005, para.27; Egypt, CCPR/CO/76/EGY, November 28, 2002, para.19; Romania, CCPR/C/79/Add.111, July 28, 1999, para.16; Lesotho, CCPR/C/79/Add.106, April 8, 1999, para.13; Chile, CCPR/C/79/Add.104, March 30, 1999, para.20; Cyprus, CCPR/C/79/Add.88, April 6, 1998, para. 11; Sudan, CCPR/C/79/Add.85, July 29, 1997, para. 8; United States, A/50/40, October 3, 1995, para.287; Algérie, CCPR/C/DZA/CO/3/CRP.1, 1 novembre 2007, para.26. Committee on Economic, Social and Cultural Rights, Concluding observations, Cyprus, E/C.12/1/Add.28, December 4, 1998, para.7; Kyrgyzstan, E/C.12/1/Add.49, September 1, 2000, paras.17 and 30. Committee on the Elimination of Discrimination Against Women, Concluding observations, Kyrgyzstan, A/54/38, August 20, 1999, paras.127-128. Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2000/3, January 25, 2000, paras.57, 70 and 116. Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, July 3, 2001, para.20. Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression, E/CN.4/2002/75/Add.1, January 17, 2002, para.124. Reports of the Special Rapporteur on the situation of human rights in the Islamic Republic of Iran, E/CN.4/1999/32, December 28, 1998; E/CN.4/1996/59, March 21, 1996, para.44. Report of the Special Representative of the Secretary-General on the situation of human rights defenders, E/CN.4/2002/106/Add.1, March 12, 2002, para.154. Commission on Human Rights resolutions on the question of death penalty, E/CN.4/RES/2004/67, April 21, 2004, para.4 (f); E/CN.4/RES/2003/67, April 25, 2003, para.4 (d); E/CN.4/RES/2002/77, April 25, 2002, para.4 (c).

<sup>146</sup> The states signing onto the 2006 statement were: Albania, Andorra, Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Netherlands, New Zealand, Norway, Panama, Peru, Poland, Portugal, the former Yugoslav republic of Macedonia, the Republic of Korea, the Republic of Moldova, Romania,

Serbia, Spain, Slovakia, Slovenia, Sweden, Switzerland, Timor-Leste, Ukraine, the United Kingdom, the United States of America, and Uruguay. The 2005 statement was co-signed by 31 states: Andorra, Argentina, Austria, Belgium, Canada, Chile, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Iceland, Ireland, Luxembourg, Mexico, New Zealand, Netherlands, Norway, Portugal, Republic of Korea, Romania, Slovenia, Spain, Sweden, Switzerland, the UK, Uruguay and Venezuela.

<sup>147</sup> The *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf), accessed 19 May 2008.

<sup>148</sup> Overview provided by ILGA and ARC International.

<sup>149</sup> *NCGLE (National Coalition for Gay and Lesbian Equality) v. Minister of Justice*, CCT 11/98 (Constitutional Court of South Africa) (Sachs, J., concurring), 9 October 1998, para.116. (Sachs, Concurring Opinion).

<sup>150</sup> Hilary Charlesworth, "What are 'women's international human rights?'" in Rebecca J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, University of Pennsylvania Press, Philadelphia, 1994, pp.58-84.

<sup>151</sup> Sachs, Concurring Opinion, especially para.114.

<sup>152</sup> Sachs, Concurring Opinion, para.117.

<sup>153</sup> "Hong Kong Court rules that sodomy laws are unconstitutional", *International Herald Tribune*, 17 July 2007. <http://www.iht.com/articles/ap/2007/07/17/asia/AS-GEN-Hong-Kong-Anti-Gay-Laws.php>, accessed 19 May 2008.

<sup>154</sup> Articles 7 and 10 of the Universal Declaration of Human Rights, Articles 2(1), 3 and 26 of the International Covenant on Civil and Political Rights; Articles 2 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women; Articles 2, 5 and 7 of the International Convention on the Elimination of All Forms of Racial Discrimination; Articles 2 and 3 of the African Charter on Human and Peoples' Rights, Articles 1, 8(2) and 24 of the American Convention on Human Rights; Article 14 of the European Convention on Human Rights. See also discussion in *Commonwealth of Kentucky v. Jeffrey Wasson*, 842 SW 2d 487 (Ky 1992).

<sup>155</sup> Sachs, Concurring Opinion, especially paras.119 and 136.

<sup>156</sup> M.J. Alexander, *Redrafting Morality*, p.133.

<sup>157</sup> See Justice Stevens' dissenting opinion in *Bowers v. Hardwick*, 478 U.S. 186, cited in *Lawrence v. Texas* at 17. In *Toonen v. Australia*, the Human Rights Committee pointed out that the fact the laws were not being enforced implied that they were "*not deemed essential to the protection of morals in Tasmania*", para. 8.6. This is similar to international human rights law on freedom of expression, peaceful assembly and association which makes clear that something should not be restricted or prohibited simply on the grounds that something might shock, offend or disturb. Therefore, a peaceful assembly may not be restricted merely on the grounds that it might offend an individual or group. Moreover, states have an obligation to protect the right to peaceful assembly even if a peaceful gathering may attract



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violent counter-demonstrations. (See *Plattform "Arzte fur das Leben" v. Austria*, 21 June 1988, application no. 10126-82.)

<sup>158</sup> Human Rights Watch, *In a Time of Torture: The Assault on Justice in Egypt's Crackdown on Homosexual Conduct*, HRW 2004, note 279, p.79.

<sup>159</sup> See Human Rights Watch, *India: Repeal Colonial-Era Sodomy Law; Entrapment, Arrests Harm AIDS Prevention Efforts*, 11 January 2006, <http://hrw.org/english/docs/2006/01/11/india12398.htm>, accessed 19 May 2008; S. Baudh, *Human Rights*, p.3.

<sup>160</sup> See Sachs, Concurring Opinion, para.128.

<sup>161</sup> See D. Richardson, *Constructing sexual citizenship*.

<sup>162</sup> See for example, Amnesty International, *Europe: Lesbians and gay men march with pride to end prejudice*, 15 May 2008.

<sup>163</sup> Information from The Alliance Against Homophobia and Discrimination of Sexual Minorities, <http://lgbtact.org/english/>, accessed 19 May 2008.

<sup>164</sup> This changed in the EU with the ruling in *E.B. v France* (Application no. 43546/02), 22 January 2008, in which the court held by 10 votes to seven that the French authorities' had acted unlawfully in refusing, on the grounds of her sexual orientation, a lesbian's application to obtain authorization to adopt a child. See, <http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=827961&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649>, accessed 19 May 2008.

<sup>165</sup> See for example, Amnesty International, *Stonewalled – still demanding respect*.

<sup>166</sup> *"From the Valley to the Highlands"*, speech by Prime Minister Goh Chok Tong at the National Day Rally, 17 August 2003, <http://www.gov.sg/nd/ND03.htm>, accessed 19 May 2008.

<sup>167</sup> Amnesty International, *Honduras: Human rights violations against lesbian, gay, bisexual and transgender people*, Index: AMR 37/014/2003. In 2004, two other organisations La Comunidad Gay Sampedrana, el Grupo Kukulkan and Colectivo Violeta had their legal status (personería jurídica) suspended.

<sup>168</sup> According to information received from the legal representatives of Rainbow House, the NGO was again denied registration in April 2007 following a renewed application for registration by the activists to the Tiumen office. The second denial was based on the FRS' statement that the charter of the organization was not in line with the legal requirements, and that there were some irregularities in the paperwork. In November 2007, the court in Tiumen refused to consider the complaint, as the second refusal of the FRS in Tiumen to register the NGO no longer contained the allegation that the NGO was planning "extremist activities". The court also found that the denial to register the organization did not violate the constitutionally guaranteed right to freedom of association, because the founders of Rainbow House were still able to engage in activities, although not registered as a legal entity. See, Amnesty International, *Russian Federation: Freedom limited - the right to freedom of expression in Russia*, Index: EUR 46/008/2008.

<sup>169</sup> See amongst others, *Economic And Social Council Approves Consultative Status For Three Non-Governmental Organizations Focusing On Gay, Lesbian Rights*, UN Press Release, 11 December 2006, <http://www.un.org/News/Press/docs//2006/ecosoc6242.doc.htm>, accessed 19 May 2008.; *Committee on Non-Governmental Organizations Approves 17 Applications for Consultative Status, Defers Action on 16 Others*, UN Press Release, 22 January 2008, <http://www.un.org/News/Press/docs//2008/ecosoc6317.doc.htm>, accessed 19 May 2008.; *Gaining the right to speak in our name at the UN: Lesbian, gay, bisexual and transgender groups still face discrimination in accessing UN consultative status*, ILGA press release, 13 February 2008, [http://www.ilga.org/news\\_results.asp?LanguageID=1&FileID=1142&ZoneID=7&FileCategory=44](http://www.ilga.org/news_results.asp?LanguageID=1&FileID=1142&ZoneID=7&FileCategory=44), accessed 19 May 2008.

<sup>170</sup> Kaye Wellings, Martine Collumbien, Emma Slaymaker, Susheela Singh, Zoé Hodges, Dhaval Patel and Nathalie Bajos, "Sexual behaviour in context: a global perspective", *The Lancet* 368(11), 2006, p. 1718.

<sup>171</sup> Numerous reports by the expert bodies of the UN have documented concerns about human rights violations committed against human rights defenders working on sexual rights, for example: reports of the Special Rapporteur on extrajudicial, summary or arbitrary executions, E/CN.4/2002/74, January 9, 2002, para. 63; E/CN.4/2001/9, January 11, 2001, para. 48; E/CN.4/2001/9/Add.1, January 17, 2001, para. 31. Reports of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, July 3, 2001, para. 25; E/CN.4/2004/56/Add.1, March 23, 2004, paras. 1878 and 1899; E/CN.4/2001/66, January 25, 2001, para. 1153; E/CN.4/2000/9, February 2, 2000, para. 151. Report of the Special Rapporteur on the independence of judges and lawyers, E/CN.4/1998/39, February 12, 1998, para. 43. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, E/CN.4/2005/51/Add.1, February 2, 2005, para. 50. Report of the High Commissioner for Human Rights on the situation of human rights in Sierra Leone, E/CN.4/2005/113, February 2, 2005, para. 8. Reports of the Special Representative of the Secretary-General on the situation of human rights defenders, E/CN.4/2005/101, December 13, 2004, paras. 27, 46 and 94; E/CN.4/2004/94/Add.3, March 23, 2004, paras. 238, 481 and 487; E/CN.4/2003/104/Add.1, February 20, 2003, para. 284; E/CN.4/2002/106, February 27, 2002, paras. 51, 61, 83, 104 and 115; E/CN.4/2002/106/Add.2, April 24, 2002, paras. 172-173; E/CN.4/2001/94, January 26, 2001, para. 89 (g). Report of the Secretary-General on human rights defenders, A/55/292, August 11, 2000, para. 7. Working paper on further proposals for the work of the World Conference submitted by Mr. Paulo Sérgio Pinheiro in his capacity as the representative of the Sub-Commission at the Preparatory Committee and the World Conference, A/CONF.189/PC.2/19/Add.1, March 14, 2001, para. 5. Source ICJ, *International Human Rights References*, p.10.

<sup>172</sup> Report of the Special Representative of the Secretary General on Human Rights Defenders, E/CN.4/2001/94, para.89(g).

<sup>173</sup> C. Browning, *Changing Theories of Lesbianism*, p.24.

<sup>174</sup> See M.J. Alexander, *Redrafting Morality*, p.147.

<sup>175</sup> Jeffrey Weeks, "Fateful Moments: Wolfenden, Identity, Citizenship", Plenary lecture at the conference *Wolfenden50: Sex/life/politics in the British World, 1945-1960*, King's College London, 28 June 2007; see also Jeffrey Weeks, *The World We Have Won: The Remaking of Erotic and Intimate Life*, Routledge, London, 2007.

<sup>176</sup> Some of these are drawn from the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, see <http://www.yogyakartaprinciples.org/>, accessed 19 May 2008.

<sup>177</sup> In December 2007 the UN General Assembly endorsed the call for a worldwide moratorium on executions by an overwhelming majority. The resolution enjoyed strong cross-regional support and was adopted by 104 countries voting in favour, 54 against and 29 abstentions. This landmark decision by the UN's highest political body is a clear recognition by states of the growing international trend towards abolition of the death penalty. See UN Doc.A/C.3/62/L.29; Amnesty International, *UN overwhelmingly backs call to suspend executions*, Index: IOR 41/2007, 18 December 2007.

<sup>178</sup> UN Doc.A/C.3/62/L.29.

<sup>179</sup> Article 341: "Sera puni d'une flagellation de quatre-vingts coups de fouet et interdit de témoignage jusqu'à sa réhabilitation judiciaire, toute personne majeure et saine d'esprit qui aura, soit par écrit intelligible, soit par parole audible ou métaphorique avouée, accusé un musulman d'être coupable du crime d'adultère, d'homosexualité ou d'être enfant naturel."

## **LOVE, HATE AND THE LAW**

### **DECRIMINALIZING HOMOSEXUALITY**

By institutionalizing discrimination, laws criminalizing homosexuality reinforce systemic disadvantage of lesbian, gay, bisexual people and transgender people. The laws act as an official incitement to or justification for violence against them, whether in custody, in prison, on the street or in the home. These laws allow law enforcement officials to invade the private residences of individuals alleged to be engaging in consensual same-sex sexual relations. They can result in impunity for arbitrary arrests on the basis of allegations about sexual orientation, rumours of sexual behaviour or objection to gender presentation, with few, if any, consequences for torture or other ill-treatment. Homophobic and transphobic individuals or groups take these laws as permission to target lesbian, gay, bisexual and transgender people, organizations and events. Survivors of human rights abuses may have no recourse to justice and be deprived of access to redress. Without the fundamental protection of legality, it is impossible for activists to form organizations and campaign for the right to engage in consensual same-sex practices, or even to meet in public. Even their use of the internet in private can be used in prosecutions against them.

Amnesty International considers that individuals imprisoned solely on the basis of their actual or presumed sexual orientation or gender identity or expression – including those individuals prosecuted for having sex in circumstances which would not be criminal for heterosexuals – are prisoners of conscience, and should be immediately and unconditionally released.

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