

INTERNATIONAL REGULATION OF SEXUAL ORIENTATION, GENDER IDENTITY, AND SEXUAL ANATOMY

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I. INTRODUCTION

Lesbian, gay, bisexual, transgender, and intersex (“LGBTI”)¹ persons continue to experience human rights violations directly linked to lack of acceptance by society and Nation States of their sexual orientation,² gender expression,³ and/or gender identity.⁴ The purpose of this Article is to provide (1) a survey of international and foreign domestic laws that positively or negatively impact the LGBTI community, and (2) an analysis of the conflicts or tensions between international legal obligations and foreign domestic laws in different countries and regions. The Article focuses on practical considerations for the wide range of legal issues relating to the international regulation of sexual orientation and gender identity. Although these issues touch on numerous areas of legal doctrine—including criminal law, family law, equal protection, privacy, and freedom of expression—this Article’s scope provides only an introduction to the current legal climate affecting various aspects of the global LGBTI community members’ lives.

Part II of this Article provides an overview of current international human rights law as it pertains to recognition of LGBTI rights. It focuses on global perspectives towards persons identifying as LGBTI by examining countries’ obligations in the context of a variety of issues, such as employment discrimination, access to public amenities, and protection from homophobic and transphobic crimes. In analyzing recent decisions emerging from regional and international human rights bodies, this Part serves as a starting point for understanding the regulatory framework addressing sexual orientation and gender identity. Part III

1. The terms used throughout this Article conform to the Yogyakarta Principles. See THE INT’L COMM’N OF JURISTS & THE INT’L SERV. FOR HUM. RTS. THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (2007), <https://perma.cc/4ATE-PMDG> [hereinafter YOGYAKARTA PRINCIPLES]. The Yogyakarta Principles were developed at a conference of international legal scholars in Yogyakarta, Indonesia from Nov. 6–9, 2006. *Id.* at 9. The Yogyakarta Principles plus 10 was adopted on Nov. 10, 2017, to supplement the Yogyakarta Principles. See THE INT’L COMM’N OF JURISTS & THE INT’L SERV. FOR HUM. RTS., THE YOGYAKARTA PRINCIPLES PLUS 10: ADDITIONAL PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES (2017), <https://perma.cc/5CUD-9R23> [hereinafter YOGYAKARTA PRINCIPLES PLUS 10].

2. Sexual orientation refers to “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” See YOGYAKARTA PRINCIPLES, *supra* note 1, at 6 n.1; see also YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 6 (affirming the 2007 version’s definition of sexual orientation).

3. Gender expression is “[h]ow a person expresses their own gender to the world, such as through names, clothes, how they walk, speak, communicate, societal roles and their general behaviour.” U.N. EDUC., SCI. & CULTURAL ORG., OUT IN THE OPEN: EDUCATION SECTOR RESPONSES TO VIOLENCE BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY/EXPRESSION 10 (2016), <https://perma.cc/5WWU-ARPM> [hereinafter UNESCO, SUMMARY REPORT].

4. Gender identity refers to “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech, and mannerisms.” YOGYAKARTA PRINCIPLES, *supra* note 1, at 6 n.2; see also YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 6 (affirming the 2007 version’s definition of gender identity).

analyzes the foreign domestic laws affecting LGBTI persons living in Africa, the Americas, Europe, and the Middle East. The analysis is divided into three Sections, with each region addressed separately. Section A discusses current legal obstacles facing the international LGBTI community. Section B describes the legal developments toward LGBTI equality, in both international human rights law and foreign domestic law, and addresses pending legislation where relevant. Finally, Section C discusses countries that have domestic laws that conflict with the international human rights conventions or charters to which they are legally bound.

This Article has several important limitations. First, some data may be missing due to language barriers, including reports, policies, or news articles published in local languages. Second, there may be data or program evaluations that were not available in the public domain that are critical to understanding the situation and response. Third, intersections of ethnicity, class, age, and other areas of marginalization may further compound the severity of the challenges discussed. Finally, this Article does not attempt to provide international or region-specific recommendations, policies, or opinions for the best way to further LGBTI rights.

The findings of this global review aim to contribute to a better understanding of the legal obstacles and developments currently facing the global LGBTI community. Such a broad overview is insufficient to dissect the complexity and dynamism of each issue raised; instead, the summaries are intended as a helpful aid to all those working to advance the fundamental rights of LGBTI individuals.

II. CURRENT STATE OF INTERNATIONAL LAW

A. YOGYAKARTA PRINCIPLES⁵

The fundamental aim of the Yogyakarta Principles is to improve the interpretation of human rights treaties and ensure that the protections laid out in them extend to gender identity and sexual orientation.⁶ For instance, self-definition of both gender identity and sexual orientation free from coercion is a basic right under the Yogyakarta Principles.⁷ Moreover, the Principles assert that all people should be protected from persecution and the denial of basic human rights based on sexual orientation or gender identity.⁸ However, the Principles are not a treaty

5. The Yogyakarta Principles have signatories representing countries from Asia, Europe, Africa, Australia, and the Americas; however, the signatories are not heads of state. See YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 26–27.

6. See Lucie Cviklová, *Advancement of Human Rights Standards for LGBT People Through the Perspective of International Human Rights Law*, 3(2) J. COMPAR. RSCH. ANTHROPOLOGY & SOCIO. 45, 48 (2012). The first Yogyakarta Principle states that “[a]ll human beings are born free and equal in dignity and rights.” YOGYAKARTA PRINCIPLES, *supra* note 1, at 10.

7. See Neela Ghoshal & Kyle Knight, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, HUM. RTS. WATCH (2016), <https://perma.cc/3D48-NKXE>.

8. See YOGYAKARTA PRINCIPLES, *supra* note 1, at 10–11, 27–28; YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 17, 22–23.

and therefore are not legally binding international human rights law.⁹ Rather, they are guidelines which remind signatories of the Universal Declaration of Human Rights (“UDHR”) and the International Covenant on Civil and Political Rights (“ICCPR”) of their responsibilities to those who face discrimination on the basis of sexual orientation.¹⁰ The Principles individually address such topics as: the right to privacy; the right to life; the right against discrimination; and the right to freedom of expression.¹¹ Advocates hope clear communication of expectations for the treatment of the LGBTI community could positively impact countries’ willingness to bear the burden of ensuring that these rights are protected.¹²

B. UN RESOLUTIONS

The UDHR states that “[a]ll humans are born free and equal in dignity and rights.”¹³ Since 2010, the United Nations (“UN”) has adopted multiple resolutions relating to the rights of the LGBTI community and the obligations of UN Member States (“States”) to protect people from discrimination and persecution based on gender identity and sexual orientation.¹⁴ In 2010, the Secretary General made an official statement against all discriminatory practices based on sexual orientation.¹⁵ Five resolutions dedicated specifically to the rights of the LGBTI community passed between 2011 and 2022, though none passed unanimously.¹⁶ In 2011, Resolution 17/19 was passed, commissioning a study to investigate the prevalence of acts of violence based on sexual orientation and gender identity.¹⁷ In 2014, Resolution 27/32 was passed, requesting the High Commissioner to update the report from the previously commissioned study with the goal of sharing effective practices to protect against discrimination and violence.¹⁸ In 2016,

9. Cviklová, *supra* note 6, at 48.

10. *Id.* at 58.

11. See YOGYAKARTA PRINCIPLES, *supra* note 1, at 10–14, 24, 29–30 (establishing Principle 2: The Rights to Equality and Non-Discrimination; Principle 4: The Right to Life; Principle 6: The Right to Privacy; Principle 19: The Right to Freedom of Opinion and Expression; and Principle 27: The Right to Promote Human Rights); YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 13–14, 17, 18, 21, 24 (establishing Principle 36: The Right to Enjoyment of Human Rights in Relation to Information and Communication Technologies and updating Principles 2, 6, 19, and 27). Principle 10 includes the right to freedom from torture and cruel, inhuman and degrading punishment, and Principle 33 includes the right to freedom from criminalization and sanction on the basis of sexual orientation, gender identity, gender expression or sex characteristics. YOGYAKARTA PRINCIPLES, *supra* note 1, at 17; YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 11, 19.

12. See Cviklová, *supra* note 6, at 48; YOGYAKARTA PRINCIPLES, *supra* note 1, at 7.

13. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

14. See *infra* notes 15, 17, 19.

15. U.N. High Commissioner for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity* ¶ 3, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) [hereinafter H.R.C. Report 19/41].

16. See *infra* notes 17, 18, 19, 21, 22, 23.

17. Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19, at 1 (July 14, 2011).

18. Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32, at 2 (Oct. 2, 2014) (referencing H.R.C. Report 19/41, *supra* note 15).

an “Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity” was appointed for three years to identify “best practices and gaps” in existing measures and encourage the implementation of new measures to combat such violence and discrimination.¹⁹ The Expert was also to provide support for States and facilitate the cooperation of States, stakeholders, and services.²⁰ The mandate of this Independent Expert was extended for another three years in 2019,²¹ and for three more years in 2022.²²

In 2003, in its biennial General Assembly resolution on extrajudicial, summary or arbitrary executions, the UN called upon governments to properly investigate and charge those responsible for killings committed for discriminatory reasons, including for sexual orientation; gender identity was added in 2013.²³ In 2019, the Human Rights Council passed a resolution on the death penalty which said the death penalty should never be a punishment for homosexuality.²⁴ On December 16, 2021, a resolution about democracy and elections became the first

19. Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2, at 2 (June 30, 2016) (mandating the Expert also identify the root causes of and raise awareness on the violence and discrimination).

20. *Id.*

21. Human Rights Council Res. 41/18, U.N. Doc. A/HRC/RES/41/18, at 2 (July 19, 2019). Prior to this extension, the former Independent Expert, Vitit Muntarbhorn, issued one report and the current Independent Expert, Victor Madrigal-Borloz, issued two reports, which included three addendums about his country visits. Vitit Muntarbhorn, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/35/36 (Apr. 19, 2017); Victor Madrigal-Borloz, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/38/43 (May 11, 2018); Victor Madrigal-Borloz, *Report of the Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity on His Mission to Argentina*, U.N. Doc. A/HRC/38/43/Add.1 (Apr. 9, 2018); Victor Madrigal-Borloz, *Data Collection and Management as a Means to Create Heightened Awareness of Violence and Discrimination Based on Sexual Orientation and Gender Identity*, U.N. Doc. A/HRC/41/45 (May 14, 2019); Victor Madrigal-Borloz, *Visit to Georgia*, U.N. Doc. A/HRC/41/45/Add.1 (May 15, 2019); Victor Madrigal-Borloz, *Visit to Mozambique*, U.N. Doc. A/HRC/41/45/Add.2 (May 17, 2019).

22. Human Rights Council Res. 50/10, U.N. Doc. A/HRC/RES/50/10 (July 15, 2022) (recognizing explicitly that discrimination based on sexual orientation or gender identity is “compounded by, inter alia, race, ethnicity, socioeconomic status, disability or age, in private and public spaces, both online and offline”). Prior to this extension, the Independent Expert, Victor Madrigal-Borloz, issued three reports, which included two addendums about his country visits. Victor Madrigal-Borloz, *Practices of So-called “Conversion Therapy”*, U.N. Doc. A/HRC/44/53 (May 1, 2020); Victor Madrigal-Borloz, *Visit to Ukraine*, U.N. Doc. A/HRC/44/53/Add.1 (Apr. 27, 2020); Victor Madrigal-Borloz, *The Law of Inclusion*, U.N. Doc. A/HRC/47/27 (June 3, 2021); Victor Madrigal-Borloz, *The Right to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health of Persons, Communities and Populations Affected by Discrimination and Violence Based on Sexual Orientation and Gender Identity in Relation to the Sustainable Development Goals*, U.N. Doc. A/HRC/50/27 (Nov. 22, 2022); Victor Madrigal-Borloz, *Visit to Tunisia*, U.N. Doc. A/HRC/50/27/Add.1 (May 11, 2022).

23. G.A. Res. 57/214, Extrajudicial, Summary or Arbitrary Executions, ¶ 6 (Feb. 25, 2003); G.A. Res. 67/168, Extrajudicial, Summary or Arbitrary Executions, ¶ 6(b) (Mar. 15, 2013). *Accord* G.A. Res. 77/218, Extrajudicial, Summary or Arbitrary Executions, ¶ 7(b) (Jan. 5, 2023).

24. Human Rights Council Res. 42/24, U.N. Doc. A/HRC/RES/42/24, at 2–3 (Oct. 8, 2019) (“[U]nder no circumstances can the death penalty ever be applied as a sanction against specific forms of conduct, such as . . . homosexuality . . . and that States parties that retain the death penalty for such offences commit a violation of their international obligations.”).

resolution to reference “sexual orientation and gender identity” and be adopted with consensus.²⁵ In a report on the criminalization of same-sex sexual acts, the UN stated that “repealing laws that criminalize same-sex conduct and other laws used to punish LGBT people is an important step towards combating prejudice and protecting human lives.”²⁶ And, on April 4, 2024, the UN Human Rights Council passed its first resolution affirming the rights of intersex people, reaffirming that other pre-existing human rights frameworks like the UDHR do apply to intersex people too and mandating that the Office of the United Nations High Commissioner for Human Rights prepare a report on human rights violations against intersex people by the sixtieth session.²⁷

C. INTERNATIONAL JURISPRUDENCE

One of the most important cases concerning LGBTI rights in international jurisprudence, *Toonen v. Australia*, came from the Human Rights Committee in 1994.²⁸ In this case, the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of sexual orientation.²⁹ Specifically, the Committee interpreted the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any case concerning the prohibition against private homosexual behavior.³⁰

D. ASYLUM

The UDHR provides that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”³¹ The Yogyakarta Principles declare that a State shall not return a person to their country of origin where there is substantial risk of such treatment.³² The United Nations High Commissioner for Refugees’ (“UNHCR”) Guidelines for asylum follow this approach, recommending against even international flight or relocation alternatives if there is risk of persecution.³³ The Guidelines on International Protection No. 9 provides that a

25. G.A. Res. 76/176, ¶ 7 (Jan. 11, 2022); see Press Release, U.S. Mission to the U.N., Statement by Ambassador Linda Thomas-Greenfield on the First-Ever Consensus Adoption of a U.N. Resolution Referencing Sexual Orientation and Gender Identity (Dec. 16, 2021), <https://perma.cc/J4E4-A2TF>.

26. *Fact Sheet: Criminalization*, U.N. FREE & EQUAL, <https://perma.cc/K2C6-NQ4D>.

27. Hilary Power & Kyle Knight, *United Nations Passes Groundbreaking Intersex Rights Resolution*, HUM. RTS. WATCH (Apr. 4, 2024), <https://perma.cc/2BYB-PLT7>; Human Rights Council Res. 55/14, U.N. Doc. A/HRC/RES/55/14 (Apr. 4, 2024).

28. See *Toonen v. Australia*, Commc’n No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

29. See *Important International Jurisprudence Concerning LGBT Rights*, HUM. RTS. WATCH (May 25, 2009, 12:30 PM), <https://perma.cc/PQ9L-SNV2>; see also *Toonen*, Commc’n No. 488/1992 at 9.

30. See *Toonen*, Commc’n No. 488/1992 at 9; G.A. Res. 2200A, International Covenant on Civil and Political Rights, at 177 (Dec. 16, 1966).

31. See Universal Declaration of Human Rights, *supra* note 13, art. 5.

32. YOGYAKARTA PRINCIPLES, *supra* note 1, at 27; YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 22.

33. See U.N. High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶¶

State should not generally deny refugee recognition because an individual may have hidden their sexual orientation or gender identity.³⁴ The UN General Assembly adopted the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) in 1984 to address the issue of jurisdiction over torture claims—namely, whether each State should assume jurisdiction for acts of torture committed outside its territory by foreign nationals.³⁵ This jurisdictional principle was accepted and became Article 5 of CAT.³⁶ CAT prohibits States from returning asylum-seekers to a State where they would be subject to torture and recognizes torture may be inflicted for reasons “based on discrimination of any kind.”³⁷ The UNHCR Guidelines provide examples of torture that especially target LGBTI individuals and may qualify a person for asylum.³⁸

III. CURRENT STATE OF FOREIGN DOMESTIC LAW

A. LEGAL OBSTACLES FACING THE LGBTI COMMUNITY

1. Africa

Among African States, legal recognition of gender identity, sexual orientation, gender expression, and sex characteristics typically operates to the detriment of LGBTI-identified or -perceived individuals.³⁹ Not all African countries have laws that directly regulate sexual and gender identity or sexual activity.⁴⁰ Countries that do address sexual orientation, gender, or sexual identity are more likely to

51–56, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <https://perma.cc/X3PY-UPZD> [hereinafter UNHCR Guidelines].

34. *Id.* ¶ 59.

35. G.A. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984).

36. *Id.* art. 5.

37. *Id.* arts. 1, 3. The Committee Against Torture also recognizes that certain populations are “especially at risk of torture,” and thus, States must ensure laws pertaining to the obligations of CAT are “in practice applied to all persons, regardless of . . . gender, sexual orientation, [or] transgender identity.” Comm. Against Torture, Gen. Comment No. 2, ¶ 21, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

38. See UNHCR Guidelines, *supra* note 33, ¶¶ 20–21 (including rape, “efforts to change an individual’s sexual orientation or gender identity by force or coercion,” and “non-consensual medical and scientific experimentation”).

39. See LUCAS RAMÓN MENDOS, KELLYN BOTHA, RAFAEL CARRANO LELIS, ENRIQUE LÓPEZ DE LA PEÑA, ILIA SAVELEV, & DARON TAN, STATE-SPONSORED HOMOPHOBIA: GLOBAL LEGISLATION OVERVIEW UPDATE 13, 113, 325–26 (2020), <https://perma.cc/625X-S4F6> [hereinafter STATE-SPONSORED HOMOPHOBIA] (showing that the majority of countries in Africa have laws that criminalize same-sex sexual acts directly or through laws that prohibit “sodomy” or “indecent,” but few have laws that give positive rights or protections to LGBTI individuals). Throughout this Article, the term “same-sex” is used to describe relationships and sexual activity that is non-heterosexual. Even though this may not be the desired description for those who engage in non-heterosexual sexual activity, this is generally the means by which the state recognizes non-heterosexual sexual activity and relationships. See, e.g., *id.* at 114 (citing Laws of Burundi, No. 1/05, art. 567 (Apr. 22, 2009) (“[A]nyone who has sex with a person of the same sex. . . .”) [translated from French original]).

40. See, e.g., *id.* at 90–93 (noting that Benin, Burkina Faso, Djibouti, Mali, and Rwanda have never criminalized same-sex sexual activity).

criminalize individuals who engage in non-normative behavior or have non-normative identities rather than provide these individuals with rights or protections.⁴¹ Some African countries have adopted laws as recently as 2023, allowing State actors to arrest and jail people who are perceived to be in same-sex relationships, participate in same-sex sexual activity, or fail to display gender-typical behavior,⁴² despite not having or not enforcing these laws in the past.⁴³ Many believe that the laws' emergence or prominence in the past decade is in direct opposition to growing Western acceptance and public support of LGBTI individuals.⁴⁴

Outside of directly regulating what the State sees as same-sex sexual activity, many countries also regulate adjacent issues that affect LGBTI individuals. Many African countries have laws that affect: (1) required disclosure or criminalization of HIV status;⁴⁵ (2) criminalization of sex work;⁴⁶ (3) lack of legal gender or sex recognition for individuals who are transgender or intersex;⁴⁷ (4) forced anal examinations;⁴⁸ and (5) limited freedom of expression and association.⁴⁹ Despite the fact that many African countries have a history of cultural norms and practices that, from a Western perspective, appear to be not strictly heterosexual or to

41. *Id.* at 325–26. Twenty-seven states have statutes on the books that criminalize same-sex sexual activity directly or indirectly, as compared to three States (Angola, Mauritius and South Africa) that offer general protection against discrimination for LGBTI individuals, and nine States (Angola, Botswana, Cabo Verde, Liberia, Mauritius, Mozambique, São Tomé and Príncipe, Seychelles, and South Africa) that offer legal protection from employment discrimination—two of which (Liberia and Mauritius) still criminalize same-sex sexual activity. *Id.*; accord AMNESTY INT'L, MAKING LOVE A CRIME: CRIMINALIZATION OF SAME-SEX CONDUCT IN SUB-SAHARAN AFRICA 18 (2013) [hereinafter MAKING LOVE A CRIME].

42. See, e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 115 (documenting that Chad added a law prohibiting “sexual relations with a person of the same gender” to its penal code in 2017) (citing CODE PÉNAL [PENAL CODE] art. 354 (Chad)); Colin Stewart, *Wave of Homophobic Legislation Hits Africa*, ERASING 76 CRIMES (Feb. 28, 2023), <https://perma.cc/G5KU-KTRY> (reporting on anti-LGBTQ legislation in Uganda, Kenya, Ghana, and Senegal); *Uganda Enacts Harsh Anti-LGBTQ Law Including Death Penalty*, REUTERS (May 30, 2023), <https://perma.cc/7KYY-CKQS>. In February 2024, Ghana's parliament passed the “Human Sexual Rights and Family Values Act,” which not only criminalizes same-sex sexual activity, but broadens the criminal sanctions against individuals simply for identifying as LGBTI or supporting LGBTI rights. The bill is currently awaiting approval from the President, though several human rights experts and organizations have urged him to veto the bill. See David McKenzie, *Ghana's Parliament Passes Anti-Homosexuality Bill*, CNN (Feb. 29, 2024), <https://perma.cc/F89S-SUHN>; *Ghana: President Should Veto Anti-LGBT Bill*, HUM. RTS. WATCH (Mar. 5, 2024), <https://perma.cc/9DKF-2AMR>.

43. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 115 (noting that prior to 2017, the “legal situation was unclear in Chad” and that in 2016, a bill to criminalize same-sex relations failed to pass); Moïse Manoël-Florisse, *Niger Leader Plans to Outlaw Gay Sex, Execute Married Same-Sex Couples*, ERASING 76 CRIMES (Jan. 23, 2023), <https://perma.cc/X3AC-HGA3> (reporting Mohamed Bazoum, president of Niger, has plans to criminalize same-sex affection, marriage, clubs, and groups with punishments including the death penalty, in a state where “same-sex intimacy is currently legal”).

44. Norimitsu Onishi, *U.S. Support of Gay Rights in Africa May Have Done More Harm Than Good*, N.Y. TIMES (Dec. 20, 2015), <https://perma.cc/U7WC-A58B>.

45. See discussion *infra* part III.A.1.c.

46. See discussion *infra* part III.A.1.d.

47. See discussion *infra* part III.A.1.e.

48. See discussion *infra* part III.A.1.f.

49. See discussion *infra* part III.A.1.g.

be otherwise non-normative,⁵⁰ most countries do not address these practices in their legal frameworks.⁵¹ All but one African country (South Africa)⁵² fail to legally recognize same-sex relationships in the same way that they recognize heterosexual relationships, and all but South Africa and Botswana fail to legally recognize an individual's gender change.⁵³ Outside of these limited instances, LGBTI individuals have historically been neither recognized nor addressed by the law.

a. Criminalization of Same-Sex Sexual Activity. Thirty-two countries in Africa criminalize consensual same-sex sexual activity either by directly using the phrase “same-sex” or through statutes that refer generally to “unnatural offences,” (sic) “sodomy,” or “gross indecency.”⁵⁴ Sixteen African countries use the words “same-sex,” “homosexuality” or variations on “between people of the same sex” in their statutes to make clear that they target non-heterosexual behavior.⁵⁵ The statutes do not criminalize the romantic relationship between individuals; instead, what is criminalized is the occurrence of, or the perceived occurrence of, a sexual act.⁵⁶

Despite the fact that most African countries have criminalization statutes currently in effect, and most refuse to address UN recommendations to repeal these laws,⁵⁷ five out of the thirty-two countries have not enforced these laws or have

50. J. Oloka-Onyango, *Debating Love, Human Rights, and Identity Politics in East Africa*, 15 AFR. HUM. RTS. L.J. 28, 31 (2015) (pointing out that some cultures in East Africa use the term ‘kuchu’ to self-identify as someone with same-sex sexual or romantic preferences). “[T]he terms used in the LGBTI alphabet are rooted in culturally-specific norms and values that are not necessarily shared by African people. Hence it is important to both remember the foreign origins of such terms as well as to take note of the different and varied ways in which individuals and groups . . . identify themselves.” *Id.*

51. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 325–26.

52. *Id.* at 278, 292.

53. Alteration of Sex Description and Sex Status Act 49 of 2003 § 2 (S. Afr.); ALEX MÜLLER, LEGAL GENDER RECOGNITION IN BOTSWANA, 19, 23–25 (2020), <https://perma.cc/9EVA-5DRX>.

54. See generally STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25 (citing statutory text for each African country that criminalizes consensual same-sex sexual activities). The following States have criminalization statutes currently in effect: Algeria, Burundi, Cameroon, Chad, Comoros, Eritrea, Eswatini, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. *Id.* Egypt does not have a specific criminalization statute, but persecutes LGBTI individuals under its “law against debauchery.” *Id.* at 115.

55. Algeria, Burundi, Cameroon, Chad, Comoros, Eritrea, Ethiopia, Gambia, Guinea, Malawi, Mauritania, Nigeria, Senegal, Somalia, Togo, and Zimbabwe. *Id.* at 114–25.

56. *Id.*; see, e.g., PENAL CODE art. 409 (Som.) (“Whoever has carnal intercourse with a person of the same sex shall be punished. . . .”); PENAL CODE art. 567 (Burundi) (“Anyone who has sexual relations with a person of the same sex. . .”).

57. During the Third Cycle of the Universal Periodic Review, a review of human rights practices of UN member states, from 2017 to 2022, the following States refused to change or failed to address their laws criminalizing same-sex practices: Algeria, Cameroon, Egypt, Kenya, Libya, Mauritius, Morocco, Somalia, Tanzania, and Zambia. Liberia, Sierra Leone, and Togo indicated their openness to changing their restrictive laws. UPR Sexual Rights Database, SEXUAL RTS. INITIATIVE, <https://perma.cc/7SEW-CDKS> (choose “Criminal laws on same-sex sexual practices” from the “Issue” dropdown; then click

not sought to impose penalties on LGBTI individuals in recent years.⁵⁸ However, laws that remain in effect perpetuate a culture of violence, by both private and State actors, against individuals who are perceived to be gender non-conforming and/or participating in same-sex sexual activity by limiting or foreclosing the recourse available to those who are attacked based on such a perception.⁵⁹ The continued existence of these laws also often prevents the introduction of legal protections for LGBTI individuals in most instances.⁶⁰ Some African countries, like Uganda, where public opinion of LGBTI individuals is overwhelmingly negative, have seen a great deal of violence against LGBTI individuals.⁶¹ Even in countries where the law is not enforced, such as in Ethiopia, the fear of being stigmatized by one's community and the lack of anti-discrimination protections available in employment, access to health care, and activities of daily life cause many LGBTI individuals to live in fear.⁶²

In countries where the law is enforced, the confirmed occurrence of a sexual act is not necessarily the basis for such enforcement; rather, the inference of the sexual act's occurrence, either through rumor or perception of the individual's non-normative gender performance, is usually the basis for punishment.⁶³ In

"Show Advanced Filters"; then choose "Africa Group" from the "SuR Regional Group" dropdown; then choose "Third Cycle" from the "Cycle or Session" dropdown; then click "Apply").

58. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25. Comoros, Eritrea, Eswatini, Mauritius, and Namibia have not had any widely reported arrests or State-sponsored enforcement of these laws, though there may be residual violence stemming from public opinion and continued effect of these laws. *See generally id.* at 9, 13, 14, 113 (describing methodology of discovering and determining "enforcement").

59. Without legal protections in statute or in State action, violence and blackmail by private and State actors is effectively sanctioned and continues in many countries, including those that no longer criminalize same-sex sexual activity. *See, e.g., Côte d'Ivoire: Freedom in the World 2023*, FREEDOM HOUSE, <https://perma.cc/PJ7N-RLV5>.

60. Johanna Bond, *Gender and Non-Normative Sex in Sub-Saharan Africa*, 23 MICH. J. GENDER & L. 65, 117 (2016); *see also* MAKING LOVE A CRIME, *supra* note 41, at 20. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 325.

61. *See* Elias Biryabarema, *LGBT Ugandans Face Backlash as Parliament Launches Schools Investigation*, REUTERS (Mar. 3, 2023), <https://perma.cc/99HK-XZ8T>; Jake Naughton, *For Uganda's LGBTQ+ Community, Visibility Brings Violence*, PULITZER CTR. (Dec. 12, 2017), <https://perma.cc/L755-DQYJ>; Oloka-Onyango, *supra* note 50, at 36–37. For an example from another country, *see Cameroon: Rising Violence Against LGBTI People*, HUM. RTS. WATCH (May 11, 2022), <https://perma.cc/5DHZ-Q3Y2>.

62. *See* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., *Ethiopia 2022 Human Rights Report 46* (2022), <https://perma.cc/8RZ6-EZHU>; DUTCH COUNCIL FOR REFUGEES, *COUNTRY OF ORIGIN REPORT ETHIOPIA 59–60* (2016).

63. Queer theory scholars suggest that homophobia is actually rooted in a societal taboo against gender transgression. Bond, *supra* note 60, at 111. "They provide an excuse for the police and other State actors to harass and arrest individuals who, because of their dress or demeanour, they suspect of being lesbian, gay, bisexual, or transgender. Sexual behavior becomes synonymous with identity; the police do not wait for evidence of offences (sic) as defined in the law[,] and they arrest individuals simply on the basis that societal prejudice holds they are likely to commit them." MAKING LOVE A CRIME, *supra* note 41, at 21. Documented examples exist in Cameroon where "[i]n most cases arrests are made on the basis of appearance or because neighbors or family members denounce a person as 'homosexual,' rather than on evidence of the acts that are defined as offences (sic) in the law." *Id.* at 23; *see Cameroon: Freedom in the World 2023*, FREEDOM HOUSE, <https://perma.cc/R5ER-8VQ4>.

2015, two men were convicted under Morocco's criminalization statute based on a photograph, which showed them holding each other.⁶⁴ Likewise, most notable cases of prosecution for same-sex sexual activity involve what the State perceives as affection between two men,⁶⁵ and two African countries' laws explicitly criminalize same-sex sexual activity only between men.⁶⁶ This further suggests that the criminalized behavior is rooted in a gender taboo specific to male gender stereotyping, rather than in same-sex sexual behavior in general.⁶⁷

Confirmed consensual encounters between two people of the same sex also result in prosecution.⁶⁸ For example, in 2016, two men were convicted under Morocco's criminal statute after admitting to police that they had sex with each other.⁶⁹ If convicted of engaging in same-sex sexual activity, whether the sexual act is confirmed or just inferred, punishment can range from fines, to months to life in prison,⁷⁰ or even the death penalty.⁷¹ Such strict punishments have become law in several countries⁷²

64. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2016: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES* 471 (Arch Puddington, Jennifer Dunham, Elen Aghekyan, Bret Nelson, Sarah Repucci, & Tyler Royslance eds., 2016), <https://perma.cc/RJ9F-9PKM>.

65. See discussion *infra* part III.B.1.b.

66. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25.

67. “Gender dynamics are implicated in the discussion by the perceived subversion that same-sex erotics present to the dominant norms of sexuality that govern society.” Oloka-Onyango, *supra* note 50, at 31. Feminist theorist Julia Serano also suggests that homophobia is a direct negative reaction to an individual's failure to meet the societal expectation that men should act masculine, and women should act feminine. See JULIA SERANO, *WHIPPING GIRL* 13–14 (2d ed. 2016) (discussing oppositional sexism). This theory is evidenced by the fact that several States (three out of the thirty-two that criminalize or enforce laws banning same-sex sexual activity) do not equally apply the criminalization statute to perceived sexual activity between women. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25; see also Press Release, Amnesty Int'l, Tunisia: Sentencing of Six Men for Same-Sex Relations Highlights State's Entrenched Homophobia (Dec. 14, 2015), <https://perma.cc/9SN4-JDDG> (“[M]ost arrests are carried out based on gender stereotypes, such as appearance and behavior, with gay men who are considered ‘effeminate’ and transgender women targeted the most.”).

68. See *Morocco: Victims of Attack Jailed for “Homosexual Acts,”* HUM. RTS. WATCH (Apr. 8, 2016), <https://perma.cc/Q9DU-AG86>.

69. *Id.*

70. See, e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114, 123 (citing PENAL CODE art. 338 (Alg.) (punishing an act of homosexuality with a two-month to two-year prison sentence and fine of 500–2000 Algerian Dinars), and PENAL CODE, Cap. 16 § 154 (Tanz.) (punishing “carnal knowledge of any person against the order of nature” with a thirty-year to life prison sentence)).

71. Parts of Nigeria and Somalia, and Mauritania impose the death penalty. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 38. However, there have been no official recorded instances where the death penalty was used as a punishment under these statutes, even if death sentences were issued. See *id.* But cf. *Somalia*, HUM. DIGNITY TR., <https://perma.cc/2PLZ-YLKE> (Dec. 8, 2022, 5:00 PM) (explaining that there are reports of executions done by militant groups but “a lack of reliable reporting from the country makes it difficult to accurately reflect the enforcement of the law”); Feisal Omar, *Somali Islamists Kill Man and Teenager for Gay Sex, Another Man for Spying*, REUTERS (Jan. 10, 2017), <https://perma.cc/V53E-Q4GQ>.

72. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 38, 114, 123. But see Nico Lang, *Sudan Repeals Death Penalty For Gay Sex*, THEM (July 16, 2020), <https://perma.cc/QN86-ELLS>; Alberto Morales, *HRC President Alphonso David on the Removal of Death Penalty for Same-Sex Relations in Sudan*, HUM. RTS. CAMPAIGN (July 16, 2020), <https://perma.cc/WM2D-J539>.

due to the adoption of Sharia law,⁷³ a reaction to the perceived openness of Western culture, and resistance to what is seen as “imported” behavior.⁷⁴

b. Criminalization of Perceived Identity or Activity. Of the thirty-two African countries that do not directly criminalize same-sex sexual activity, thirteen countries criminalize non-heterosexual sexual activity *indirectly* through statutes that punish “improper or unnatural acts” or something similar.⁷⁵ Currently, there are only twenty-two African countries that neither directly nor indirectly criminalize same-sex sexual activity.⁷⁶

Most countries with laws that criminalize same-sex sexual activity inherited these laws from their colonizing countries.⁷⁷ In many cases, the statutes remain in effect because the public is opposed to removing them.⁷⁸ Alternatively, the criminalization of same-sex sexual activity may have been instituted when the country adopted Sharia law.⁷⁹ Some countries are updating these laws to explicitly and more vigorously punish same-sex sexual activity.⁸⁰

73. See *Somalia*, *supra* note 71 (noting parts of Somalia under al-Shabaab’s control follow a strict interpretation of Sharia law); *Mauritania*, HUM. DIGNITY TR., <https://perma.cc/MKC2-98GS> (Jan. 25, 2023, 10:49 AM) (noting the Constitution of Mauritania designates Sharia as the “sole source of law”); *Nigeria*, HUM. DIGNITY TR. (Jan. 25, 2023, 10:51 AM), <https://perma.cc/P3H6-SNB3> (reporting twelve northern states adopted Sharia law that permitted death by stoning).

74. See Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 98–99 (2002); e.g., Rodney Muhumuza, *Ugandan Lawmaker Introduces New Anti-LGBTQ Legislation*, L.A. TIMES (Feb. 28, 2023), <https://perma.cc/QKC5-QSTQ> (reporting Speaker Anita Among said, “You are either with us or you’re with the Western world,” when announcing how lawmakers could vote in support of the anti-LGBTQ bill); Samuel Okiror, *Uganda MPS Revive Hardline Anti-LGBTQ Bill, Calling Homosexuality a ‘Cancer’*, THE GUARDIAN (Mar. 1, 2023), <https://perma.cc/CR4J-X9U6> (“President Yoweri Museveni last month said Uganda will not embrace homosexuality and that the west should stop seeking to impose its views to compel dissenting countries to ‘normalise’ what he called ‘deviations’ [He said] ‘We are not going to follow people who are lost. These Europeans are not normal, they don’t listen[.]’”).

75. Comoros, Egypt, Ghana, Guinea, Kenya, Malawi, Morocco, Senegal, South Sudan, Tanzania, Togo, Uganda, and Zambia. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25.

76. Angola, Benin, Botswana, Burkina Faso, Cabo Verde, Central African Republic, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Gabon, Guinea-Bissau, Lesotho, Madagascar, Mali, Mozambique, Niger, Rwanda, São Tomé & Príncipe, Seychelles, and South Africa. *Id.* at 90–93.

77. Botswana, Eswatini, The Gambia, Ghana, Kenya, Lesotho, Malawi, Nigeria, Seychelles, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe all inherited Britain’s penal code criminalizing “carnal intercourse against the order of nature.” Bond, *supra* note 60, at 120. Only Botswana, Lesotho, and Seychelles have since decriminalized it. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 90, 92–93.

78. See e.g., Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexuality Persists*, PEW RSCH. CTR. (June 25, 2020), <https://perma.cc/39JR-ZZAU> (explaining the results of a 2019 study that found 91% of individuals surveyed in Nigeria and 83% in Kenya believe that homosexuality should not be accepted by society).

79. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 119–20 (noting Mauritania’s Sharia-based criminal code and 12 Northern Nigerian states’ Sharia-based penal codes criminalize same-sex sexual activity).

80. In 2009, Burundi expressly outlawed same-sex sexual activity. *Id.* at 114. Eritrea increased the penalty for same-sex sexual acts from a maximum of three years to “not less than [five] years and not more than [seven] years” in 2015. See *id.* at 116. Ethiopia and The Gambia have also expanded criminal penalties for same-sex sexual acts. *Id.*

Enforcement of criminalization statutes is, in many cases, a relatively recent response⁸¹ to the perception of LGBTI identity being a Western cultural export.⁸² Scholars have noted the apparent contradiction of the backlash against LGBTI individuals who represent their identity openly and the long history of accepted practice of non-normative gender expression or same-sex, non-normative, or extramarital sexual or romantic activity that exists in some African countries.⁸³ Of the thirty-two African countries with criminalization laws in effect, twenty-seven currently enforce them by arresting and detaining individuals.⁸⁴ As discussed in Part C below, many times the country will drop charges against an individual charged with engaging in same-sex sexual activity, or a court will acquit an individual if the State produces no evidence to support the charge.⁸⁵ Finally, even though the criminalization statutes are not uniformly enforced, in many places they serve as a placeholder that enables police to arrest and detain individuals and keep the fear of criminalization intact.⁸⁶

c. Criminalization of HIV Status. Since 2000, thirty-two African countries have adopted laws that mandate disclosure of HIV, criminalize “knowingly” transmitting HIV, or both.⁸⁷ Whether a person “knowingly” transmits HIV is

81. See Bond, *supra* note 60, at 91–92. (“This new racism is particularly vexing given that the sub-Saharan African region inherited from colonial powers many of the laws now used to persecute and discriminate against [LGBTI] individuals. . . . The direct influence of colonial authority on criminal regulation, along with contemporary collaborations with western evangelicals, undermines any characterization of the problem as an Africa-specific ‘cultural’ problem.”).

82. *Id.* at 93, 95 (“A number of scholars point out that the true import from the colonial era was not same-sex sexuality but, rather, homophobia. . . . The colonial narrative equated African male sexuality with a lack of civilization and with a state of being that was ‘close to nature.’”).

83. *Id.* at 107–08 (citing to evidence of same-sex sexuality and desire in Nigeria and Lesotho that exists outside of heterosexual marriage); see also Katyal, *supra* note 74, at 100, 128 (suggesting that the idea of LGBTI identity being a Western export essentially created these categorical enforcements in Africa; what previously did not fall under non-normative behavior is now illegal).

84. According to the International Lesbian, Gay, Bisexual, Transgender, and Intersex Association, Algeria, Burundi, Cameroon, Chad, Egypt, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Morocco, Nigeria, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe currently enforce the criminalization of same-sex sexual activity. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25. According to the U.S. Department of State, Burkina Faso and Democratic Republic of the Congo have also persecuted LGBTI individuals under criminalization statutes or other public decency laws. See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Burkina Faso 32 (2021); U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Democratic Republic of the Congo 43 (2022).

85. See *infra* part III.B.1.b; see also Agence France-Presse, *Ghana Court Frees 21 Arrested for Attending May LGBTQ+ Event*, THE GUARDIAN (Aug. 5, 2021), <https://perma.cc/KJ4R-WCEY>.

86. See NEELA GHOSHAL & MONICA TABENGWA, THE ISSUE IS VIOLENCE: ATTACKS ON LGBT PEOPLE ON KENYA’S COAST 49–50 (2015) [hereinafter GHOSHAL & TABENGWA].

87. EDWIN J. BERNARD & ALISON SYMINGTON, ADVANCING HIV JUSTICE 4: UNDERSTANDING COMMONALITIES, SEIZING OPPORTUNITIES 49–50 (2022), <https://perma.cc/JGB2-5BBC>. As of December 2021, the following thirty-two countries have HIV-specific criminalization statutes currently enacted: Angola, Benin, Burkina Faso, Burundi, Cabo Verde, Central African Republic, Chad, Congo, Côte d’Ivoire, Democratic Republic of the Congo, Djibouti, Equatorial Guinea, Ghana, Guinea, Guinea-

open to interpretation, and many of these laws exist in countries that also impose a harsher sentence for a person convicted of same-sex sexual activity.⁸⁸ Ten African countries have taken action against individuals who are HIV-positive or perceived to be HIV-positive under the HIV criminalization statute, and ten under general laws that prohibit assault or other transmission of the disease.⁸⁹ Officials may also discover an individual's HIV status by conducting compulsory testing upon an individual's arrest or detainment under laws that criminalize same-sex sexual activity.⁹⁰ Some countries more severely penalize those who are arrested for suspicion of same-sex sexual activity and subsequently test positive for HIV.⁹¹

In African countries that criminalize HIV status, or that associate HIV status with proof of same-sex sexual activity, patients fear that doctors may breach confidentiality and reveal their medical status if the doctors suspect them of engaging in same-sex sexual activity.⁹² Therefore, individuals who suspect they are HIV-positive may decide not to seek medical treatment out of fear that it will lead to an unwanted disclosure of their sexual identity to the community or, worse, to law enforcement officials.⁹³ Countries that enforce laws that criminalize same-sex sexual activity may also refuse to include robust treatment services and

Bissau, Kenya, Lesotho, Liberia, Libya, Madagascar, Mali, Mauritania, Mozambique, Niger, Nigeria (Enugu and Lagos), Senegal, Sierra Leone, South Sudan, Tanzania, Togo, Uganda, and Zimbabwe. *Id.*

88. *Ethiopian Government Cancels Anti-Gay Rally*, *THE GUARDIAN* (Apr. 16, 2014), <https://perma.cc/R6ZL-B3AK>. Ethiopia imposes a twenty-five-year prison sentence on those convicted of infecting someone else with HIV during same-sex sexual acts, as opposed to a fifteen-year sentence for conviction related to same-sex sexual acts alone. *Id.* The Gambia also criminalizes "aggravated homosexuality," which is defined as transmitting HIV during a same-sex sexual act. *Gambia: Life Sentence for "Aggravated Homosexuality,"* HUM. RTS. WATCH (Nov. 21, 2014), <https://perma.cc/CKB8-DJSY>.

89. See BERNARD & SYMINGTON, *supra* note 87, at 11, 13. Angola, Congo, Democratic Republic of the Congo, Ghana, Kenya, Lesotho, Niger, Nigeria (Lagos state), Uganda, and Zimbabwe actively enforce their HIV criminalization statutes. *Id.* at 11. Botswana, Cameroon, Ethiopia, Gabon, The Gambia, Malawi, Mauritius, Somalia, South Africa, and Zambia have enforced HIV criminalization under general laws. *Id.* at 13. Of these countries, Cameroon, Ethiopia, The Gambia, Ghana, Kenya, Malawi, Mauritius, Nigeria, Somalia, Uganda, Zambia, and Zimbabwe also criminalize same-sex sexual activity. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 114–25.

90. See *Egypt: 117 NGOs Slam HIV-Based Arrests and Trials*, HUM. RTS. WATCH (Apr. 6, 2008), <https://perma.cc/PQQ6-5EAW>. Possession of HIV and health commodities associated with HIV medical treatment has also been used as evidence in criminal cases to prosecute for same-sex sexual behavior. AFR. COMM'N ON HUM. & PEOPLES' RTS., INTER-AM. COMM'N ON HUM. RTS. & U.N., ENDING VIOLENCE AND OTHER HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY: A JOINT DIALOGUE 80 (2016) [hereinafter ENDING VIOLENCE].

91. See, e.g., *Ethiopian Government Cancels Anti-Gay Rally*, *supra* note 88 (citing Ethiopia's law, which punishes transmission of HIV during same-sex sexual acts with a 25-year prison sentence); ANNA DICKSON, TIM ROBINSON, & LOUISA BROOKE-HOLLAND, LGBT+ RIGHTS AND ISSUES IN SUB-SAHARAN AFRICA 22 (2021), <https://perma.cc/KRE8-HXYF> (citing The Gambia's law, which increases the charge to "aggravated homosexuality," punishable by life imprisonment, if the individual is HIV positive).

92. See, e.g., Philip Obaji, Jr., *Hunting Down Gays in Nigeria*, *DAILY BEAST* (Apr. 11, 2016), <https://perma.cc/973J-Y8V8>. In Botswana, Malawi, and Namibia, more than 80% of men who have sex with men reported in a survey that they did not disclose same-sex sexual activity to health care providers for fear of being reported. ENDING VIOLENCE, *supra* note 90, at 81.

93. See Onishi, *supra* note 44.

outreach as part of their HIV/AIDS prevention policies, due to the stigma associated with HIV and its assumed connection to same-sex sexual activity.⁹⁴ Some countries actively hamper HIV-prevention outreach to LGBTI individuals or those engaged in same-sex sexual activity.⁹⁵

Even in African countries where organizations are allowed to conduct HIV- and AIDS-prevention outreach to LGBTI individuals, efforts to reach the LGBTI population may fall short.⁹⁶ And even if organizations were to primarily target “men who have sex with men” (MSM), they fail to reach women and transgender or gender non-conforming people.⁹⁷ Some organizations may conflate transgender women with MSM, and transgender women may fail to seek services knowing that doctors may fail or even refuse to recognize their gender identity and particularized health needs.⁹⁸ In countries where discrimination against people with HIV is not illegal, medical professionals may refuse to treat people with HIV, or people who they suspect are engaged in same-sex sexual activity, without consequence.⁹⁹ A lack of State interference with and legal protections against discrimination leaves HIV-positive people and LGBTI individuals at risk of greater health disparities than individuals who do not identify under the LGBTI umbrella.¹⁰⁰

d. Criminalization of Sex Work. Sex work is illegal by statute in sixteen African countries.¹⁰¹ LGBTI individuals, and transgender women in particular, participate in the sex trade industry at a higher rate per capita than the rest of the population.¹⁰² Participation in sex work can affect an individual’s access to

94. See MAKING LOVE A CRIME, *supra* note 41, at 61.

95. See, e.g., ENDING VIOLENCE, *supra* note 90, at 80 (noting the arrest of HIV outreach workers who were working with men who have sex with men). In Kenya, violence against LGBTI individuals and the threat of violence against organizations that serve them has prevented organizations from openly conducting outreach and getting information to individuals who may be engaged in same-sex sexual activity. UK HOME OFFICE, COUNTRY POLICY AND INFORMATION NOTE: KENYA: SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION 20, 46–47 (2020), <https://perma.cc/2LA9-DLGB> [hereinafter UK HOME OFFICE]. Similarly, in Malawi, only 17% of a survey of MSM in Malawi reported being exposed to information about risk of HIV in non-heterosexual interactions, and 73% of MSM in Zambia reported a belief that they were less at risk for HIV when having anal sex as compared to vaginal sex. ENDING VIOLENCE, *supra* note 90, at 82.

96. See ENDING VIOLENCE, *supra* note 90, at 82 (“HIV prevention and education programmes (sic) often fail to specifically target MSM and transgender people and are not adapted to their health needs.”).

97. See *id.* at 82.

98. *Id.* at 81.

99. See, e.g., NEELA GHOSHAL, “IF WE DON’T GET SERVICES, WE WILL DIE”: TANZANIA’S ANTI-LGBT CRACKDOWN AND THE RIGHT TO HEALTH 102–03 (2020), <https://perma.cc/H4ME-XV42>.

100. Following the arrest of nine HIV prevention workers in Senegal, there was a sharp drop in MSM seeking HIV care and treatment. ENDING VIOLENCE, *supra* note 90, at 80.

101. GLOB. COMM’N ON HIV AND THE L., REGIONAL ISSUE BRIEF: CRIMINAL LAW AND HIV 17 (2011), <https://perma.cc/577D-KDGY> (naming Angola, Botswana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, South Africa, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe as countries where sex work is illegal) [hereinafter GLOBAL COMMISSION ON HIV AND THE LAW].

102. See AMNESTY INT’L, AMNESTY INTERNATIONAL POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT AND FULFILL THE HUMAN RIGHTS OF SEX WORKERS 5–6 (2016), <https://perma.cc/E5EN-LS9D>.

appropriate health care, especially in the face of marginalization resulting from engaging in same-sex sexual activity or other gender non-conforming behavior.¹⁰³ Whether participating in sex work out of need, choice, or indifference, transgender and gender nonconforming sex workers can risk arrest, extortion, and violence by police¹⁰⁴ without hope of protection against violence by the State.

Even without involvement in sex work, there is evidence that in some African nations law enforcement arrests or prosecutes individuals who are transgender or who display a non-normative gender presentation under existing sex work prohibitions.¹⁰⁵ Transgender women in Namibia have reported arrests merely based on the law enforcement official's perception of the person as being transgender.¹⁰⁶ In Burkina Faso, the High Court of Bobo-Dioulasso heard a case in 2013 of a gender nonconforming individual who was being prosecuted for street solicitation, even though the court would not typically hear a street solicitation case.¹⁰⁷ Finally, in Kenya, individuals have been arrested under laws that punish loitering or soliciting sex work rather than a charge of engaging in same-sex sexual activity.¹⁰⁸

e. Failure to Recognize Gender Change. Most African countries do not recognize transgender and gender nonconforming individuals as such, or acknowledge adjacent issues.¹⁰⁹ Additionally, even in more progressive African countries like South Africa, health systems are usually not required to cover gender-affirming care, and access to trans-specific health care is limited.¹¹⁰ Trans people who seek

103. Marlies Richter & Kholi Buthelezi, *Stigma, Denial of Health Services, and Other Human Rights Violations Faced by Sex Workers in Africa: 'My Eyes Were Full of Tears Throughout Walking Towards the Clinic that I Was Referred to'*, in *SEX WORK, HEALTH, AND HUMAN RIGHTS* 144 (Springer, 2021). Transgender sex workers in South Africa, Botswana and Namibia are penalized and neglected when they seek trans-specific health care. JAYNE ARNOTT & ANNA-LOUISE CRAGO, *RIGHTS NOT RESCUE: A REPORT ON FEMALE, MALE, AND TRANS SEX WORKERS' HUMAN RIGHTS IN BOTSWANA, NAMIBIA, AND SOUTH AFRICA* 10 (2009), <https://perma.cc/S6JB-8ESL>. In Namibia and Botswana, trans and female-presenting sex workers report lack of access to hormone treatments that they rely on for daily life or for their work. *Id.* at 21.

104. See ARNOTT & CRAGO, *supra* note 103, at 40. Trans and gender-non-conforming sex workers report significant police violence as a reaction to their gender-atypical presentation and behavior, in addition to their profession as a sex worker, including humiliation, physical violence, and other public announcement of their identities. *Id.* Trans sex workers also report being raped by police and having their condoms confiscated. *Id.* at 35–36.

105. See, e.g., *id.* at 40.

106. *Id.*

107. CAN.: IMMIGR. & REFUGEE BD. OF CAN., *BURKINA FASO: TREATMENT OF SEXUAL MINORITIES, INCLUDING LEGISLATION, STATE PROTECTION AND SUPPORT SERVICES (2014–APRIL 2016)* (2016), <https://perma.cc/B9ZA-SS37>.

108. See GHOSHAL & TABENGWA, *supra* note 86, at 33; see also ARNOTT & CRAGO, *supra* note 103, at 40 (discussing how transgender women are sometimes arrested for soliciting sex work despite going about their daily business, simply for the reason that they are visible).

109. See *infra*, Part III.B.1.c for discussion of recognition of gender identity in African countries.

110. See Tiyese Jeranji, *Gender-Affirming Surgery Little More Than a Distant Dream for the Many Hamstrung by High Costs and Long Waiting Lists*, *DAILY MAVERICK* (Sept. 16, 2021), <https://perma.cc/VU2E-7SCC>.

legal recognition or health care using documents that identify their sex assigned at birth may find themselves at risk of persecution under laws against same-sex behavior, loitering, or public nuisance.¹¹¹ Countries that do allow name and gender change on state documents may require individuals to undergo mandatory medical or psychological treatment or divorce from their partners before issuing updated documents.¹¹²

f. Forced Anal Examinations Used to Penalize Sexual Activity. In some countries, like Cameroon, Egypt, Tunisia, and Zambia, officials routinely use the result of an anal examination as proof to convict individuals under anti-same-sex sexual activity statutes; occasional use of anal examinations is also documented in Kenya and Uganda.¹¹³ In Tanzania, officials have banned lube and subjected individuals suspected of same-sex sexual activity to anal examinations.¹¹⁴ The examinations are intended to serve as legitimate evidence that the individual has engaged in anal sex for the purposes of convicting them under laws that prohibit same-sex sexual activity, sodomy, or “unnatural offenses.”¹¹⁵ Despite this alleged purpose, there is no factual or scientific connection between the results of an anal examination and an individual’s sexual history.¹¹⁶ In several countries, evidence even suggests that doctors have either been coerced or have of their own accord reported same-sex sexual activity based on the perception that the individual before them is someone who has engaged in same-sex sexual activity.¹¹⁷

Despite the tenuous connection between the examination’s result and the individual’s actual sexual behavior or identity, in some cases, the anal examination can be the sole piece of proof used to convict men and trans women under these statutes.¹¹⁸ In Cameroon, police conduct exams of their own accord, which are then used as the sole piece of proof to convict individuals under the criminalization statute.¹¹⁹ In Egypt and Tunisia, prosecutors and law enforcement routinely order the examination as part of the conviction process.¹²⁰ Since 2013, Egypt and Uganda have seen an uptick in arrests on the basis of same-sex sexual conduct resulting in an anal examination, but in recent years, Cameroon and Kenya have

111. See MAKING LOVE A CRIME, *supra* note 41, at 54.

112. *Id.* at 55 (documenting the account of a trans woman in Malawi who was penalized for her marriage because the State recognized her relationship as between two individuals of the same sex).

113. See, e.g., Michael K. Lavers, *Transgender Woman in Zambia Convicted of Sodomy*, WASH. BLADE (Nov. 5, 2015), <https://perma.cc/2WLB-JTET>; NEELA GHOSHAL, DIGNITY DEBASED: FORCED ANAL EXAMINATIONS IN HOMOSEXUALITY PROSECUTIONS 19, 24, 29, 40, 50, 56, (2016), <https://perma.cc/77GV-V6H9> [hereinafter GHOSHAL, DIGNITY DEBASED].

114. See Patrick Kelleher, *Tanzania Has Banned Lube and Is Forcing Men into Humiliating Anal Exams to Check for Gay Sex*, PINK NEWS (Feb. 3, 2020), <https://perma.cc/WKJ9-KB4D>.

115. GHOSHAL, DIGNITY DEBASED, *supra* note 113, at 3.

116. *Id.* at 69.

117. *Id.* at 22, 25, 52–3 (naming Cameroon, Egypt, and Uganda as countries where this has occurred).

118. *Id.* at 20–21.

119. *Id.* at 22–23.

120. *Id.* at 11, 40.

seen relatively few arrests and examinations.¹²¹ In Uganda, forced exams have been conducted in the context of a consensual same-sex sexual activity charge, but have not been admitted at trial.¹²² In Zambia, anal exams are often used in the courtroom as evidence of violating sodomy laws.¹²³ Even though this evidence is sometimes not enough to convict, the threat of the examination remains even without the conviction.¹²⁴ In Zambia, Egypt, Kenya, and Uganda, there are documented instances where men accused of same-sex sexual activity are also subject to an HIV and STI test in addition to an anal examination.¹²⁵ This may affect how LGBTI or LGBTI-perceived individuals access HIV-related and general medical care if they fear a conviction as a result of seeking it.¹²⁶

g. Limits on Freedom of Expression and Association. The criminalization of same-sex sexual activity has a chilling effect on the freedom of citizens to assemble and to live openly and freely.¹²⁷ Residents of African countries that outlaw same-sex sexual activity are restricted in their ability to gather freely under the banner of shared LGBTI identity, to access health care, and to obtain recognition of their non-heterosexual relationships.¹²⁸

Seven African countries limit meeting and publication regarding, and expression of same-sex desire or sexual behavior via statute.¹²⁹ Regardless of whether they criminalize same-sex sexual activity, many countries also refuse to officially recognize organizations that represent or serve LGBTI populations as organizations or human rights groups by allowing them to register and operate openly in the country.¹³⁰ Uganda passed a bill in 2016 which prevents organizations that

121. GHOSHAL, DIGNITY DEBASED, *supra* note 113, at 23, 26, 28, 49–50. *See, e.g.*, Marika Malaea, *LGBT Activists in Uganda Taken into Custody for Their Protection Subjected to Forced Anal Examinations*, NEWSWEEK (Oct. 24, 2019), <https://perma.cc/N4HL-X6X9> (stating that 16 LGBTQIA+ activists were subjected to anal examinations after a raid of their home Uganda in 2019).

122. *Id.* at 3, 50–54.

123. *Id.* at 56–58.

124. *Id.*

125. *Id.* at 17–18, 26, 29, 50.

126. *Id.* at 17–18. *See* ENDING VIOLENCE, *supra* note 90, at 80 (discussing reluctance to seek treatment for fear of being subject to arrest or prosecution).

127. *See* INITIATIVE FOR EQUAL RIGHTS., 2022 REPORT ON HUMAN RIGHTS VIOLATIONS BASED ON REAL OR PERCEIVED SEXUAL ORIENTATION, GENDER IDENTITY/EXPRESSION AND SEX CHARACTERISTICS (SOGIESC) IN NIGERIA 10 (2022), <https://perma.cc/LNP6-NMYL> (discussing impact of Nigeria's criminalization statute). *See, e.g.*, Mansur Abubakar, *Islamic Police Raid 'Gay Wedding' In Nigeria's Kano City*, BBC NEWS (Dec. 20, 2022), <https://perma.cc/5TD4-Z6FS>.

128. *See, e.g.*, Obaji, *supra* note 92; *Uganda: Police Attack LGBTI Pride Event*, HUM. RTS. WATCH (Aug. 5, 2016), <https://perma.cc/X35P-K256>.

129. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 146–50 (noting that Algeria, Cameroon, Egypt, Kenya, Nigeria, Togo, and Uganda have laws either directly restricting LGBTI individuals' freedom of expression; Burundi, Cote d'Ivoire, Democratic Republic of the Congo, Djibouti, Ethiopia, Libya, Mauritania, Morocco, Somalia, Sudan, Tanzania, Tunisia, and Zambia have indirect laws.).

130. *See* Eric Gitari, *Equality of LGBTIQ Persons in Africa*, HEINRICH BÖLL STIFTUNG: GREEN POL. FOUND. (Mar. 20, 2015), <https://perma.cc/2H42-NLCH>. LGBTI rights organizations have been deregistered, delayed, or refused registration in Tanzania, Burkina Faso, Zimbabwe, and others. *Id.* Mozambique decriminalized same-sex sexual activity in 2015. STATE-SPONSORED HOMOPHOBIA, *supra*

engage in activity “contrary to the dignity of the people of Uganda” from operating, which serves to criminalize or at least severely limit the ability of LGBTI rights organizations to form and conduct activities.¹³¹

Lack of legal protections or recourse for LGBTI individuals also acts as a barrier to public gathering.¹³² Police in many African nations conduct raids, arrests, and attacks on open gatherings of LGBTI individuals.¹³³ Even if an arrest does not lead to prosecution under the criminalization statute, arrests may nonetheless be extremely violent in nature.¹³⁴ The fact that the criminalization statute exists sanctions this violent activity by both State and non-State actors.¹³⁵

However, courts in several African nations have acted to counter the harsh enforcement of criminalization laws against LGBTI and LGBTI-perceived individuals, as courts often dismiss charges advancing State-sponsored discrimination.¹³⁶ For example, in 2014, the High Court in Kenya ruled that the government’s denial of NGO registration to a human rights organization that serves transgender individuals was discriminatory and unconstitutional.¹³⁷

Finally, countries that do not criminalize same-sex sexual activity statutorily may nonetheless treat LGBTI individuals, expressions, and relationships asymmetrically in the law.¹³⁸ Four African countries have an age of consent codified for same-sex sexual activity that differs from that for heterosexual sexual activity.¹³⁹ Eight countries’ constitutions explicitly make same-sex marriages illegal as of 2023,¹⁴⁰ and eleven countries constitutionally restrict the right to marry to

note 39, at 325. It, continues to refuse legal registration to some LGBT rights NGOs, despite the Constitutional Court ruling in 2017 that “groups could not be precluded from registration based on ‘morality.’” U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Mozambique 31 (2022), <https://perma.cc/Z7ZU-JWXH>; see also *Mozambique: Freedom in the World 2023*, FREEDOM HOUSE, <https://perma.cc/FW7D-MJL8>.

131. Anna Leach, *NGO Alert: Ugandan Parliament Debates Controversial NGO Bill*, THE GUARDIAN (Sept. 1, 2015), <https://perma.cc/UVP3-8TC4>; Hanibal Goitom, *Uganda: Non-Governmental Organizations Bill Becomes Law*, LIBR. OF CONG. (Mar. 17, 2016), <https://perma.cc/23Z6-URGW>.

132. See *Uganda: Police Attack LGBTI Pride Event*, *supra* note 128.

133. In August 2016, police raided, attacked, and arrested participants at a Pride celebration in Kampala. *Id.* Those arrested were later released without charge. *Id.*

134. *Id.*

135. See UK HOME OFFICE, *supra* note 95, at 10–11 (citing a case brought by an NGO seeking to register and conduct affairs openly in Kenya, which has a notoriously negative climate for sexual and gender minorities).

136. See, e.g., *id.* at 19. *But see* Lavers, *supra* note 113.

137. Gitari, *supra* note 130. See *infra* part III.B.1.b below for more details on court enforcement of applications on behalf of LGBTI organizations.

138. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 91–92 (noting that Congo, Côte d’Ivoire, Madagascar, and Niger have age of consent laws that are asymmetrical for heterosexual sexual activity and same-sex sexual activity).

139. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 91–92.

140. Those countries are Burundi, Democratic Republic of the Congo, Kenya, Rwanda, South Sudan, Uganda, Mali, and Zimbabwe. *What is the Constitutional Status of Same-Sex Marriage?*, WORLD POL’Y CTR., <https://perma.cc/KX3U-GQQC>; *LGBT Rights in Mali*, EQUALDEX, <https://perma.cc/N8DT-E9TM>; Seventeen percent of constitutions in sub-Saharan Africa prohibit same-sex marriages or permit legislation to do so. Amy Raub, Adèle Cassola, Isabel Latz, & Jody Heymann, *Protections of Equal Rights Across Sexual Orientation and Gender Identity: An Analysis of 193 National Constitutions*, 28

couples consisting of a man and a woman, by omission refusing to recognize what the State views as non-heterosexual couples.¹⁴¹ Only Nigeria goes so far as to criminalize the legal recognition of a same-sex relationship.¹⁴²

h. Continued Efforts to Criminalize Same-Sex Sexual Activity. Several African countries continue to resist the urging of the international community to decriminalize and put into place protections for the LGBTI community so that LGBTI individuals can live freely and openly with the full protection of the State.¹⁴³ Zimbabwe's legislature passed the "Sexual Deviancy Law" in 2006, which updated the common law prohibition on same-sex sexual activity to also prohibit acts of affection between individuals of the same-sex, including kissing, holding hands, or hugging.¹⁴⁴ Later, Zimbabwe's former President Robert Mugabe led an opposition to a burgeoning movement to grant rights to LGBTI individuals by law, and ultimately led the country to pass a constitutional provision that banned homosexual conduct.¹⁴⁵ In 2014, Uganda passed a high-profile bill, the Anti-Homosexuality Bill, which increased the punishment for same-sex sexual activity, set greater punishment for "aggravated homosexuality" (defined in the law as transmitting HIV during a same-sex sexual act) and prohibited a number of

YALE J.L. & FEMINISM 149, 158–59 (2016). Notably, in 2013, Nigeria passed the Same-Sex Marriage (Prohibition) Act and in 2015, Malawi passed the Marriage, Divorce and Family Relations Act; both prohibited same-sex marriage via statute. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 120; Malawi, HUM. DIGNITY Tr., <https://perma.cc/D7HB-89Y3>.

141. Raub, Cassola, Latz, & Heymann, *supra* note 140, at 159; *see* CONSTITUTION OF THE REPUBLIC OF ANGOLA Jan. 21, 2010, art. 35 (Angl.) ("The family is the basic nucleus of social organization and shall be the object of special protection by the state, whether based on marriage or on a de facto union between a man and a woman."); CONSTITUTION DU BURKINA FASO June 2, 1991, art. 23 (Burk. Faso), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., 2018) ("Marriage is founded on the free consent of the man and of the woman."); IBWIRIZWA SHINGIRO RYA REPUBURIKA Y'UBURUNDI [CONSTITUTION] June 7, 2018, art. 29 (Burundi), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., 2018) ("Marriage between two persons of the same sex is prohibited."); CONSTITUTION DE LA RÉPUBLIQUE CENTRAFRICAINE Mar. 30, 2016, Decree No. 160218, art. 7 (Cent. Afr. Rep.), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., 2017) ("Marriage is the union between a man and a woman."); LA CONSTITUTION Mar. 26, 1991, No. 3/91, art. 1, as amended by No. 046/2020 (Jan. 11, 2021) (Gabon), *translated in* WORLD CONSTITUTIONS ILLUSTRATED (Jefri Jay Ruchti ed., 2021) ("[M]arriage, the union between two persons of different sex. . . ."); CONSTITUTION OF THE REPUBLIC OF RWANDA Dec. 24, 2015, art. 17 (Rwanda) ("A civil monogamous marriage between a man and a woman is the only recognized marital union."); CONSTITUTION OF THE REPUBLIC OF SEYCHELLES June 21, 1993, art. 32 (Sey.) ("The right . . . may be subject to such restrictions . . . including the prevention of marriage between persons of the same sex."); PROVISIONAL CONSTITUTION Aug. 1, 2012, art. 28 (Som.) ("A marriage shall not be legal without the free consent of both the man and the woman."); LAWS OF SOUTH SUDAN [CONSTITUTION] July 9, 2011, art. 15 (S. Sudan) ("Every person of marriageable age shall have the right to marry a person of the opposite sex."); CONSTITUTION OF THE REPUBLIC OF UGANDA Oct. 8, 1995, art. 31 (Uganda) ("Marriage between persons of the same sex is prohibited."); CONSTITUTION OF ZIMBABWE May 9, 2013, art. 78 (Zim.) ("Persons of the same sex are prohibited from marrying each other.")

142. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 120.

143. *See infra* part III.B.1.a.

144. Adam J. Kretz, *From "Kill the Gays" to "Kill the Gay Rights Movement": The Future of Homosexuality Legislation in Africa*, 11 NW. J. INT'L HUM. RTS. 207, 226–27 (2013).

145. *Id.* at 228–30.

activities including open discussion or gatherings of LGBTI individuals.¹⁴⁶ Following the passage of that bill, Nigeria,¹⁴⁷ The Gambia,¹⁴⁸ Ethiopia,¹⁴⁹ Kenya,¹⁵⁰ and Tanzania¹⁵¹ considered similar bills, with politicians openly condemning or denying the existence of LGBTI individuals or same-sex activity in the country.¹⁵² Bills passed in Nigeria¹⁵³ and The Gambia¹⁵⁴ (with the provisions pulling directly from the now-defunct Uganda law),¹⁵⁵ and Namibia repealed protections for discrimination on the basis of sexual orientation that were enacted in 1992.¹⁵⁶ Finally, though Uganda's own Anti-Homosexuality Act was struck down by its High Court in 2014, other provisions that criminalize and persecute individuals who identify as or are perceived as LGBTI, including a new provision in Uganda's penal code in 2000 that increases the punishment for same-sex sexual activity to life imprisonment,¹⁵⁷ a constitutional amendment in 2005 that banned same-sex marriage,¹⁵⁸ and a 2007 amendment to its employment protection law that explicitly prevents the Employment Opportunity Commission from investigating matters involving "immoral or socially unacceptable" behavior, including homosexuality remain in place.¹⁵⁹

Several African countries have also both formally and informally adopted parts of Sharia law, Islamic religious law.¹⁶⁰ Sharia law mandates the criminalization of same-sex sexual behavior between men, punishable by death by stoning.¹⁶¹ Parts of Nigeria and parts of Somalia have adopted Sharia law and impose the death penalty on those convicted of same-sex sexual activity.¹⁶²

At least thirty countries in Africa criminalize HIV as of 2021.¹⁶³ While ten countries have enforced such statutes, two enforcing countries have repealed their

146. The Anti-Homosexuality Act, 2014 (Uganda), <https://perma.cc/4FQL-Z5YP>.

147. Same Sex Marriage (Prohibition) Act (2013) Cap. (77), §1 (Nigeria), <https://perma.cc/6CH3-VWEJ>.

148. *Gambia: Life Sentence for "Aggravated Homosexuality"*, *supra* note 88.

149. *Ethiopian Government Cancels Anti-Gay Rally*, *supra* note 88.

150. Alita Byrd, *Kenyan Adventist Politician Proposes Extreme Anti-Gay Bill*, THE SPECTRUM (Aug. 14, 2014), <https://perma.cc/JZF4-BY9C>.

151. See Oloka-Onyango, *supra* note 50, at 46 (citing Emmanuel Muga, *Dar Plans to Introduce Tougher Anti-Gay Bill*, EASTAFRICAN (Mar. 29, 2014)).

152. See, e.g., *Gambia: Life Sentence for "Aggravated Homosexuality"*, *supra* note 88.

153. Felix Onuah, *Nigerian Leader Signs Anti-Gay Law, Drawing U.S. Fire*, REUTERS (Jan. 13, 2014), <https://perma.cc/5QM4-CSDT>.

154. See, e.g., *Gambia: Life Sentence for "Aggravated Homosexuality"*, *supra* note 88.

155. *Id.*; Kretz, *supra* note 144, at 234 n.156 ("Nigerian parliamentarians introduced a copycat Bill.").

156. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 219.

157. Kretz, *supra* note 144, at 219 (discussing revision of penal code by Penal Code Amendment Act of 2000).

158. See Oloka-Onyango, *supra* note 50, at 38.

159. See *id.* at 39.

160. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 36–37.

161. *Id.*

162. *Id.* at 38.

163. *2022 in Review: A Turning Point for HIV Justice?*, HIV JUST. NETWORK (Dec. 16, 2022), <https://perma.cc/68MM-QYW9>; BERNARD & SYMINGTON, *supra* note 87, at 16.

HIV-specific statutes since 2018.¹⁶⁴ Furthermore, “the only country on the African continent with reported new HIV criminalisation (sic) cases in 2023 was Kenya,” so there has been some improvement.¹⁶⁵

2. The Americas

Across the Americas, countries have varying levels of legal protections for LGBTI individuals.¹⁶⁶ In North America, the United States and Canada afford more legal protections to the LGBTI community than other countries in the region.¹⁶⁷ Latin America, once highly restrictive, has become increasingly progressive in regard to the protections its countries provide for the LGBTI community.¹⁶⁸ Meanwhile, the Caribbean nations still deny the LGBTI community many basic rights.¹⁶⁹

From 2010 to 2014, there was growing popular support for LGBTI rights in Latin America, but approval grew at a slower pace or even decreased in Central American nations.¹⁷⁰ Shelters in Mexico reported an increase in LGBTI Central American migrants in the mid-2010s due to large-scale discrimination and persecution of LGBTI individuals in various countries.¹⁷¹ Local NGOs in those Central American nations also reported that LGBTI migrants were fleeing.¹⁷²

Latin American progressiveness was spurred by countries emerging from military dictatorships and a rise in democracy beginning in the 1980s.¹⁷³ These

164. Angola, Congo, Democratic Republic of Congo, Ghana, Kenya, Lesotho, Niger, Nigeria, Uganda, and Zimbabwe have applied their laws; Benin, Burkina Faso, Burundi, Cape Verde, Central African Republic, Chad, Côte d’Ivoire, Djibouti, Equatorial Guinea, Guinea, Guinea-Bissau, Liberia, Libya, Madagascar, Mali, Mauritania, Mozambique, Senegal, Sierra Leone, South Sudan, Tanzania, and Togo have not. BERNARD & SYMINGTON, *supra* note 87, at 11–12, 50. The Democratic Republic of Congo was the first to repeal its law (2018), and Zimbabwe, the second (2022). 2022 *in Review*, *supra* note 163.

165. 2023 *in Review: A Delicate Balance*, HIV JUST. NETWORK (Dec. 20, 2023), <https://perma.cc/6NE5-DBYS>.

166. *Sexual Orientation Laws in the World—Criminalisation*, INT’L GAY, LESBIAN, BISEXUAL, TRANSGENDER, & INTERSEX ASS’N (June 2016), <https://perma.cc/D4FA-MN9R> [hereinafter *Criminalisation Map*]; *Sexual Orientation Laws in the World—Protection*, INT’L GAY, LESBIAN, BISEXUAL, TRANSGENDER, & INTERSEX ASS’N (June 2016), <https://perma.cc/X95E-Z8GX> [hereinafter *Protection Map*]; *Sexual Orientation Laws in the World—Recognition*, INT’L GAY, LESBIAN, BISEXUAL, TRANSGENDER, & INTERSEX ASS’N (June 2016), <https://perma.cc/WL7F-GDPX> [hereinafter *Recognition Map*]; see generally U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports of Human Rights Practices (2022), <https://perma.cc/L5K5-2MBZ>. (detailing legal protections for LGBTI individuals and rights violations by country).

167. See *Protection Map*, *supra* note 166.

168. Javier Corrales, *LGBT Rights and Representation in Latin America and the Caribbean: The Influence of Structure, Movements, Institutions, and Culture*, UNIV. OF N.C. AT CHAPEL HILL LGBT REPRESENTATION & RTS. INITIATIVE 4 (2015), <https://perma.cc/44N4-DTHC>.

169. See, e.g., 2021 Country Reports on Human Rights Practices, *supra* note 166; *Protection Map*, *supra* note 166; Corrales, *supra* note 168, at 14–15.

170. Whitney Eulich, *In Latin America, LGBT Legal Rights Change More Quickly than Attitudes*, CHRISTIAN SCI. MONITOR (May 20, 2016), <https://perma.cc/3N5B-DWDY>.

171. *Id.*

172. *Id.*

173. Omar G. Encarnación, *Beyond Machismo*, FOREIGN AFFS. (Jan. 11, 2016), <https://perma.cc/L2FF-P4XG>.

countries developed new constitutions that used human rights language stated in the 1948 UDHR.¹⁷⁴ Although that language does not explicitly protect LGBTI individuals, it has been interpreted to include LGBTI rights.¹⁷⁵ Those protections did not always come from public opinion—courts and legislatures occasionally made legal changes before public opinion was favorable to protections.¹⁷⁶ In contrast, a major change of public opinion in the U.S. led to LGBTI- friendly court rulings and legislation.¹⁷⁷

a. Social Attitudes. Despite legal advances and formalized protections for the LGBTI community in Latin America, members still experience social stigma.¹⁷⁸ In some countries, it may be acceptable to “be gay” in private but not in public, especially if one’s identity outwardly challenges traditional gender norms and expressions.¹⁷⁹ In addition, violence and harassment towards LGBTI individuals occurs even in countries with formalized LGBTI protections.¹⁸⁰

b. Violence. Though there have been many legal advances in the region, Latin America is still reported as having the highest rates of violence against members of the LGBTI community.¹⁸¹ In late 1980s Brazil, there was a tremendous amount of violence directed at those perceived as gay.¹⁸² In 1995, an Amnesty International report about worldwide violence against LGBTI individuals highlighted this problem in Latin America—it was also the first time that a major human rights organization had highlighted LGBTI issues.¹⁸³ Data on homophobic violence in Latin America shows that, on average, one LGBTI-identity-related homicide occurs per day.¹⁸⁴ Violence against LGBTI individuals has been common in Guatemala; there are many documented murders of transgender individuals between 2004 and 2006.¹⁸⁵ As recently as 2021, LGBTI rights groups in Guatemala alleged that gay and transgender individuals experienced high rates of police violence.¹⁸⁶

174. *Id.*

175. *Id.*

176. Eulich, *supra* note 170.

177. *Id.*

178. Francis Torres, *Challenges to LGBT Rights in Latin America*, BROWN POL. REV. (Mar. 17, 2014), <https://perma.cc/TJ7R-NDX9>.

179. *Id.*

180. *Id.*

181. *Id.*; Eulich, *supra* note 170.

182. Encarnación, *supra* note 173.

183. *Id.*

184. Torres, *supra* note 168.

185. Rachel Glickhouse & Mark Keller, *Explainer: LGBT Rights in Latin America and the Caribbean*, AMS. SOC’Y/COUNCIL OF THE AMS. (May 24, 2012), <https://perma.cc/YJ3W-XKR3>.

186. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Guatemala (2022), <https://perma.cc/75QY-L2KD>.

In many countries, the police themselves harass or discriminate against LGBTI individuals, leaving little recourse for those individuals.¹⁸⁷ Individuals may be reluctant to report due to fear of retribution for their LGBTI status, or fear that they may face arbitrary police violence and harassment.¹⁸⁸ As a result, underreporting of crimes against LGBTI individuals continues to be a problem.¹⁸⁹ For

187. Countries that reported police violence or discrimination include: Argentina (discrimination on all fronts—especially towards transgender individuals), Barbados (deterrence from reporting crimes or seeking justice), Belize (discrimination by refusing to take reports from LGBTI individuals), Bolivia (both failures to investigate and targeting), Brazil (underreporting of crimes likely due to widespread fear of discrimination or violence on the part of law enforcement), Chile (reporting record highs in violence and discrimination in 2020 stemming in part from police abuse), Colombia (harassment and discrimination on the basis of sexual orientation and gender identity), Costa Rica (police abuse), Dominica (fears and reports of police discrimination), Dominican Republic (credible reports of violence), Ecuador (inadequate investigations), El Salvador (violence, harassment, and failures to act), Guatemala (extortion, harassment, and failures to investigate), Haiti (condoning violence and responding inconsistently), Jamaica (underreporting of crimes due to fears of police discrimination or inaction), Mexico (failures to investigate and routine mistreatment in custody), Nicaragua (unresponsiveness, lack of access to justice, discrimination, and targeted violence and sexual violence), Peru (both failures to protect and active violations on the part of police), and Venezuela (failures to investigate bias and reports of police blocking entry into public spaces). See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Argentina (2022) <https://perma.cc/TG3R-YTQQ> [hereinafter Argentina 2021]; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Barbados (2022), <https://perma.cc/RL32-K2K5>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Belize (2022), <https://perma.cc/BFJ4-JEFH>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Bolivia (2022) <https://perma.cc/45RY-7ZBA> [hereinafter Bolivia 2021]; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Brazil (2022) <https://perma.cc/EAB9-XXXG>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Chile (2022) <https://perma.cc/5TAW-VATY>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Colombia (2022), <https://perma.cc/U3FT-L5LJ>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Costa Rica (2022), <https://perma.cc/MWQ9-XZM3>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Dominica (2022), <https://perma.cc/2CUY-PCY9>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Dominican Republic (2022), <https://perma.cc/7UVZ-KF5Z> [hereinafter Dominican Republic 2021]; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Ecuador (2022), <https://perma.cc/97EM-DSK9>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: El Salvador (2022), <https://perma.cc/S7Z7-SS6P>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Guatemala (2022), <https://perma.cc/RM7G-5AM7>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Haiti (2022), <https://perma.cc/9ZH2-RWX2>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Jamaica (2022), <https://perma.cc/L23M-LQ5H>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Mexico (2022), <https://perma.cc/EEG5-QLHX> [hereinafter Mexico 2021]; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Nicaragua (2022), <https://perma.cc/W985-KXG4>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Peru (2022), <https://perma.cc/GU9U-NMUB>; U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Venezuela (2022), <https://perma.cc/Y6B2-N2FT>.

188. See Dominican Republic 2021, *supra* note 187.

189. See *id.*; Torres, *supra* note 168.

example, in Belize, many LGBTI individuals do not report crimes for fear of harassment while reporting.¹⁹⁰ At times, police in Belize refused to take reports at all.¹⁹¹

c. Criminalization of Same-Sex Relations. Few countries in the Americas have legalized either marriage or same-sex unions for LGBTI individuals.¹⁹² In fact, many countries in the Caribbean and some in Central America criminalize same-sex relationships.¹⁹³ For example, in Dominica, the criminalization of same-sex relationships is enshrined in its Constitution, which prohibits cohabitation as well as marriage between same-sex couples.¹⁹⁴ As noted above, this type of criminalization causes underreporting and fear of retribution from police.¹⁹⁵ It is worth noting that some countries only criminalize male relationships.¹⁹⁶

3. Asia

LGBTI individuals remain at the margins of society in Asia.¹⁹⁷ Asia is home to various constructions of sexual orientation and gender identity that are just as diverse as the region's cultures and religions.¹⁹⁸ An increasing number of advocacy groups in Asia use the words "LGBT" and "LGBTI" in their activities, bringing the discourse of sexual orientation and gender identity to the public.¹⁹⁹ The region exhibits little progress in reforming its laws to better protect LGBTI individuals from criminalization²⁰⁰ and faces numerous hurdles in recognizing LGBTI rights, including but not limited to: conservative religious beliefs, ethnic minority relations, rural cultural attitudes, and socioeconomic disparities.²⁰¹ For

190. See Belize 2021, *supra* note 187.

191. *Id.*

192. *Marriage Equality Around the World*, HUM. RTS. CAMPAIGN, <https://perma.cc/8BNP-7HK8>. Countries that have legalized same-sex marriage include Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Mexico, the United States, and Uruguay.

193. *#Outlawed "The Love That Dare Not Speak Its Name"*, HUM. RTS. WATCH, <https://perma.cc/J99P-TJKL>. Countries define these relationships as "unnatural/indecent acts" or as "buggery" and have varying sanctions. Countries in which same-sex relationships are "buggery" include Dominica, Guyana, Jamaica, St. Lucia, and St. Vincent. Countries in which same-sex relationships are "unnatural/indecent acts" include Dominica, Grenada, and Guyana. The punishments for "buggery" and/or "unnatural/indecent acts" are four to ten years for an adult or five years for a minor in Dominica, ten years in prison in Grenada, life in prison or two years for "gross indecency" in Guyana, ten years in prison and hard labor in Jamaica, and five to ten years in prison in St. Lucia and St. Vincent.

194. Glickhouse & Keller, *supra* note 185.

195. See Torres, *supra* note 168.

196. See *#Outlawed "The Love That Dare Not Speak Its Name," supra* note 193 (listing those countries, including Guyana and Jamaica).

197. U.N. DEV. PROGRAMME, LEAVE NO ONE BEHIND: ADVANCING SOCIAL, ECONOMIC, CULTURAL AND POLITICAL INCLUSION OF LGBTI PEOPLE IN ASIA AND THE PACIFIC - SUMMARY 1 (2015) [hereinafter LEAVE NO ONE BEHIND], <https://perma.cc/4DC4-8XU8>.

198. See *id.* at 2.

199. See *id.* at 11.

200. U.N. DEV. PROGRAMME, REPORT OF THE REGIONAL DIALOGUE ON LGBTI HUMAN RIGHTS AND HEALTH IN ASIA-PACIFIC 2 (2015) [hereinafter REGIONAL DIALOGUE], <https://perma.cc/59CZ-FPYP>.

201. See, e.g., *id.* at 1, 18, 42.

example, an LGBTI person becomes more vulnerable when they also belong to socially excluded groups such as immigrants, sex workers, or the poor.²⁰² Nevertheless, some parts of Asia exhibit major advancements in LGBTI rights.²⁰³ This section discusses the social and political status of LGBTI individuals throughout Asia.

a. Tradition of Patriarchy. Traditional patriarchal structures in many Asian cultures often foster negative societal reactions towards LGBTI individuals.²⁰⁴ The traditional notion of patriarchy, in which men marry and produce children, may marginalize LGBTI individuals who do not conform to the existing model.²⁰⁵ For example, the idea of “phallocentrism” or “sex without a male partner [is] not considered an actual sexual act” has long prevailed in China.²⁰⁶ In Pakistan, same-sex marriage is punishable by up to ten years in prison.²⁰⁷ Schools in Asia begin reinforcing the norm of heterosexuality to the younger generation in the classrooms. In Malaysia, boys with stereotypical feminine behavior were identified as gay and sent to masculinity training.²⁰⁸ At home, parents struggle to accept their children’s seemingly abnormal sexual orientation or gender identity; they often misjudge their children’s status as a “psychiatric condition” or “immoral conduct.”²⁰⁹ In Afghanistan, for example, it is a taboo to be homosexual.²¹⁰ Until the 2010s, the term *seidôitsusei shôgai* (gender identity disorder)—which carries a negative connotation—was an integral part of Japan’s vocabulary in describing transgender individuals.²¹¹ Homosexuality is gradually becoming more tolerated in some Asian countries, though among these countries there is a great deal of variation in the degree to which homosexuality is accepted.²¹²

b. Religious Fundamentalism. Asia’s religious landscape is one of the most diverse in the world.²¹³ This diversity influences each local population differently; as such, regional differences in animosity towards LGBTI communities

202. LEAVE NO ONE BEHIND, *supra* note 197, at 7.

203. See *infra* Section III.B.3.

204. See LEAVE NO ONE BEHIND, *supra* note 197, at 10.

205. See *id.* at 4.

206. See U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT’L DEV., BEING LGBT IN ASIA: CHINA COUNTRY REPORT 8 (2014) [hereinafter CHINA COUNTRY REPORT], <https://perma.cc/5D9N-G4HZ>.

207. See DJ Kamal Mustafa, *LGBTQ and Intersex Communities in Pakistan Forge Ahead*, WASH. BLADE (Aug. 13, 2022), <https://perma.cc/M5YH-HMHT>.

208. See REGIONAL DIALOGUE, *supra* note 200, at 4.

209. *Id.* at 5.

210. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Afghanistan 60 (2022) [hereinafter Afghanistan 2021], <https://perma.cc/4E9D-37TW>.

211. Sechiyama Kaku, *Rainbow in the East: LGBT Rights in Japan*, NIPPON.COM (May 28, 2015), <https://perma.cc/F528-44QG>.

212. See Brian Wong, *Homophobia is Not an Asian Value. It’s Time for the East to Reconnect to Its Own Tradition of Tolerance*, TIME (Dec. 17, 2020), <https://perma.cc/AD7E-XWU2>; see also *infra* Section III.B.3.

213. See Zachary Keck, *Asia Leads the World in Religious Diversity*, THE DIPLOMAT (Apr. 9, 2014), <https://perma.cc/CG44-EW7L>.

and activities may be correlated with the presence of religious fundamentalism.²¹⁴ Religious doctrines that treat homosexuality as a wrong reinforce the hostile environment towards LGBTI individuals.²¹⁵ For example, countries which adopt Sharia law into their legal system, such as the Aceh province in Indonesia, may accordingly criminalize homosexual activities.²¹⁶ However, not all aspects of religions such as Islam or Buddhism are hostile towards LGBTI people.²¹⁷ For example, Theravada Buddhism in Cambodia generally does not discriminate against homosexuality in its doctrine.²¹⁸

c. Lack of Legal Recognition and Protection. Numerous transgender individuals in Asia struggle to secure identity documents that help recognize and protect them under the law.²¹⁹ Some countries—such as Japan, Singapore, South Korea, Taiwan, Hong Kong, and China—require surgical procedures such as “sex reassignment surgeries and sterilization” before recognizing a non-traditional gender.²²⁰ Malaysia has domestic laws criminalizing “a male person posing as a woman” or “a female person posing as a man” and has been enforcing those laws against transgender women.²²¹

The Chinese government has taken a passive stance towards issues of sexual orientation and gender identity.²²² No particular department is in charge of LGBTI matters at the moment.²²³ South Korea has been similarly passive on the legal front; while the LGBTI rights movement in the country is growing, it continues to face hostility and discrimination.²²⁴ Activists and progressive legislators have advocated for the passage of anti-discrimination laws to protect LGBTI individuals, but the government has not made much progress, citing vocal anti-LGBTI opposition.²²⁵ In Cambodia, no domestic law punishes violations of LGBTI rights.²²⁶ In Vietnam, laws that fail to protect LGBTI people and harsh

214. See Ryon C. McDermott, Lori D. Lindley, Jonathan P. Schwartz, & Josiah S. Proietti, *Exploring Men's Homophobia: Associations with Religious Fundamentalism and Gender Role Conflict Domains*, 15(2) PSYCH. OF MEN & MASCULINITY 191, 192 (2014) (discussing how religious fundamentalism is related to homophobia); see also Wong, *supra* note 212.

215. See generally REGIONAL DIALOGUE, *supra* note 200 (featuring narratives from LGBTQIA+ Asian people about their experience of religion-based discrimination).

216. Kyle Knight, *77 Lashes for a Gay Couple in Indonesia: Troubling Trend of Anti-LGBT Actions*, HUM. RTS. WATCH (Jan. 28, 2021), <https://perma.cc/YSR4-TYF2>.

217. CHINA COUNTRY REPORT, *supra* note 206, at 11, 30.

218. U.N. DEV. PROGRAMME, BEING LGBT IN ASIA: CAMBODIA COUNTRY REPORT 8 (2014) [hereinafter CAMBODIA COUNTRY REPORT], <https://perma.cc/C9QF-EMK3>.

219. LEAVE NO ONE BEHIND, *supra* note 197, at 8.

220. Kyle Knight, *Dispatches: A Blueprint for Transgender Rights in Asia*, HUM. RTS. WATCH (Oct. 8, 2015, 4:30 PM), <https://perma.cc/S9NH-KX5J>.

221. *Id.*

222. See CHINA COUNTRY REPORT, *supra* note 206, at 11.

223. *Id.*

224. *World Report 2022: South Korea*, HUM. RTS. WATCH, <https://perma.cc/HM47-H7XF>.

225. *Id.*

226. CAMBODIA COUNTRY REPORT, *supra* note 218, at 8.

views from conservative Vietnamese culture fuel the social stigma towards LGBTI persons.²²⁷

The rest of Southeast Asia likewise remains passive in legal recognition of LGBTI rights, if not hostile towards the idea.²²⁸ Moreover, transgender individuals in Indonesia may have difficulty obtaining identity documents without receiving sex reassignment surgery because the national law recognizes males and females only.²²⁹

d. Criminalization of Homosexual and Gender-Expansive Activity. At least nineteen countries in Asia criminalize consensual same-sex sexual activity between adult males in some form.²³⁰ As of 2024, same-sex sexual activity between males is illegal in Brunei, Indonesia, Malaysia, and Myanmar.²³¹ Many Asian countries have had arrests and/or prosecutions targeting same-sex sexual activity since 2013 (Bangladesh, Bhutan, Brunei, India, Malaysia, Maldives, Myanmar, Pakistan, Papua New Guinea, Russia).²³² Some countries only criminalize sexual activity between males (Bangladesh, Myanmar, Pakistan, Turkmenistan, and Uzbekistan).²³³ Several criminalize sexual activity between males and between females (Afghanistan, Brunei, Indonesia, Malaysia, Maldives, and Sri Lanka).²³⁴ Same-sex marriage is illegal in Indonesia, and although same-sex sexual activity and relationships are not illegal, the passage of a 2022 law criminalizing consensual sex outside of marriage has effectively made all same-sex conduct illegal.²³⁵

The justifications for laws that criminalize gender-expansive and same-sex sexual activity vary by country.²³⁶ For example, the Taliban in Afghanistan criminalize consensual same-sex sexual activity under Sharia law.²³⁷ In Brunei, the

227. See Thoi Nguyen, *The Fight for LGBT Rights in Vietnam Still Has a Long Way To Go*, THE DIPLOMAT (Feb. 28, 2020), <https://perma.cc/ND3T-7MPK>.

228. See generally Dominique Mosbergen, *Being LGBT in Southeast Asia: Stories of Abuse, Survival and Tremendous Courage*, HUFFPOST (Oct. 11, 2015), <https://perma.cc/M4HB-34DQ> (describing instances of discrimination and lack of legal protection for LGBTQIA+ individuals); see also *LGBTQ Rights in Southeast Asia Slow to Improve*, UNIV. AT ALBANY: SUNY (June 3, 2021), <https://perma.cc/V8ZU-P7T4>.

229. U.N. DEV. PROGRAMME & U.S. AGENCY FOR INT'L DEV., *BEING LGBT IN ASIA: INDONESIA COUNTRY REPORT*, at 8 (2014) [hereinafter *INDONESIA COUNTRY REPORT*], <https://perma.cc/99L8-JFWL>.

230. *LEAVE NO ONE BEHIND*, *supra* note 197, at 8.

231. *Map of Countries that Criminalise LGBT People*, HUM. DIGNITY TR., <https://perma.cc/KS59-5KB3>.

232. *Criminalisation Map*, *supra* note 166; see *STATE-SPONSORED HOMOPHOBIA*, *supra* note 39, at 129–39.

233. *Map of Countries that Criminalise LGBT People*, *supra* note 231.

234. *Id.*

235. *Indonesia: New Criminal Code Disastrous for Rights*, HUM. RTS. WATCH (Dec. 8, 2022, 8:00 AM), <https://perma.cc/SD5A-DZVN>.

236. See *infra* notes 235–40.

237. Heather Barr & J. Lester Feder, “*Even If You Go to the Skies, We’ll Find You*” *LGBT People in Afghanistan After the Taliban Takeover*, HUM. RTS. WATCH (Jan. 26, 2022), <https://perma.cc/F5DF-R3FZ>.

Sharia-based penal code “prohibits men from dressing as women or women dressing as men.”²³⁸ In Burma, Section 377 of the penal code criminalizes consensual same-sex sexual activity, which it “inherited from British colonial rule” as a part of British India.²³⁹

e. Violence Towards LGBTI Persons. In Asia, the police are too often the perpetrators of violence towards LGBTI individuals.²⁴⁰ Reports in Afghanistan state that LGBTQI+ individuals faced harassment and violence by the police, and after the Taliban takeover, some LGBTI individuals chose to leave the country.²⁴¹ In Indonesia, LGBTI people are without protection from the police and remain vulnerable to attacks by conservative Islamist activists; some police even abuse LGBTI persons who are deemed “vagrants.”²⁴² In Nepal, “*metis* (feminine men, cross-dressing men)” and transgender men especially suffer from police violence.²⁴³ LGBTI individuals in Myanmar have reported that the police threaten to prosecute them for bribes.²⁴⁴ Furthermore, in China, LGBTI persons are often too afraid to seek the police when they fall victim to sexual violence because of the derision and discrimination they might face.²⁴⁵ Transgender women in Malaysia are often subject to capricious arrests by the police.²⁴⁶ In Kyrgyzstan, authorities reportedly surveil online LGBTI communities to punish and extort LGBTI individuals.²⁴⁷

LGBTI individuals in Asia may also experience violence and abuse from their own families.²⁴⁸ In Kyrgyzstan, 70% of violence experienced by LGBTI persons occurs in home environments. For example, families may force lesbians and

238. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Report on Human Rights Practices: Brunei 21 (2021), <https://perma.cc/YM87-JDA8>.

239. INT’L COMM’N OF JURISTS, IN THE SHADOWS: SYSTEMIC INJUSTICE BASED ON SEXUAL ORIENTATION AND IDENTITY/EXPRESSION IN MYANMAR 7–8 (2019), <https://perma.cc/2CVA-B6WL>.

240. See, e.g., Afghanistan 2021, *supra* note 210, at 60 (Afghanistan); Neela Ghoshal, “*The Deceased Can’t Speak for Herself: Violence Against LGBT People in Malaysia*,” HUM. RTS. WATCH (Jun. 25, 2019, 12:47PM EDT), <https://perma.cc/4EP8-2P5L> (Malaysia); OUTRIGHT ACTION INT’L, TO SERVE & PROTECT WITHOUT EXCEPTION: ADDRESSING POLICE ABUSE TOWARD LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX (LGBTI) PEOPLE IN THE PHILIPPINES, 8 (2016), <https://perma.cc/T8YC-UUCGD> (Philippines); RFE/RL’s Uzbek Service, *LGBT Community In Uzbekistan Faces Abuse, Discrimination, Imprisonment, Report Says*, RADIO FREE EUROPE/RADIO LIBERTY (Jun. 9, 2022, 4:38 PM GMT), <https://perma.cc/9VKQ-RMY3> (Uzbekistan).

241. See Afghanistan 2021, *supra* note 210, at 60.

242. INDONESIA COUNTRY REPORT, *supra* note 229, at 8.

243. INT’L GAY & LESBIAN HUM. RTS. COMM’N, VIOLENCE ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY, AND GENDER EXPRESSION AGAINST NON-HETERONORMATIVE WOMEN IN ASIA: SUMMARY REPORT, at 7 (Feb. 2010), <https://perma.cc/MQY8-WY4B>.

244. IN THE SHADOWS: SYSTEMIC INJUSTICE BASED ON SEXUAL ORIENTATION AND IDENTITY/EXPRESSION IN MYANMAR, *supra* note 239, at 27–31, 33.

245. CHINA COUNTRY REPORT, *supra* note 206, at 8.

246. Knight, *supra* note 220.

247. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Kyrgyz Republic 16, (2022), <https://perma.cc/2TG8-LUCH>.

248. Alisa Tang, *Asia’s LGBT People Migrate to Escape Violence at Home*, REUTERS (Apr. 8, 2015), <https://perma.cc/X55N-BHS4>.

bisexual women to marry men.²⁴⁹ In Singapore, “corrective” rape was used to discipline a lesbian girl, and when the girl told her parents they replied that she “deserved it” for being a lesbian.²⁵⁰ Police may also refuse to do anything about family violence when asked for assistance.²⁵¹ LGBTI individuals in various Asian countries such as Pakistan, India, and China may feel pressured into entering into heterosexual marriages due to societal and family pressure.²⁵²

f. Employment Discrimination. LGBTI individuals regularly face discrimination at their workplace, and in China, no national law protects them from such human rights violations.²⁵³ A 2013 survey of 2,161 LGB individuals in China revealed that almost half of them hide their sexual orientation from their place of employment.²⁵⁴ LGBTI persons in Cambodia also express discomfort in revealing their sexual orientation and fear that discrimination may impact their job prospects.²⁵⁵

LGBTI people in Thailand are generally bound by the country’s traditional gender roles at their workplaces and accordingly keep their identities hidden to shield themselves from unpleasant interactions.²⁵⁶ Discriminatory barriers can limit the employment opportunities for LGBTI individuals and limit their opportunities to only more accessible professions such as “beauty and wellness, hospitality, retail, and sex work.”²⁵⁷ LGBTI individuals also face difficulties during the recruitment process, where they may be asked improper questions about their sexual orientation or gender identity.²⁵⁸ LGBTI individuals in China, the Philippines and Thailand also face discrimination from employers, including

249. Kyrgyz Republic 2022 Human Rights Report, *supra* note 247, at 31.

250. *See* Mosbergen, *supra* note 227.

251. *See* Tang, *supra* note 248.

252. *See* Rimal Farruk, *Inside the Lives of Queer People in Heterosexual Marriages*, VICE WORLD NEWS (July 13, 2022), <https://perma.cc/L4KW-AQ75>.

253. *See* CHINA COUNTRY REPORT, *supra* note 206, at 9.

254. *See id.* at 9, 28.

255. *See* CAMBODIA COUNTRY REPORT, *supra* note 218, at 9.

256. *See* U.N. DEV. PROGRAMME, BEING LGBT IN ASIA: THAILAND COUNTRY REPORT, 7 (2014), <https://perma.cc/U4R4-MTNN> [hereinafter THAILAND COUNTRY REPORT]; *see also* Laura Villadiego, *Land of Lady Boys? Thailand is Not the LGBTI Paradise It Appears*, S. CHINA MORNING POST (Sept. 16, 2018), <https://perma.cc/47Z9-E3MR>.

257. Peter A. Newman, Luke Reid, Suchon Tepjan, & Pakorn Akkakanjanasupar, *LGBT+ Inclusion and Human Rights in Thailand: A Scoping Review of the Literature*, 21 BMC PUB. HEALTH 1, 14 (citing THE WORLD BANK, *Economic Inclusion of LGBTI Groups in Thailand* (Mar. 26, 2018), <https://perma.cc/QP5D-ASMA>); BUSAKORN SURIYASARN, GENDER IDENTITY AND SEXUAL ORIENTATION IN THAILAND: PROMOTING RIGHTS, DIVERSITY, AND EQUALITY IN THE WORLD OF WORK (PRIDE) PROJECT, ILO COUNTRY OFFICE FOR THAILAND, CAMBODIA AND LAO PEOPLE’S DEMOCRATIC REPUBLIC 43 (2014), <https://perma.cc/W7QA-LZ3H>).

258. *See, e.g.*, Aditi Shetty, Kyle Knight, Thanita Wongprasert, & Sawita Rattivarakorn, “People Can’t Be Fit Into Boxes” Thailand’s Need for Legal Gender Recognition, HUM. RTS. WATCH, 2, 29, 31, 37 (2021), <https://perma.cc/K3YR-CWQY>.

harassment, bullying, and denial of training opportunities.²⁵⁹ Meanwhile, a study of LGBTI employees in India revealed discrimination and harassment for employees who were open about their sexuality.²⁶⁰

4. Europe

The laws in Europe, and particularly those governing the European Union (“EU”),²⁶¹ are considered among the friendliest in the world for LGBTI individuals.²⁶² In 2024, the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA-Europe”) submitted rankings that demonstrate Europe’s positive efforts to develop LGBTI rights.²⁶³ However, the rate and type of progress varies substantially across Europe.²⁶⁴ As important legal and policy changes continue to sweep the continent, an increasingly differentiated pattern of developments in LGBTI rights across Europe is emerging.²⁶⁵ While some countries are advancing standard-setting actions,²⁶⁶ others have grown passive or complacent, and some have even regressed.²⁶⁷ Consequently, the various

259. See U.N. DEV. PROGRAMME, LGBTI PEOPLE AND EMPLOYMENT: DISCRIMINATION BASED ON SEXUAL ORIENTATION, GENDER IDENTITY AND EXPRESSION, AND SEX CHARACTERISTICS IN CHINA, THE PHILIPPINES AND THAILAND, 48 (2018), <https://perma.cc/U9FE-2QZ3>.

260. Abhay Mane, *Experience of LGBT+ Employees at the Workplace in India: Diversity and Inclusion*, 9 INT’L J. SOC. SCI. RES. 164, 173–74 (2021).

261. For instance, the EU Charter of Fundamental Rights was the first international human rights charter to explicitly include the term “sexual orientation” in its prohibition against discrimination. Article 21(1) states that, “[a]ny discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or *sexual orientation* shall be prohibited.” Charter of Fundamental Rights of the European Union art. 21(1), 2000 O.J. (C 364) 13 (emphasis added).

262. See ILGA-EUR., *ILGA-Europe Rainbow Map (Index) May 2023* (2023), <https://perma.cc/496V-HVNP> [hereinafter ILGA-EUR., *Rainbow Index 2023*].

263. *Country Ranking*, ILGA-EUR., <https://perma.cc/J6DJ-NWNL>.

264. See generally, ILGA-EUR., 2024 ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE IN EUROPE AND CENTRAL ASIA (2024), <https://perma.cc/AE52-94DB> [hereinafter ILGA-EUR., ANNUAL REVIEW 2024].

265. ILGA-Europe Executive Director Evelyn Paradis at the 2016 launch of the Annual Review stated: “Contrary to popular belief, LGBTI equality is far from being a done deal in Europe. The picture is actually very mixed at the moment: a lot of the governments that were leading the way on LGBTI equality a few years ago have slowed down their work, especially when it comes to new standards.” *Changing Laws and Changing Lives Are Not Always the Same Thing: Rainbow Europe 2016 Examines the Situation of LGBTI People in Europe*, ILGA-EUR. (May 10, 2016, 3:00 PM), <https://perma.cc/9M5P-JYY9>.

266. For example, in 2015, Malta became the first country in the world to protect intersex persons’ physical autonomy and bodily integrity by prohibiting doctors from performing surgical procedures without prior consent. *Fact Sheet: Intersex*, U.N. FREE & EQUAL (May 2017), <https://perma.cc/NF2F-G3B3>. Similar laws have since been passed in Germany, Iceland, Portugal, Greece, and some regions of Spain. *How Activism Led the Way Forward to Protect Intersex Children in Greece*, IGLA-EUR. (Nov. 10, 2022, 5:51 PM), <https://perma.cc/9QEU-2T8C>. Greece’s law is the first to ban hormonal interventions targeting intersex children. *Id.*

267. For instance, there has been legal gender recognition regression in Greece, Poland, Portugal, and Russia. ILGA-EUR., 2022 ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE IN EUROPE AND CENTRAL ASIA 8 (2022), <https://perma.cc/C528-3G3L> [hereinafter ILGA-EUR., ANNUAL REVIEW 2022].

protections, obstacles, and public opinions affecting the lives of LGBTI individuals living in different parts of Europe are growing more disparate.²⁶⁸ Within this muddled legal environment are new milestones in the recognition of LGBTI rights and a great deal of work that still needs to be done.²⁶⁹

a. Barriers to Asylum and Recognition of LGBT²⁷⁰ Families. In 2022, more than five million people sought refuge in the EU.²⁷¹ Many of these individuals were LGBTI people seeking asylum protection from repressive systems and precarious conditions caused by persecution of their gender identity and/or sexual orientation in their native countries, although the exact number of LGBTI asylees are unknown.²⁷² The Charter of Fundamental Rights of the European Union assures a person's right to asylum.²⁷³ Under the EU Qualifications Directive and Asylum Procedures Directive, EU Member States are obligated to recognize gender identity and sexual orientation as qualifying bases for consideration as members within "a particular social group."²⁷⁴ The Directives expressly reference gender identity and sexual orientation; consequently, people who are victimized because of their LGBTI status have valid grounds for receiving international protection within a Member State.²⁷⁵ Despite these obligations placed upon Member States, LGBTI asylees face unequal treatment compared to individuals who are granted asylum on other protected grounds.²⁷⁶

Europe's refugee law developed around the principles articulated in the 1951 Convention Relating to the Status of Refugees ("Refugee Convention")²⁷⁷ and

268. Tony Wesolowsky, *The Worrying Regression of LGBT Rights in Eastern Europe*, RADIO FREE EUR./RADIO LIBERTY (Dec. 23, 2021), <https://perma.cc/AR3C-PRJL>.

269. See, IGLA-EUR., 2023 ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE IN EUROPE AND CENTRAL ASIA 8–12 (2023), <https://perma.cc/GQ42-6JB2>.

270. The "I" normally included in "LGBTI" is dropped because the asylum application process for individuals who are intersex is lacking.

271. ASYLUM REPORT 2023, EUR. UNION AGENCY FOR ASYLUM 3 (2023), <https://perma.cc/R98R-95GC>.

272. Ari Shaw & Namrata Verghese, *LGBTQI+ Refugees and Asylum Seekers: A Review of Research and Data Needs*, UCLA L. WILLIAMS INST. 1 (June 2022), <https://perma.cc/DU7S-S9K5>; see also Jon Henley, *LGBT Asylum Seekers' Claims Routinely Rejected in Europe and UK*, THE GUARDIAN (July 9, 2020, 04:19 PM), <https://perma.cc/87F8-5EW8>. As of March 2023, sixty-seven countries criminalize same-sex sexual activity and eleven still impose the death penalty as punishment. See *Map of Countries that Criminalise LGBT People*, *supra* note 231.

273. Charter of Fundamental Rights of the European Union, art. 18, 2000 O.J. (C 364) 1, 12.

274. FRA, PROTECTION AGAINST DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION, GENDER IDENTITY AND SEX CHARACTERISTICS IN THE EU: COMPARATIVE LEGAL ANALYSIS UPDATE 2015 100–01 (2015), <https://perma.cc/4JPC-5FWG> [hereinafter FRA 2015 UPDATE].

275. *Id.* at 100.

276. See generally UK LESBIAN & GAY IMMIGRATION GROUP, *Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum*, RAINBOW MIGRATION (Apr. 2010), <https://perma.cc/6XB6-UL9W>; see also *LGBTI Asylum Seekers Facing 'Double Discrimination' Across Europe, Warns Report*, EURONEWS (Feb. 15, 2022), <https://perma.cc/V3GH-TUNR> [hereinafter *Double Discrimination*].

277. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

the 1967 Protocol to the Geneva Convention (“Protocol”).²⁷⁸ A number of human rights treaties have oversight bodies to monitor the implementation of the rights enshrined within the treaty, but no such body exists for refugee treaties.²⁷⁹ In other words, there lacks any mechanisms for accounting how countries decide whether to grant asylum to an individual, and “every state is free to use its own methods to determine who qualifies for refugee status.”²⁸⁰ Furthermore, the UN High Commissioner offers countries little guidance on how to make their determinations of who qualifies for refugee status.²⁸¹ In its Guidance Note, the UNHCR follows the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity²⁸² and broadly defines persecution as “serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm.”²⁸³ Given this definition, it is reasonable to conclude that LGBTI individuals suffer persecution when “compelled to forsake or conceal [their] sexual orientation and gender identity, where this is instigated or condoned by the State. . . .”²⁸⁴ While these definitions provide countries with a framework for assessing persecution, the UNHCR’s guidance is not ultimately binding upon the countries.²⁸⁵

LGBTI asylum-seekers fleeing countries that do not recognize same-sex marriage may also face significant roadblocks when trying to bring their partner with them to a Member State within the EU.²⁸⁶ EU law regulates freedom of movement and family unification through the Free Movement Directive²⁸⁷ and Family

278. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. Both the Convention and the Protocol define “refugee” as meeting the following criteria: “[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.” Refugee Convention, *supra* note 277, at 152.

279. See Symposium, *Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation*, 29 COLUM. HUM. RTS. L. REV. 467, 472 (1998).

280. *Id.*

281. UNHCR Guidelines, *supra* note 33, ¶ 4.

282. See YOGYAKARTA PRINCIPLES, *supra* note 1, at 32 (recommending the UNHCR integrate the Principles).

283. UNHCR Guidelines, *supra* note 33, ¶ 16.

284. UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, ¶ 12 (Nov. 21, 2008) <https://perma.cc/9UJJ-9VHS>. The Court of Justice of the European Union denounced various countries’ attempts to deny requests for international protection on the bases that LGBTI individuals could avoid persecution by concealing their identity and held that “the fact that [the applicant] could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account.” Joined Cases C-199/12 to C-201/12, X, Y and Z v. Minister voor Immigratie en Asiel, ECLI:EU:C:2013:720, ¶ 75 (Nov. 7, 2013).

285. See UNHCR Guidelines, *supra* note 33, ¶ 7.

286. FRA 2015 UPDATE, *supra* note 274, at 88.

287. See generally Directive 2004/38/EC, of the European Parliament and of the Council of 29 April 2004 on the Right of Citizens and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation 1612/68/EEC and Repealing Directives 64/221/

Reunification Directive.²⁸⁸ The Free Movement Directive sets forth that all EU citizens and their family members possess the right to move freely within EU territory.²⁸⁹ Although the directive does not differentiate between different- and same-sex spouses, LGBTI individuals seeking to join their spouse in another Member State may face disqualification during application proceedings as a result of not being considered a “family member.”²⁹⁰ Consequently, in Member States that do not recognize same-sex marriage or registered partnerships in their national legislation, LGBTI spouses are potentially unable to reunite.²⁹¹ Because national legislation does not define “family member” to expressly include same-sex partners—whether married, registered, or in a *de facto* union—LGBTI individuals are vulnerable to the countries’ varying classifications of who qualifies as such.²⁹²

The Court of Justice of the European Union (“CJEU”)²⁹³ has tried to explicate how asylum claims based on the protected ground of sexual orientation should be assessed.²⁹⁴ Several rulings from 2014 prohibit asylum authorities in EU Member States from subjecting LGBTI persons to “credibility tests” about their sexual orientation or from requiring applicants to simply change their residency within their native country rather than granting protection.²⁹⁵ In addition, authorities must broaden their consideration to include the applicant’s personal circumstances; if the origin country imposes a criminal sanction for same-sex sexual activity, the sanction itself constitutes an act of persecution.²⁹⁶ Nevertheless, significant discrepancies remain in how LGBTI asylum claims are processed among Member States.²⁹⁷

EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC, and 93/96/EEC, 2004 O.J. (L 158) [hereinafter Free Movement Directive].

288. Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification, 2003 O.J. (L 251) 12, 12–18.

289. Free Movement Directive, *supra* note 287, at ¶ 1.

290. See FRA 2015 UPDATE, *supra* note 274, at 10.

291. *Id.*

292. *Id.* at 81–82.

293. “The CJEU is the judiciary of the EU. It reviews the legality of the acts of the institutions of the EU; ensures that Member States comply with obligations under the Treaties; and interprets EU law at the request of the national courts and tribunals. The Court is composed of one judge from each EU country, assisted by eight advocates-general.” ILGA-EUR., 2016 ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE IN EUROPE 177 (2016), <https://perma.cc/N2KA-LTD6>.

294. In *A, B, & C*, the Court of Justice obligated EU Member States to recognize sexual orientation and gender identity as a valid ground for protection and to provide adequate reception conditions and legal assistance. Joined Cases C-148/13 to C-150/13, *A, B, & C v. Staatssecretaris van Veiligheid en Justitie*, ECLI:EU:C:2014:2406, ¶ 73 (Dec. 2, 2014), <https://perma.cc/W7PS-LPW5>.

295. Prior to the CJEU’s judgment issued in December 2014, asylum authorities frequently required that applicants hide their sexual orientation or move to other parts of their countries of origin instead of granting international protection. *Id.* at ¶ 9.

296. *Id.* at ¶ 10(d).

297. ILGA-EUR., SEEKING REFUGE WITHOUT HARASSMENT, DETENTION OR RETURN TO A “SAFE COUNTRY.” ILGA-EUR. BRIEFING ON LGBTI REFUGEES AND ASYLUM 1 (2016), <https://perma.cc/LD6J-WYGS>. See also Sabine Jansen, *Good Practices Related to LGBTI Asylum Applicants in Europe*, ILGA-

b. Violence Against and Non-Inclusion of LGBT²⁹⁸ Youth in Schools. Many LGBT youth experience bullying at school, and the pervasiveness exposes a lack of adequate administrative policies and strategies for addressing violence.²⁹⁹ Studies suggest that the prevalence of homophobic and transphobic violence correlates with the lack of protections for at-risk students.³⁰⁰ Even if the school does have institution-wide guidelines for identifying students who might be experiencing abuse, the reports suggest that faculty are ill-equipped to implement the procedures in effective and responsive ways anyway.³⁰¹ In 2013, the European Union for Fundamental Rights Agency researched the various processes that schools across nineteen EU Member States use for handling LGBTI bullying and concluded that: “[W]here anti-bullying measures are in place, these are often generic, and they may be ineffective in dealing specifically with bullying on the grounds of sexual orientation and gender identity.”³⁰² Another 2015 survey conducted in Norway estimated that 48% of LGBTI youth experienced violence as compared to 7% of their heterosexual peers.³⁰³ As a result of school authorities’ inattention to the violence against their LGBT youth, these students face a hostile environment for learning.³⁰⁴ Unsurprisingly, the rate of school dropouts is higher among LGBTI students, who are also statistically more likely to experience suicidal ideation³⁰⁵ and avoid participating in school activities.³⁰⁶ These reports attest

EUR. (May 2014), <https://perma.cc/4HB7-NNX8>; see also UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), PROTECTING PERSONS WITH DIVERSE SEXUAL ORIENTATIONS AND GENDER IDENTITIES: A GLOBAL REPORT ON UNHCR’S EFFORTS TO PROTECT LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND INTERSEX ASYLUM-SEEKERS AND REFUGEES 27 (Dec. 2015), <https://perma.cc/SP8L-7ZKW>; see also *Double Discrimination*, *supra* note 276.

298. The “I” normally included in “LGBTI” is dropped because current available data reflects results from studies focused on homophobic and transphobic violence in school settings.

299. Countries in Europe with policies addressing homophobic and transphobic violence in educational settings include: Belgium, France, parts of Germany, Ireland, Italy, Malta, Montenegro, the Netherlands, Norway, Serbia, parts of Spain, Sweden, and the United Kingdom. UNESCO, SUMMARY REPORT, *supra* note 3, at 74.

300. The terms “homophobic and transphobic violence” refers to all types of school-related gender-based violence against a person as a result of their sexual orientation or gender identity/expression. UNESCO, SUMMARY REPORT, *supra* note 3, at 11.

301. FRA, PROFESSIONALLY SPEAKING: CHALLENGES TO ACHIEVING EQUALITY FOR LGBT PEOPLE 10 (2016), <https://perma.cc/CY9M-GENV>; see also *Over Half Of LGBTQI Students In Europe Bullied In Schools*, Says UNESCO Report, UNESCO (May 17, 2021), <https://perma.cc/RZ9Z-P286>.

302. UNESCO, SUMMARY REPORT, *supra* note 3, at 72.

303. UNESCO, SUMMARY REPORT, *supra* note 3, at 43.

304. See *id.* at 28.

305. For a helpful chart on the prevalence of homophobic and transphobic violence across the various States within Europe, see *id.* at 42–44.

306. For example, survey results from Ireland, Italy, Denmark, Croatia, and Poland revealed that 49% of LGBTI respondents disclosed being afraid to participate in class questions or discussions. Eleanor Formby, *The Impact of Homophobic Bullying on Education and Employment*, SHEFFIELD HALLAM UNIV. RSCH. ARCHIVE 6 (2013), <https://perma.cc/SE8J-8HEQ>; see also *Youth Chances Survey of 16–25 Year Olds: First Reference Report*, SERVS. FOR EDUC. (2014), <https://perma.cc/R9FC-XDZF>.

to the need for more robust and effective strategies to counteract anti-LGBTI violence in schools.³⁰⁷

The standard curricula used within European schools do not discuss sexual and gender diversity, potentially exacerbating the sluggishness of school authorities in developing procedures to address LGBTI violence and discrimination.³⁰⁸ Consequently, the UN Human Rights Committee and the Special Rapporteur on the Right to Education have urged European countries to recognize diversity in sexuality and identity by broadening the curricula, thereby acknowledging students' rights to understand their sexuality.³⁰⁹ A number of LGBTI activist groups and NGOs have worked to encourage more inclusive language and continue to submit their recommendations in support of this process.³¹⁰

Some countries, however, have been more receptive to making changes within their schools' policies, recognizing the consequences of inaction upon LGBTI students isolated by violence.³¹¹ For example, teachers in the Netherlands have modified the content of core curricular subjects—the sciences, humanities and citizenship, and sexual education—to include more discussion of gender diversity.³¹² In addition, the Netherlands has sought to provide better training for teachers to facilitate these conversations in the classroom.³¹³ Similarly, the National Agency for Education in Sweden implemented a curricular approach to topics of sexuality that looks critically at the role of societal norms in shaping views about “normal” or “abnormal” sexual orientations and gender identities.³¹⁴ In the United Kingdom (“UK”), the Government Equalities Office commissioned independent research in 2014 to evaluate the most effective education sector responses to homophobic and transphobic bullying.³¹⁵ Researchers reviewed

307. Only a few countries in Europe collect comprehensive data on homophobic and transphobic violence. These countries are Belgium, France, Germany, and the Netherlands. Most rely solely on the research collected by various institutions and NGOs. UNESCO, SUMMARY REPORT, *supra* note 3, at 42.

308. *See id.* at 87–88.

309. *Report of the U.N. Special Rapporteur on the Right to Education*, RIGHT TO EDUC. (July 23, 2010), <https://perma.cc/C25Z-PGGE>; *see also Over half of LGBTIQI students in Europe bullied in schools*, *supra* note 301.

310. *See* WHO Regional Office for Europe and BZgA, *Standards for Sexuality Education in Europe: A Framework for Policy Makers, Educational and Health Authorities and Specialists*, INT'L CTR. FOR MISSING & EXPLOITED CHILD. (2010), <https://perma.cc/XLR4-3T25>; *International Technical Guidance on Sexuality Education: An Evidence-Informed Approach for Schools, Teachers and Health Educators*, UNESCO (Dec. 2009), <https://perma.cc/7ZRV-TG49>.

311. In an attempt to address violence at school against LGBTI students, some countries have made progress including sexual orientation and gender identity in education. ILGA-EUR, ANNUAL REVIEW 2024, *supra* note 264, at 9.

312. UNESCO, SUMMARY REPORT, *supra* note 3, at 90.

313. *Id.* at 111.

314. *About LGBT Youth: Health*, MUCF (2012), <https://perma.cc/MW3G-MBJQ>. For further discussion on recommendations for effectively covering sexual and gender diversity needs within Europe, *see* Formby, *supra* note 306; Peter Dankmeijer, *GALE Toolkit Working with Schools 1.0: Tools for School Consultants, Principals, Teachers, Students and Parents to Integrate Adequate Attention of Lesbian, Gay, Bisexual and Transgender Topics in Curricula and School Policies*, GALE THE GLOB. ALL. FOR LGBT EDUC. (2011), <https://perma.cc/E4UY-BDVR>.

315. UNESCO, SUMMARY REPORT, *supra* note 3, at 112.

existing legislation and policies, interviewed teachers and educational staff involved in the delivery of anti-bullying responses, and developed case studies based on four schools.³¹⁶ While these measures serve as a starting point, educational institutions generally lack comprehensive responses to violence against LGBTI youth, and implementing effective responses will precipitate greater equality in education.³¹⁷

c. Hate Speech and Hate Crimes. European countries differ in their receptivity to the increased incorporation of LGBTI rights into national discussions on human rights.³¹⁸ In more traditionally conservative countries, societal views toward LGBTI self-identified or perceived individuals are often antagonistic.³¹⁹ The general public's boldness in displaying hostile sentiments often correlates with how the State's legislation treats hate speech and hate crimes.³²⁰ In this regard, there is a growing disparity between Western and Eastern European countries.³²¹ Formerly Soviet-controlled countries are especially lacking in protections for LGBTI individuals from hate speech and hate crimes.³²² For example, Russia bans the distribution of LGBTI-supportive materials, asserting that such "propaganda" of non-traditional relationships constitutes a criminal offense.³²³ Similar propaganda laws have been proposed in Ukraine, Belarus, Bulgaria, Latvia, Kazakhstan, Hungary, and Romania.³²⁴ In Kyrgyzstan, the parliament approved a bill penalizing the "promotion of homosexuality" and imposed a prison sentence

316. Martin Mitchell, Michelle Gray, & Kelsey Beninger, *Tackling Homophobic, Biphobic and Transphobic Bullying Among School-Age Children and Young People: Findings From a Mixed Method Study of Teachers, Other Providers and Pupils*, NATCEN SOC. RSCH. (Sept. 2014), <https://perma.cc/GFX3-MPPW>.

317. See *Overview of Youth Discrimination in the European Union*, EUR. COMM'N (2015), <https://perma.cc/W77U-F64X>; see also *Over half of LGBTIQI students in Europe bullied in schools*, *supra* note 301.

318. See Emily E. Holley, *International Anti-LGBT Legislation: How Nationalistic Cultural Warfare Supports Political Motivations*, 24 TUL. J.L. & SEXUALITY 179, 193 (2015).

319. See FRA 2015 Update, *supra* note 274, at 47. See generally David W. Austin, *Sexual Orientation and Gender Identity*, 46 INT'L L. 447 (2012).

320. Morgan Meaker, *Azerbaijan Worst Place to Be Gay in Europe, Finds LGBTI Index*, THE GUARDIAN (May 10, 2016, 9:46 AM), <https://perma.cc/2EQ5-S7EQ>.

321. ILGA-EUR., *Rainbow Index 2023*, *supra* note 262. According to this index, Azerbaijan, Armenia, Russia, and Turkey ranked lowest in meeting the organization's criteria for protecting LGBTI individuals from abuse and violence. *Id.* See also Tony Wesolowky, *The Worrying Regression of LGBT Rights in Eastern Europe*, RADIOFREEEUROPE (Dec. 23, 2021), <https://perma.cc/2KCT-99XG>.

322. ILGA-EUR., *Rainbow Index 2023*, *supra* note 262. See also Wesolowky, *supra* note 321.

323. Laura Mills, *How Russia Enforces Its Ban on 'Gay Propaganda'*, GLOB. NEWS (Feb. 6, 2014), <https://perma.cc/5P3U-FD4E>. Schools in Russia have expelled students who voice support for LGBT individuals. *Id.* See also *Russia: Expanded 'Gay Propaganda' Ban Progresses Toward Law: Another Blow to LGBT Rights*, HUM. RTS. WATCH (Nov. 25, 2022), <https://perma.cc/9352-DDGW>. Fines have also been imposed on peaceful protestors with some resulting in arrest and detention. John Berrow, *John Berrow: This Isn't Just About Sexuality. It's About Basic Humanity*, INDEPENDENT (May 17, 2012), <https://perma.cc/6AB6-ZEVZ>.

324. See Michaela Krejcová, *What's Happening To LGBT People in Europe?*, GLAAD (May 18, 2015), <https://perma.cc/VF93-3NRT>; see also Alison Mutler, *First Russia, Then Hungary, Now Romania Is Considering a 'Gay Propaganda' Law*, RADIOFREEEUROPE (June 26, 2022), <https://perma.cc/EV6Y-JHW7>.

for violators.³²⁵ In several instances, law enforcement personnel have suspended LGBTI pride marches and other events supporting LGBTI rights, asserting that the gatherings present risks to public safety and security.³²⁶ Georgia, Poland, Uzbekistan, Turkey, and Russia are a few of the countries where heightened policing continues to restrict public demonstrations of LGBTI solidarity, obstructing the work of advocates.³²⁷ In Bulgaria, France, Italy, Sweden, Turkey, and other countries, high-ranking officials have made openly pejorative statements toward LGBTI individuals.³²⁸

Regression of LGBTI rights at the State level is surprising because of the simultaneous emergence of more inclusive reforms on the international level.³²⁹ In *Alekseyev v. Russia*,³³⁰ the European Court of Human Rights (“ECtHR”) held that refusing to allow an LGBTI parade violated Articles 11, 13, and 14 of the European Convention on Human Rights.³³¹ Thus, the decision represents an unambiguous declaration that the rights of sexual minorities include the freedom of assembly.³³² In another progressive step toward recognizing LGBTI rights, the Council of Europe passed resolutions encouraging its forty-seven Member States to end discrimination and violence.³³³ This is significant because many of the countries that turn a blind eye to violence against LGBTI individuals are also members to the Council of Europe, and consequently are signatories of the European Convention on Human Rights, which prohibits discrimination.³³⁴ In 2014, the European Parliament called on countries to “ensure that rights to freedom of expression and assembly are guaranteed, particularly with regard to pride marches and similar events, by ensuring these events take place lawfully and by guaranteeing the effective protection of participants.”³³⁵ Despite these protective measures, however, enforcement is lacking and instances of physical violence and hate speech toward LGBTI individuals continue to keep the community vulnerable.³³⁶ Unless enforcement authorities take seriously the need to implement established protections, progress in safeguarding LGBTI rights will be limited.³³⁷

325. Haley Miller, *Anti-LGBT “Propaganda” Law Advances in Kyrgyzstan*, HUM. RTS. CAMPAIGN (June 20, 2014), <https://perma.cc/QZB6-466F>.

326. IGLA-Eur., 2023 ANNUAL REVIEW OF THE HUMAN RIGHTS SITUATION OF LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE IN EUROPE AND CENTRAL ASIA 8–12 (2023), *supra* note 269.

327. *Id.*

328. *Id.*

329. *Id.*

330. *Alekseyev v. Russia*, App. No. 14599/09, ¶ 100, 110 Eur. Ct. H.R. (2010), <https://perma.cc/VW47-T4UB>.

331. *Id.* at 28–29.

332. *Id.*

333. *Serbia: Revoke Ban on Belgrade Pride Parade*, HUM. RTS. WATCH (Oct. 5, 2012), <https://perma.cc/YJ8W-ZFLY>.

334. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221. <https://perma.cc/AS74-WG4Q>

335. FRA 2015 Update, *supra* note 274, at 48.

336. *Id.* at 49.

337. See IGLA-Eur., 2023 Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia 8–12 (2023), *supra* note 269.

d. Barriers to Gender Recognition for Transgender Individuals. In several European countries, transgender individuals must first obtain a medical diagnosis and receive judicial authorization before legally changing their gender.³³⁸ Courts often require proof that the individual has received medical treatment, including a psychiatric diagnosis of gender dysphoria.³³⁹ Some countries require proof that the individual has been living as their desired gender for a period of time prior to seeking legal gender-reassignment.³⁴⁰ Other countries lack any provisions that govern the process for legal recognition of preferred gender.³⁴¹ The Commissioner for Human Rights of the Council of Europe has stated that these omissions contravene ECtHR jurisprudence for legal certainty.³⁴²

For transgender individuals who choose to undergo sex-reassignment surgery, more than half must finance the procedure themselves, in addition to the costs associated with documentation changes.³⁴³ Alternatively, even if these individuals were potentially eligible for financial assistance through state or private insurance plans, their access to sex-reassignment surgery would still be dependent on the approval or assistance of medical professionals.³⁴⁴ These professionals often demonstrate disrespect or ignorance towards the needs of transgender individuals.³⁴⁵ For transgender individuals under the age of eighteen, the challenges to being authorized for sex-reassignment surgery are even more complex.³⁴⁶ This dilemma is similarly true for transgender individuals who are incarcerated.³⁴⁷ Consequently, transgender Europeans remain uniquely vulnerable to discrimination when their legal gender does not match the gender they wish to express on a daily basis.

338. FRA 2015 Update, *supra* note 274, at 16.

339. The most recent edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) replaced the term “gender identity disorder” with “gender dysphoria.” *Id.*

340. COUNCIL OF EUR. COMM’R FOR HUMAN RIGHTS, HUMAN RIGHTS AND GENDER IDENTITY 8 (July 29, 2009), <https://perma.cc/25GQ-5M8R>.

341. TGEU, Trans Rights Map: Europe & Central Asia 2023 (2023), <https://perma.cc/NTW7-XF3J>. See also COUNCIL OF EUR. PORTAL, THEMATIC REPORT ON LEGAL GENDER RECOGNITION IN EUROPE 20 (2022), <https://perma.cc/4KV2-UETM> (stating that Albania, Andorra, Armenia, Azerbaijan, Hungary, Monaco, North Macedonia, and San Marino have no procedures in place for legal gender recognition of preferred gender).

342. CRISTINA CASTAGNOLI, TRANSGENDER PERSONS’ RIGHTS IN THE EU MEMBER STATES 7 (Eur. Parliament 2010), <https://perma.cc/XP6F-L77J>.

343. Serhii Lashyn, *Transgender EU Citizens and the Limited Form of Union Citizenship Available to Them*, 30 Feminist Legal Stud. 201, 209 (2022). For example, in Lithuania, the lack of surgeons available to perform reassignment surgery forces transgender Lithuanians to incur costs of going abroad to have the procedure. See FRA 2015 Update, *supra* note 274, at 17. Then, they must undergo a costly and lengthy process of obtaining national documentation that aligns with their reassigned gender. *Id.*

344. European Commission: Directorate-General for Justice and Consumers, Legal Gender Recognition in the EU: The Journeys of Trans People Towards Full Equality 151, 155 (2020).

345. *Id.* at 151.

346. See *Malta Adopts Ground-Breaking Trans and Intersex Law - TGEU Press Release*, TGEU (Apr. 1, 2015), <https://perma.cc/6EU8-BGMB>.

347. See FRA 2015 Update, *supra* note 274, at 18.

e. The Pathologization of Intersex Individuals. Public recognition of individuals who are intersex³⁴⁸ is still greatly lacking in most European countries.³⁴⁹ As a result of binary views of gender, individuals born with neither a “female” nor “male” body are often subjected to the decisions of parents or doctors about which gender they will be.³⁵⁰ In many instances, there is no medical risk posed by keeping both sets of genitalia, and yet the bodies of intersex individuals are viewed as a “medical problem.”³⁵¹ Their “condition” is seen as requiring immediate medical intervention through hormonal, surgical, or psychological means without any attention given to the wishes of the individual affected.³⁵²

At least twenty-one Member States allow doctors to perform “normalizing” surgeries on intersex children who are too young to meaningfully contribute to the decision-making.³⁵³ Even when a child is old enough to express a gender preference if they have one, an additional eight Member States allow legal representatives to consent to surgical operations on the child’s behalf.³⁵⁴ The lack of self-determination given to intersex individuals reveals the general view that intersexuality is a “deviance” from a “male” or “female” body, and medical interventions to disambiguate the body of an intersex person are justified by labeling the “condition” as a Disorder of Sex Development (“DSD”).³⁵⁵

Also noteworthy is the absence of recognition of intersex individuals in European school curricula.³⁵⁶ Consequently, the vulnerability of children who are intersex to isolation, bullying, and discrimination are compounded.³⁵⁷ With the exception of Malta³⁵⁸ and Iceland, school systems lack policies that protect and

348. The term “intersex” is used throughout this article as an umbrella term for people born with sex characteristics, such as physical, hormonal, or chromosomal features, which do not fit typical binary notions of male and female bodies. Intersex persons may have any sexual orientation or gender identity. UNESCO, SUMMARY REPORT, *supra* note 3, at 11.

349. Dan C. Ghattas, *Standing Up For The Human Rights Of Intersex People—How You Can Help?*, ILGA-EUR. 16 (Dec. 2015), <https://perma.cc/VQ9N-XB85> [hereinafter ILGA-EUR., Intersex People].

350. *See id.*

351. *See Children Born Intersex Are at Risk in Most European Countries. Here’s Why*, ILGA-EUR. (May 20, 2022), <https://perma.cc/JH6T-M6FZ> [hereinafter *Children Born Intersex*].

352. *See Children Born Intersex*, *supra* note 351.

353. *The Fundamental Rights Situation of Intersex People*, EUR. UNION AGENCY FOR FUNDAMENTAL RTS. 1 (Apr. 2015), <https://perma.cc/9WJ7-5EQX>.

354. *Id.*

355. The term DSD was coined as a medical term in 2006 by a Clinician Consensus Statement and describes intersex sex characteristics as “deviating” from the normal male or female body, thereby necessitating procedures to “disambiguate” or “fix” their bodies to conform to norms. ILGA-EUR., Intersex People, *supra* note 349, at 20.

356. *See Overview of Youth Discrimination in the European Union*, *supra* note 317, at 8.

357. *See id.*

358. In Malta, the Ministry for Education and Employment published the Trans, Gender Variant and Intersex Students in Schools Policy in June 2015. The policy allows students to present themselves, choose the facilities—such as toilets—and wear uniforms that match their gender. The policy also includes recommendations for implementation in schools. MINISTRY OF EDUC. & EMP. RESPECT FOR ALL FRAMEWORK, TRANS, GENDER VARIANT AND INTERSEX STUDENTS IN SCHOOLS: POLICY 5–6 (June 2015), <https://perma.cc/ZMM5-K3CA>. *See Ghoshal & Knight*, *supra* note 7.

support intersex students.³⁵⁹ More recently, however, Germany and Portugal have joined Malta and Iceland in prohibiting surgical interventions for intersex children that are medically unnecessary, while Belgium and Spain have begun pursuing similar measures.³⁶⁰

5. The Middle East

The regulation of sexual orientation in the Middle East varies considerably, yet there are some common themes.³⁶¹ Although religion and tradition certainly play a role in the attitudes of many Middle Eastern countries towards the LGBTI community, many of the laws that originally criminalized same-sex sexual acts are rooted in European colonization.³⁶² In Gaza, for example, the criminalization of same-sex relations is based on the British Mandate Criminal Code from 1936.³⁶³

As of 2023, some of the strongest societal reactions to same-sex acts and relationships in the Middle East arise out of public displays that inherently challenge the conservative notions of gender norms in the region.³⁶⁴ In other words, when the acts take place in private, and are not encouraged or supported in any way in public, same-sex sexual acts are not a primary concern of enforcement bodies.³⁶⁵ Issues arise when same-sex relationships and the acknowledgement of homosexuality are brought into and recognized in public, thereby challenging traditional heteronormative conceptions of gender and sexuality.³⁶⁶

a. Legal Obstacles Facing the LGBTI Community. Across the Middle East there is significant disparity in both the legality and illegality of same-sex relationships, as well as the penalties for such acts if participants are caught; this disparity spans both religion and region.³⁶⁷ In Bahrain, Israel, Palestine (West Bank), and Jordan, same-sex sexual acts are legal.³⁶⁸ Same-sex relations have

359. ILGA-EUR., *Intersex People*, *supra* note 349, at 11 n.5.

360. Yessica Mestre, *The Human Rights Situation of Intersex People: An Analysis of Europe and Latin America*, 11 Soc. Sci. 317, 318, 324 (2022).

361. *See infra* Section III.A.5.

362. *See* STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 36 (“Some sources indicate that before the 19th century, non-heteronormative forms of sexuality in certain Muslim societies were to some extent tolerated but, under colonialism, sexual notions prevalent in European societies may have contributed to the shifting of these attitudes into more negative ones.”).

363. *Id.* at 135. Jordan and Israel’s laws criminalizing same-sex sexual activity, which were later amended, also came from the British. *Id.* at 102.

364. Thus, many countries take issue with men dressing and acting in an effeminate manner while in public. Brian Whitaker, *Everything You Need to Know About Being Gay in Muslim Countries*, THE GUARDIAN (June 21, 2016, 6:30 AM), <https://perma.cc/G6V2-LSZD>.

365. *Id.* In other countries, however, even private parties that are seen as encouraging homosexuality or effeminate conduct amongst men can be targeted by the State for raids, often leading to arrests. *Bahrain Gays Arrested at Same-Sex Wedding*, HUFFPOST (Feb. 7, 2011, 10:48 AM), <https://perma.cc/GPD3-HDBA>.

366. *See* Whitaker, *supra* note 364.

367. *See infra* Section III.A.5.a.

368. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 101–03. Same-sex affection may also be prosecuted under the public decency laws. *Bahrain: Freedom in the World 2022*, FREEDOM HOUSE (Feb.

been legal in Bahrain since 1976 and in Israel since 1988, with Jordan legalizing such conduct decades before.³⁶⁹ Although Israel and Jordan have decriminalized same-sex relations,³⁷⁰ this does not necessarily mean that same-sex couples are viewed as equals or largely accepted by civil society within those countries.³⁷¹ States that lack statutes explicitly outlawing same-sex sexual acts often have “morality laws” that can be used to prosecute people who are suspected to be members of the LGBTI community for a variety of actions deemed “immoral.”³⁷²

b. Marriage. No country in the Middle East permits same-sex marriage as of 2023, including Israel.³⁷³ Although Israel does permit joint adoption for same-sex couples, the failure to legalize same-sex marriages is accompanied by its denial of many other basic benefits of domestic partnership.³⁷⁴ In Middle Eastern countries where same-sex relations are legal, the LGB community receives little to no benefit from the State due to their inability to marry.³⁷⁵

The inability of same-sex couples to marry throughout the Middle East creates an even larger problem in more conservative countries: many Middle Eastern countries prohibit sexual relationships between parties that are not married, regardless of whether the sexual acts take place between same-sex couples or opposite-sex couples.³⁷⁶ Thus, any sexual relationship between consenting parties who are not married to each other technically constitutes a violation of the law in some Middle Eastern countries.³⁷⁷

c. Sources of Law. In the majority of countries in the Middle East, same-sex sexual acts are illegal.³⁷⁸ The major differences among countries in which same-

23, 2022, 7:34 PM), <https://perma.cc/F7UX-2FDT>. It should be noted that in Bahrain in 2022, the King, Supreme Council for Islamic Affairs, and members of Parliament all expressed a desire to prohibit homosexuality. See Hudhaifa Ebrahim, *Arab Gulf Countries Crack Down on Homosexuality*, THEMEDIALINE (Dec. 16, 2022), <https://perma.cc/8RQQ-MZTG>.

369. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 101–02.

370. See *e.g.*, *id.* at 102.

371. See generally Aeyal Gross, *Why Gay Marriage Isn't Coming to Israel Any Time Soon*, HAARETZ (June 30, 2015), <https://perma.cc/N9FX-3VQG>.

372. Many countries in the Middle East, including Syria and Bahrain, have laws that criminalize any acts promoting immorality or public indecency, which can and are often used as another method of suppressing the expression of same-sex sexual orientation. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 137; *Bahrain: Freedom in the World 2022*, *supra* note 368.

373. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 327–28. The Israeli Government does recognize same-sex marriages performed abroad, however. See Gross, *supra* note 371.

374. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 298, 311; see also Gross, *supra* note 371.

375. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 327–28.

376. See *id.* at 37.

377. See Tirana Hassan, *World Report 2023: Iran*, HUM. RTS. WATCH, <https://perma.cc/U23Y-KBJM>; Chas Newkey-Burden, *Where is Sex Before Marriage Illegal?*, THE WEEK (DEC. 9, 2022), <https://perma.cc/9NWQ-3YFR>.

378. Same-sex relations are illegal in several countries including Iran, Kuwait, Lebanon, Libya, Oman, Palestine, Qatar, Saudi Arabia, Sudan, Syria, United Arab Emirates, and Yemen. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 101–39, 325–29. Though not explicitly illegal in Iraq, the

sex relations are illegal are the legal rationales for its criminalization.³⁷⁹ Some countries like Oman have a penal code that specifically criminalizes and penalizes sexual acts between members of the same sex.³⁸⁰ For example, the Omani penal code criminalizes “lustful acts with a person of the same sex.”³⁸¹

In Middle Eastern countries, however, the law finds its roots in Sharia law and the Qur’an.³⁸² For example, Saudi Arabia has no codified penal law, and instead applies only Islamic Sharia law.³⁸³ Similarly, in the United Arab Emirates, any death penalty sentence is derived from Sharia law instead of the penal code, though the country has yet to actually execute any person for the violation of Sharia law.³⁸⁴ Many countries also have morality laws based in Sharia law that are used to prosecute same-sex relations and any behavior considered immoral because it is perceived as “homosexual.”³⁸⁵ Even countries like Lebanon and Jordan, alongside countries that impose brutal punishments for same-sex relations like Iran, Iraq, and Syria, have laws criminalizing behavior that could be seen as breaching modesty.³⁸⁶ Thus, there are many laws in countries with laws based in Sharia law that are not designed to target LGBTI individuals specifically, but can nevertheless be used to prosecute members of the LGBTI community for their gender identity and sexual orientation.³⁸⁷

In Iraq, Sharia judges may target men who are perceived as homosexual with “extreme penalties,” including death, even though the civil code in the country does not specifically reference same-sex relations.³⁸⁸ Similarly, the Qatari penal code does not explicitly outlaw same-sex relations, but the country’s Sharia code does subject citizens to potential punishment for such relations.³⁸⁹ In contrast,

disarray of the State and the rise of Da’esh warrants its inclusion in the ILGA’s State-Sponsored Homophobia Report as a country in which same-sex relations are illegal. *Id.* at 131.

379. See generally STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 101–39. In Kuwait, for example, any perceived acts of homosexuality are criminalized. *Id.* at 133. The trans community is often arrested and harassed for “imitating the opposite sex” under Article 198 of Kuwait’s Penal Code. Belkis Wille, *Being Transgender in Kuwait: My Biggest Fear is a Flat Tire*, HUM. RTS. WATCH (July 15, 2013, 3:03 PM), <https://perma.cc/76LR-Y9Z6>.

380. See *e.g.*, PENAL LAW ROYAL DECREE 7/2018 art. 262 (Oman).

381. *Id.*

382. See *infra* Section III.A.5.c).

383. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 135.

384. *Id.* at 38.

385. See, *e.g.*, *id.* at 35–37. These laws are even used as a basis for punishment in countries where same-sex sexual acts are legal. *Bahrain: Freedom in the World 2023*, FREEDOM HOUSE (May 16, 2023, 8:01 PM), <https://perma.cc/3EQU-AB87>.

386. See, *e.g.*, STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 154. For example, in Syria, any utterance or act, which anyone could witness either intentionally or accidentally, can be punished with a prison sentence. PENAL CODE art. 208, 517 (Syria).

387. See *e.g.*, STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 51. Decency laws based on Sharia law can be used to target and prosecute LGBTI individuals, though a penal code may not expressly outlaw same-sex sexual acts. *Id.*

388. See *e.g.*, AENGUS CARROLL, STATE-SPONSORED HOMOPHOBIA, A WORLD SURVEY OF SEXUAL ORIENTATION LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION 35–37 (11th ed. May 2016), <https://perma.cc/6WBR-6FGY>.

389. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 38, 67–68.

Iran's law offers a hybrid, utilizing both Sharia law and its penal code in prosecution and sentencing: sodomy is explicitly outlawed in the penal code, and Sharia judges rule on how the execution for sodomy should take place.³⁹⁰

d. Punishment. States in the Middle East that criminalize same-sex relations also differ significantly in the forms of punishment that are enforced.³⁹¹ The most severe punishment for sexual acts with a person of the same sex is the death penalty.³⁹² However, amongst countries that prescribe the death penalty, the means of execution varies in terms of brutality.³⁹³ In Iran, Article 110 and 111 of the penal code states that same-sex relations with penetration between males is punishable by death, while in Saudi Arabia the punishment is death by stoning for married men who engage in same-sex sexual relations.³⁹⁴ Lesser forms of punishments can include flogging and varying terms of imprisonment, which can range from a couple years in prison to upwards of fourteen years.³⁹⁵

Some countries that explicitly outlaw same-sex relationships between both men and women, like Yemen and Iran, have different types of punishments based on the offender's gender.³⁹⁶ The Yemeni penal code states that married men can be sentenced to death for same-sex sexual relations, whereas the punishment for women who engage in such sexual relations is a sentence of up to three years in prison.³⁹⁷ Similarly, in Iran, women can be subjected to one-hundred lashes for same-sex sexual relations and the death penalty upon the fourth offense, while men can face the death penalty for their first offense in some situations.³⁹⁸ Since 1979, Iran has sentenced over four thousand people to death for engaging in same-sex relationships.³⁹⁹ Penal codes may also impose a harsher punishment

390. *Id.* at 38, 46–50; MAJMU'AH QAVANINI JAZAI (Code of Criminal Laws) [1991], art. 110 (Iran). In Article 120 of Iran's penal code, there is also a provision that Sharia judges "may act according to [their] own knowledge" when deciding on whether or not sodomy has taken place. MAJMU'AH QAVANINI JAZAI (Code of Criminal Laws) [1991], art. 120 (Iran).

391. *See infra* Section III.A.5.d.

392. In countries including Iran, Qatar, Saudi Arabia, the United Arab Emirates, and Yemen, the maximum sentence for same-sex relations is the death penalty, although it has not been implemented in Qatar or the United Arab Emirates. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 38. After visiting Iraq in 2017, the U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported extrajudicial killings of LGBTI persons by non-legal Sharia judges. *Id.* at 131 (citing Agnes Callamard (U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions on Her Mission To Iraq*, U.N. Doc. A/HRC/38/44/Add.1 (June 20, 2018)).

393. *See generally* STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 31–86.

394. *See* MAJMU'AH QAVANINI JAZAI, *supra* note 391, art. 110–111. *See also* STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 69–74.

395. Cviklová, *supra* note 6, at 53; STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 37. In the United Arab Emirates, for example, maximum sentences range from ten years in Dubai and Sharjah to fourteen years in Abu Dhabi. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 138.

396. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 48, 139.

397. *Id.* at 139.

398. *Id.* at 47–48 (citing ISLAMIC PENAL CODE [2013], arts. 136, 233, 234 nn.1–2, 236, 238 (Iran)); Cviklová, *supra* note 6, at 53.

399. Cviklová, *supra* note 6, at 53.

based on the marital status and religion of the parties engaging in the conduct.⁴⁰⁰ For example, in Iran, married men are sentenced to death, while unmarried men are subjected to one-hundred lashes.⁴⁰¹ Non-Muslims who engage in same-sex sexual acts with Muslim men are also subject to the death penalty.⁴⁰²

It is important to note that in some Middle Eastern countries, punishment is not reserved only for instances where actual sexual relations took place.⁴⁰³ In Saudi Arabia, for example, punishment for acts merely perceived as homosexual in any way are criminalized.⁴⁰⁴ Iran also criminalizes any kissing “with lust” between members of the same sex and punishes it with sixty lashes, while unrelated women who lay naked together under one cover are subject to less than one hundred lashes.⁴⁰⁵

e. Discriminatory Practices Targeting the LGBTI Community. While hostility may be expected in countries where same-sex relations are illegal, discrimination is common even in countries where same-sex relations are legal, such as Bahrain.⁴⁰⁶ Even some Middle Eastern countries that do not criminalize same-sex sexual activities severely limit freedom of speech and expression.⁴⁰⁷ Countries like Jordan and Lebanon that have more progressive attitudes towards the LGBTI community still curtail the ability of LGBTI people to freely express themselves.⁴⁰⁸ In 2016, an international Arabic news channel reported on a protest against Lebanese laws targeting the LGBTI community, noting that the protest in Lebanon was “rare.”⁴⁰⁹ Qatar goes so far as to criminalize certain speech acts, handing down prison terms for “leading, instigating, or seducing a male anyhow for sodomy or immorality.”⁴¹⁰ This Qatari law, along with similar ones in other

400. See *id.*; see, e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 47, 65–66.

401. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 47 (citing ISLAMIC PENAL CODE [2013], art. 234 n.2 (Iran)).

402. Cviklová, *supra* note 6, at 53; STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 47 (citing ISLAMIC PENAL CODE [2013], art. 234 n.1 (Iran)).

403. See e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 129–39.

404. *Id.* at 135 (noting media reports that said people were accused and convicted for acts such as “men living together ‘as married couples’” and “behaving like women”).

405. *Id.* at 131 (citing ISLAMIC PENAL CODE [2013], art. 237 (Iran)).

406. See *Bahrain: Freedom in the World 2023*, *supra* note 385. When the U.S. Ambassador to Jordan visited a small event with LGBT activists, there was harsh criticism from the Jordanian public. Aaron Magid, *US Ambassador’s Visit to LGBT Event Sparks Outrage in Jordan*, AL-MONITOR (June 16, 2015), <https://perma.cc/9YHX-C39L>. A Pew Research poll concluded that 97% of the population does not “accept homosexuality.” *Id.* During a Jerusalem pride parade, six people were stabbed by a conservative Jewish man. Yair Ettinger, Yarden Skop, & Chaim Levinson, *6 Stabbed at Jerusalem Pride Parade by Ultra-Orthodox Jewish Assailant*, HAARETZ (July 30, 2015), <https://perma.cc/6LSY-L4X9>.

407. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 153–58.

408. *Id.* at 155.

409. *LGBT Activists Stage Rare Lebanon Sit-In to Protest Law*, AL ARIBYA (May 16, 2020, 10:46 AM), <https://perma.cc/8YUP-4CJV> [hereinafter *Lebanese Sit-In*].

410. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 157 (citing PENAL CODE [2004] art. 296(3)–(4) (Qatar)).

countries like Saudi Arabia and Iran, can be construed broadly, criminalizing any act that could possibly “lead” to “immorality.”⁴¹¹

Countries and territories including Israel, the West Bank, and Jordan have equal ages of consent for same-sex and different-sex relationships.⁴¹² Israel has largely presented itself as an outlier, making greater strides in legalizing same-sex sexual acts and relationships, and is currently the only country in the Middle East that protects LGBT individuals from discrimination in the workplace, prohibiting discrimination in employment based on sexual orientation.⁴¹³ Israel is also the only Middle Eastern country that permits joint adoption and surrogacy by same-sex couples.⁴¹⁴

Aside from the limited ability to express oneself in public, some countries actively discourage and punish gatherings of LGBTI persons even in private.⁴¹⁵ In Saudi Arabia, the government has raided private parties held within the home and arrested individuals on suspicion of engaging in same-sex sexual acts.⁴¹⁶ Saudi Arabia also arrested a doctor for flying a rainbow flag, though he was unaware that the flag was a symbol for the LGBTI community.⁴¹⁷ In Lebanon, the police have raided nightclubs that members of the LGBTI community commonly visit.⁴¹⁸ Governments may also block access to websites targeting the LGBTI community.⁴¹⁹

Even in countries that do not exercise rigid policies like those described above, subtler forms of discrimination impact daily life for many people who are merely suspected of belonging to the LGBTI community.⁴²⁰ In Turkey, hospitals have denied treatment to individuals based on the belief that they were homosexual.⁴²¹

411. *Id.* at 154, 157.

412. See §§ 346–47, PENAL LAW (Amendment No. 22), 5748-1987/88, LSI 42 57 (Isr.), <https://perma.cc/Y2EL-D875> (amending §§ 346–47, PENAL LAW, 5737–1977, LSI 31A 1 (Isr.), <https://perma.cc/9EJU-K3CQ>); PENAL CODE arts. 298–99 (Jordan); see also STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 103 (stating the West Bank aligns with the Jordanian Penal Code).

413. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 204, 225, 327.

414. *Id.* at 311, 327–28; Jeffrey Heller, *Israel Lifts Restrictions on Same-sex Surrogacy*, REUTERS (Jan. 4, 2022, 5:01 AM), <https://perma.cc/XMH5-YWT4>.

415. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 129–138 (listing 21 out of 42 Asian UN Member States that criminalize private same-sex sexual acts).

416. *Id.* at 135–36 n.182 (citing Habib Toumi, “Married” Gay Couples Arrested in Saudi Raid, GULF NEWS (Jan. 26, 2016, 6:09 PM), <https://perma.cc/6TKU-JEFR>).

417. See Alexandra Sims, *Saudi Man Arrested for Flying “Pretty” Rainbow Flag Unaware It Symbolised LGBT Pride*, THE INDEPENDENT (Mar. 27, 2016, 10:49 PM), <https://perma.cc/WLX8-Z2FE>. After the *Obergefell* decision legalized same-sex marriage in the U.S., a school in Saudi Arabia was fined for having rainbows on the building’s exterior. See Whitaker, *supra* note 364. Prior to this, the government was allegedly unaware that the rainbow was also an “emblem of the homosexuals.” *Id.*

418. *Lebanese Sit-In*, *supra* note 409.

419. See e.g., U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Oman 22, <https://perma.cc/6CCR-A22H>.

420. See e.g., *Turkey’s Erdogan Denounces LGBT Youth as Police Arrest Students*, BBC (Feb. 2, 2021, 10:10 AM), <https://perma.cc/7Z6J-6TD7> (noting that Turkey banned Pride marches from 2014–2019 despite the legalization of homosexuality).

421. Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC (Nov. 5, 2014), <https://perma.cc/TE8Z-BRLU>.

Even in Jordan, a country where same-sex relationships are legal, discrimination in areas like housing, access to public services, and employment are common.⁴²² Jordanian tourist police have also arrested LGBTI individuals based on their appearance.⁴²³

f. Regulation of Gender Identity. Many traditionally conservative Middle Eastern countries prefer that persons attracted to members of their own sex change their gender in order to avoid homosexuality in a relationship.⁴²⁴ In Iran, the government may even facilitate loans to help pay for gender reassignment surgery and will issue legal paperwork reflecting the change in gender after they undergo surgery.⁴²⁵ Iran even sets aside government money to assist in gender reassignment, which the State and medical professionals treat as a psychological disorder.⁴²⁶ The eagerness of the Iranian medical establishment to encourage gender reassignment for persons attracted to members of their own sex, however, has pressured many cisgender individuals into treatments that they do not actually want.

In other countries, though, it is illegal for transgender individuals to receive gender-affirming care and official gender recognition, either with or without surgery.⁴²⁷ For example, Kuwait forbids official gender recognition contrary to sex assigned at birth.⁴²⁸ Further, any form of cross-dressing or “imitating” the opposite gender may be punishable by arrest and imprisonment.⁴²⁹ As discussed above, Middle Eastern countries vary significantly in their sources of law, the criminalization and punishment of same-sex sexual relations, and the regulation of gender identity.⁴³⁰

B. LEGAL DEVELOPMENTS TOWARDS LGBTI EQUALITY

1. Africa

Despite many world leaders’ harsh criticism of African nations’ failures to protect sexual and gender minorities,⁴³¹ African countries demonstrate a mix of continued criminalization efforts, moves toward decriminalization, and even unprecedented protections for LGBTI individuals.⁴³² The most explicit protections

422. U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2015 Country Reports on Human Rights Practices: Jordan 53–54, <https://perma.cc/7JPB-96NS>.

423. *Id.*

424. Hamedani, *supra* note 422.

425. *Id.*

426. Rochelle Terman, *Trans[ition] in Iran*, WORLD POL’Y J. 28, 29 (2014).

427. See Colin Stewart, *In 5 Middle East Nations, Gender-affirming Health Care Is Illegal*, ERASING 76CRIMES (Aug. 2, 2022), <https://perma.cc/RVX6-KW9F>.

428. *Id.*

429. See Whitaker, *supra* note 364.

430. See *supra* Section III.A.5.

431. See UK HOME OFFICE, *supra* note 95, at 21 (describing U.S. President Obama’s visit to Kenya in 2015, during which he openly criticized Kenya’s policies against LGBTI individuals).

432. Compare Chris Pleasance, *Gambia’s President Warns Homosexuals: ‘If You Do It Here I Will Slit Your Throat . . . No-One Will Ever Set Eyes on You Again,’* DAILY MAIL (May 14, 2015, 10:17 AM),

for LGBTI individuals among African countries are found in South Africa.⁴³³ LGBTI individuals who live in countries that have neither discriminatory nor protective laws may still face challenges due to lack of resources,⁴³⁴ or lack of State-enforced protection or recourse for discrimination.⁴³⁵ Public awareness of LGBTI identities and issues, the global conversation about LGBTI rights and identities, and the influence of the inter-regional dialogue on LGBTI issues affect what legal protections are available and may alternatively help or hurt LGBTI individuals in these nations.⁴³⁶

Several African countries have pending commitments to comply with international obligations and to address or remove criminalization statutes still in effect.⁴³⁷ Other African countries simply deny that they have laws criminalizing

<https://perma.cc/Y3RE-JP9H> (describing an ongoing negative attitude of Gambia toward same-sex couples) with S. AFR. CONST., 1996 art. 9(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.”).

433. South Africa codifies prohibition of discrimination based on sexual orientation, grants joint adoption rights to LGBT couples, and recognizes marriage between non-heterosexual couples. DIPIKA NATH, HUM. RTS. WATCH, “WE’LL SHOW YOU YOU’RE A WOMAN”: VIOLENCE AND DISCRIMINATION AGAINST BLACK LESBIANS AND TRANSGENDER MEN IN SOUTH AFRICA 1, 13, 63 (2011), <https://perma.cc/NAZ4-7D97>. Notwithstanding the laws, however, there are still widespread incidences of discrimination against LGBTI individuals that South Africa fails to adequately protect against. *Id.* at 46–56 (describing instances of police violence against LGBTI individuals).

434. Mozambique, which decriminalized same-sex sexual activity in 2014, has a case pending to allow an NGO to register to do work in the country with LGBTI individuals. *See* Zenaida Machado, *Dispatches: Mozambique’s Double Speak on LGBT Rights*, HUM. RTS. WATCH (Jan. 25, 2016, 12:00 AM), <https://perma.cc/G8P5-R69T>; *see also Mozambique: Freedom in the World 2023*, *supra* note 130.

435. Although in Côte d’Ivoire some same-sex sexual activity is not criminalized, LGBTI individuals still face violence, for instance. *See*, U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Côte d’Ivoire 34, (Apr. 12, 2022), <https://perma.cc/P3CR-KU7M>.

436. *Compare Ethiopian Government Cancels Anti-Gay Rally*, *supra* note 88 with Elias Biryabarema, *Uganda President Defiant after World Bank Suspends Funding over LGBT Law*, REUTERS (Aug. 10, 2023, 8:33 AM), <https://perma.cc/DFE6-KH3Y> (showing strong pushback from Uganda’s president in response to international pressure to eliminate the death penalty for same-sex sexual activity).

437. *See UPR Sexual Rights Database*, *supra* note 57 (follow the same instructions except in the “Issue” dropdown select “Criminal laws on same-sex sexual practices,” “Discrimination based on sexual orientation,” “HIV and AIDS,” “Intersex persons’ rights,” “Rights of same-sex desiring persons,” “Transgender persons’ rights,” and “Violence on the basis of sexual orientation”). Eswatini, in their 2021 UPR, accepted one recommendation about combating discrimination and violence based on sexual orientation and gender identity. *Id.* In 2017, Ghana accepted three similar recommendations and in 2020, Kenya accepted three similar recommendations, including one specifically about discrimination and violence in the workplace. *Id.* Liberia accepted one recommendation to adopt comprehensive anti-discrimination legislation in 2020. *Id.* Namibia accepted four recommendations in 2021 pertaining to curbing discrimination and violence against LGBTI persons. *Id.* In 2018, Nigeria accepted one recommendation calling for people’s freedom of association, expression, and peaceful assembly to be protected regardless of sexual orientation or gender identity. *Id.* In 2021, Sierra Leone accepted five recommendations regarding the decriminalization of same-sex relations, one about anti-discrimination legislation, and one calling for the effective investigation of violence against LGBTI persons and restrictions of rights. *Id.* In 2022, Togo accepted one recommendation to protect sexual minorities from all forms of violence and marginalization. *Id.* Tunisia, in 2017, accepted one recommendation to stop forced

homosexuality or that they enforce laws against LGBTI individuals.⁴³⁸ However, even if the law changes, public opinion and the violence resulting from stigma are not guaranteed to change.⁴³⁹ In countries that have recently repealed a statute prohibiting same-sex sexual activity, persistent stigma and remaining laws that criminalize “indecent activity” allow State and private actors to exploit LGBTI individuals, while LGBTI individuals may have misconceptions about what activity can subject them to prosecution.⁴⁴⁰ For a lasting impact, more international and local human rights organizations are seeking the ability to register and operate in countries without harassment.⁴⁴¹

a. Decriminalization Efforts. Responding to popular pressure and public opinion, prominent leaders of African countries have made public statements arguing against protections for LGBTI individuals in the law.⁴⁴² However, even though public opinion in most African countries profoundly disfavors LGBTI

anal examinations and another to protect LGBTIQI persons from discrimination, stigmatization, random testing and violence. *Id.* In 2022, Zimbabwe accepted one recommendation to strengthen efforts against violence motivated by sexual orientation and gender identity and one recommendation to protect intersex minors’ bodily integrity and stop non-consensual surgeries. *Id.* Of the countries that currently criminalize same-sex activity, the following accepted recommendations to increase healthcare access for and prohibit discrimination against people living with HIV/AIDS: Cameroon (2018), Eswatini (2021), Ethiopia (2019), Ghana (2017), Guinea (2020), Kenya (2020), Liberia (2020), Malawi (2020), Namibia (2021), Senegal (2018), Sierra Leone (2021) (for some populations), South Sudan (2022), Sudan (2022), Tanzania (2021), Togo (2022), Uganda (2022), Zambia (2017), and Zimbabwe (2022). *Id.*

438. *See, e.g., id.* (reporting the Morocco delegation provided the following statement during their 2017 UPR: “The Kingdom of Morocco confirms that the Constitution has laid the principle of equality among all citizens and created mechanisms to protect it. Domestic law condemns and punishes perpetrators of violence and discrimination regardless of their causes, incentives and the sexual, racial or religious orientations or identities of the victims.”). *But see* U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Morocco 42 (2021), <https://perma.cc/B2DU-UAUF> (noting an artist was arrested when filing a complaint against another person for harassment and homophobia, although the country claims they were arrested for violating COVID-19 restrictions, not their sexual orientation); STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 120 (“Moroccan authorities are known to intimidate LGBTI activists by contacting their families and asking them questions that may end up ‘outing’ them.”).

439. *See, e.g.,* Mariel Ferragamo & Kali Robinson, *Where African Countries Stand in Their Struggle Toward More Inclusive LGBTQ+ Laws*, PBS (June 18, 2023, 2:55 PM), <https://perma.cc/Q29K-TUMU> (explaining that even in countries where same-sex activity is not criminalized, discrimination is still rampant).

440. *See* Ottilia Anna Maunganidze & Chelsea Cohen, *Anti-Gay Laws: Africa’s Human Rights Regression*, INST. FOR SEC. STUD. (Sept. 27, 2023), <https://perma.cc/93TQ-S7NR> (discussing how LGBTI people in countries that have decriminalized homosexuality are still often extorted and fear repercussions or discrimination arising from common activities, such as visiting a doctor).

441. *See*, OUTRIGHT INT’L, *Freedom of Assembly and Association: The Global State of LGBTIQ Organizing* 20–24 (Sept. 2023), <https://perma.cc/SM7P-BUBQ>.

442. *See generally* Ayenat Mersie & Mukelwa Hlatshwayo, *Insight: Kenya Could Follow Uganda as East African Nations Wage War on LGBT Rights*, REUTERS (June 27, 2023, 6:57 AM), <https://perma.cc/2XSA-DQSH> (noting that a key member of Kenya’s parliament does not believe gay Africans exist, but rather believes that homosexuality is a Western invention imposed on the continent.).

individuals,⁴⁴³ three African countries have repealed laws criminalizing homosexuality since 2020: Gabon (2020), Angola (2021),⁴⁴⁴ and Mauritius (2023).⁴⁴⁵ In 2019, Botswana's High Court also ruled in favor of decriminalizing homosexuality, but the relevant enforcing amendment to the penal code has been deferred.⁴⁴⁶ Some countries are also quietly moving toward decriminalizing same-sex sexual activity or instituting protections in the law for LGBTI individuals. For example, in May of 2023, the Supreme Court of Namibia ruled to recognize same-sex couples who marry abroad.⁴⁴⁷ Further, in March of 2022, Zimbabwe decriminalized HIV transmission.⁴⁴⁸ Even when these nations continue to criminalize same-sex sexual activity,⁴⁴⁹ decriminalizing HIV-positive status still removes one tool that the state may use to target LGBTI individuals in these nations.⁴⁵⁰ Nevertheless, in some other African countries such as Uganda, Tanzania, and Kenya, in which same-sex sexual activity is already criminalized, there have been recent efforts to further restrict the rights of LGBTI individuals.⁴⁵¹ Supporters of these efforts have either proposed or passed legislation that would impose both longer prison sentences for same-sex sexual relations and introduce penalties for any public identification or allyship with LGBTI communities.⁴⁵² In some other African countries that criminalize same-sex activity and prosecute on the basis of perceived sexual orientation, however, lawmakers have

443. Graeme Reid, *Progress and Setbacks on LGBTQ Rights in Africa*, HUM. RTS. WATCH (June 22, 2022, 9:14 AM), <https://perma.cc/3U6W-DEKZ>.

444. *Homosexuality: The Countries Where It Is Illegal to Be Gay*, BBC (Mar. 31, 2023), <https://perma.cc/R7G3-ANSM> (“In February 2021, Angola’s President Joao Lourenco signed into law a revised penal code to allow same-sex relationships and ban discrimination on the basis of sexual orientation. In 2020, Gabon reversed a law that had criminalised homosexuality. . . .”).

445. *Mauritius’ Top Court Decriminalizes Same-sex Relations*, NBC NEWS (Oct. 5, 2023, 7:36 PM), <https://perma.cc/DF2X-QZGP>.

446. Lorato Gaofise, *Minister Defers Penal Code Amendment Bill*, DAILY NEWS (Aug. 6, 2023), <https://perma.cc/YQ9Z-3TB6>.

447. Ferragamo & Robinson, *supra* note 439.

448. Press Statement, UNAIDS, UNAIDS Welcomes Parliament’s Decision to Repeal the Law That Criminalizes HIV Transmission in Zimbabwe (Mar. 18, 2022), <https://perma.cc/8XJL-3LAL>.

449. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 125. See also *Zimbabwe’s Vice President Says the Government Will Block a Scholarship For LGBTQ people*, NBC NEWS (Feb. 16, 2024, 1:25 PM), <https://perma.cc/FCK7-FP79> (“Like many African countries, Zimbabwe has laws criminalizing homosexual activity. Sex between men carries a potential sentence of up to a year in prison, and the country’s constitution bans same-sex marriages.”).

450. Ethiopia and several other countries that prohibit “aggravated homosexuality” impose a lengthier prison sentence on those convicted of engaging in same-sex sexual activity who are also HIV-positive. See *Ethiopia*, HIV JUST. NETWORK, <https://perma.cc/4Q5S-J5BV> (Mar. 2020) (“Ethiopia does not have an HIV-specific law, but the Criminal Code makes it an offence for a person to transmit a communicable disease. Neither the Code nor the specific article (§514) clearly defines ‘communicable disease’ but article 514 has been used in relation to HIV.”).

451. Sam Kisika, *Uganda, Kenya, Tanzania move to further curtail LGBTQ rights*, Washington Blade (Mar. 4, 2023), <https://perma.cc/HU52-XWNN>.

452. *Id.*

signaled areas in which they would be open to instituting legal protections⁴⁵³ or building public support to enact such protections in law.⁴⁵⁴ For example, Mauritius, over a decade prior to decriminalizing same-sex sexual activity,⁴⁵⁵ instituted protections in its employment non-discrimination statutes in the past ten years.⁴⁵⁶ Many countries received recommendations from a UPR report to decriminalize or institute other protections for LGBTI individuals but failed to respond.⁴⁵⁷ Other countries have accepted recommendations; in 2022, Zimbabwe accepted one recommendation to strengthen efforts against violence motivated by sexual orientation and gender identity and one recommendation to protect intersex minors' bodily integrity and stop non-consensual surgeries.⁴⁵⁸

Finally, some other countries have abandoned or failed to pass several large initiatives to criminalize perceived or actual participation in same-sex sexual activity.⁴⁵⁹ Ethiopia introduced a law similar to Uganda's Anti-Homosexuality Act, but it ultimately never came to fruition.⁴⁶⁰ Ethiopia also considered legislation in 2014 that would make same-sex sexual activity a non-pardonable offense, and the bill was ultimately abandoned.⁴⁶¹ The Republic of Chad considered making same-sex sexual activity a punishable offense in 2014, but the provisions did not pass.⁴⁶² Rwanda, a State that has never criminalized or enforced its laws to persecute same-sex sexual activity, considered amending its penal code to criminalize consensual sexual acts between individuals of the same sex, but ultimately rejected the provision because of concerns that it would invade individuals' privacy.⁴⁶³

States that have decriminalized same-sex sexual activity may still lack protections and effective ways to prevent violence against LGBTI individuals.⁴⁶⁴ Cabo

453. See, e.g., Equal Opportunities Act 2008 (Act No. 42/2008) (Mauritius) [hereinafter Mauritius Equal Opportunities Act], <https://perma.cc/3EZL-E7X5> (providing for equal opportunities in employment).

454. See, e.g., Human Rights Council, Rep. of the Working Group on the Universal Periodic Review: Tunisia, ¶ 45, U.N. Doc A/HRC/WG.6/13/TUN/1 (July 9, 2012) (indicating Tunisia's response in its last UPR cycle that it would consider an "objective and transparent national dialogue on the subject").

455. See Reid, *supra* note 443.

456. Mauritius Equal Opportunities Act, *supra* note 453, at § I.3; see also Mauritius' Top Court Decriminalizes, *supra* note 445.

457. Five African countries rejected all recommendations on rights and protections for sex and gender minorities in their Universal Periodic Review during the Third Cycle (2017–2022) and twenty only responded, "Noted." See *UPR Sexual Rights Database*, *supra* note 57 (follow the same instructions except select "Recommendation" in the "Reference type" dropdown and in the "Issue" dropdown select "Criminal laws on same-sex sexual practices," "Discrimination based on sexual orientation," "Intersex persons' rights," "Rights of same-sex desiring persons," "Transgender persons' rights," and "Violence on the basis of sexual orientation") <https://perma.cc/PF3R-9DBZ>.

458. *Id.*

459. See, e.g., *World Report 2015: Ethiopia*, HUM. RTS. WATCH (2015), <https://perma.cc/HKR8-UTF7>.

460. *Id.*

461. DUTCH COUNCIL FOR REFUGEES, *supra* note 62, at 59.

462. Chad: *Proposed Anti-Gay Law Will Fuel Homophobia*, AMNESTY INT'L (Sept. 23, 2014), <https://perma.cc/4R6M-H8HQ>.

463. See GLOBAL COMMISSION ON HIV AND THE LAW, *supra* note 101, at 18.

464. See Issabelah Nthambi Mutuku, *Rwanda: LGBT Rights Are Protected on Paper, but Discrimination and Homophobia Persist*, THE CONVERSATION (May 16, 2022), <https://perma.cc/9HJW-B4RN>.

Verde, Guinea Bissau, and Mozambique have enacted laws that directly or indirectly prohibit same-sex marriage.⁴⁶⁵ Many African countries also report both major and minor instances of violence and discrimination against LGBTI individuals,⁴⁶⁶ including South Africa, which includes protections against discrimination in multiple pieces of legislation and in its constitution.⁴⁶⁷

b. Recent Protections. As of 2023, South Africa is the only African country to allow LGBTI couples to marry, enter civil unions, and adopt children.⁴⁶⁸ South Africa has statutes that explicitly recognize same-sex marriage,⁴⁶⁹ adoption rights for non-heterosexual couples,⁴⁷⁰ and policies addressing crimes such as rape and sexual assault that were rewritten to be gender-neutral.⁴⁷¹ In December 2023, South Africa's Parliament took further steps to protect LGBTI individuals by passing the Hate Crimes and Hate Speech Bill, which would recognize "hate crimes" as crimes motivated by prejudice or intolerance toward one's characteristics, including a person's sexual orientation, gender identity or expression, or sex characteristics.⁴⁷² Perpetrators of such crimes would then face jail time.⁴⁷³ Moreover, in July 2023, the Department of Home Affairs invited the public to comment on the Draft Marriage Bill of 2022, which would "rationalise legislations dealing with marriages and ensure that all persons, regardless of race, sex, gender, sexual orientation, religious or cultural beliefs, are treated equally and with dignity."⁴⁷⁴ The draft bill ultimately showcases South Africa's attempts at expanding the legal framework to recognize and grant rights to all forms of

465. See CÓDIGO CIVIL [CIVIL CODE] arts. 1554, 1563 (Cabo Verde) (defining marriages and de facto unions as between two people of different sexes); CÓDIGO CIVIL E LEGISLAÇÃO COMPLEMENTAR [CIVIL CODE] arts. 1577, 1628 (Guinea-Bissau) (defining marriage as between two people of different sexes and specifying marriage cannot be between two people of the same sex); LEI DA FAMÍLIA [FAMILY LAW] arts. 19, 53 (Mozam.) (defining marriage as between two people of different sexes and specifying marriage cannot be between two people of the same sex).

466. See generally *Widespread Arrests, Attacks and Legal Restrictions Facing LGBTQI+ Activists Across Africa, Finds New Report*, CIVICUS (July 4, 2023), <https://perma.cc/2CNR-N5MR>; Nick Logan, *Arrests in Uganda, Nigeria Shine Spotlight on Grim State of LGBTQ Rights Across Much of Africa*, CBC NEWS (Aug. 31, 2023), <https://perma.cc/BJ9U-TDS9>.

467. See S. Afr. Const., 1996 art. 9(3); Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 8 (S. Afr.); Aditi Bhandari, *Uganda's Anti-Gay Bill is the Latest and Worst to Target LGBTQ Africans*, REUTERS (Apr. 7, 2023, 5:30 AM), <https://perma.cc/5RS6-LXCY>.

468. Bhandari, *supra* note 467.

469. See generally Civil Union Act 17 of 2006 (S. Afr.).

470. See, e.g., *Du Toit & Another v. Minister of Welfare & Population Dev. & Others* 2003 (2) SA 1982 40/01 (CC) (S. Afr.), <https://perma.cc/YA62-89CR>.

471. See generally Criminal Law (Sexual Offences and Related Matters) Amendment Act 37 of 2007 (S. Afr.); see also Nath, *supra* note 433, at 17.

472. See Luiz De Barros, *Hate Crimes and Hate Speech Bill Passes Final Hurdle in Parliament*, MAMBA ONLINE (Dec. 7, 2023), <https://perma.cc/SS2H-9WBD>.

473. *Id.*

474. *Home Affairs Invites Public Comment on the Draft Marriage Bill*, DEP'T OF HOME AFFS. (July 11, 2023), <https://perma.cc/9WZ6-2MBN>.

intimate partnerships, regardless of gender, sexual orientation, religious, cultural, or other beliefs.⁴⁷⁵

While South Africa remains the country with the most legal protection explicitly granted to LGBTI individuals,⁴⁷⁶ several other nations, such as Angola, Botswana, Cape Verde, and Mozambique, have also adopted constitutional or legal protections against discrimination.⁴⁷⁷ These measures include broad protections against discrimination based on sexual orientation, gender identity, and intersex status in employment settings, protections against hate crimes, incitement to violence, and other forms of discrimination,⁴⁷⁸ and are generally based on sexual orientation, gender identity, and intersex status.⁴⁷⁹ South Africa also has statutes that explicitly recognize same-sex marriage,⁴⁸⁰ adoption rights for non-heterosexual couples,⁴⁸¹ and policies addressing crimes, such as rape and sexual assault that were rewritten to be gender-neutral.⁴⁸² Courts have consistently held that laws limiting protections or rights to heterosexual individuals violate the provisions against discrimination in the Constitution and by statute.⁴⁸³

As of 2023, nine countries in Africa, including South Africa, prohibit discrimination in employment based on sexual orientation, four of which enacted their protections since 2010.⁴⁸⁴ Fewer countries are enacting laws that discriminate against individuals with HIV, and they are instead enacting laws that protect individuals with HIV from discrimination.⁴⁸⁵ However, African countries that have decriminalized or outlawed discrimination against those who are HIV-positive may still criminalize same-sex sexual activity or “aggravated homosexuality,” thereby enacting a contradictory law.⁴⁸⁶

475. Naledi Joy & Cathy-Ann Potgieter, *The New Marriage Bill and its Implications in South Africa*, CSVSR (Sept. 29, 2023, 8:28 AM), <https://perma.cc/8WQN-WS6A>.

476. Bhandari, *supra* note 467.

477. *Id.*

478. *Id.*

479. Promotion of Equality Act, *supra* note 467.

480. *See generally* Civil Union Act 17 of 2006 (S. Afr.).

481. *See, e.g.*, Du Toit & Another v. Minister of Welfare & Population Dev. & Others 2003 (2) SA 198 (CC) (S. Afr.), <https://perma.cc/Y2VF-QQ36>.

482. *See generally* Criminal Law (Sexual Offences and Related Matters) Amendment Act 37 of 2007 (S. Afr.); *see also* Nath, *supra* note 433, at 17.

483. *See* National Coalition of Gay & Lesbian Equal. & Others v. Minister of Home Affs. & Others 1999 10/99 (CC) at 58 para. 59 (S. Afr.) (holding that gay and lesbian non-citizen partners of South Africa citizens are entitled to the same benefits as heterosexual spouses); *Du Toit & Another* 2002 40/01 (CC) at 16–17 para. 20 (S. Afr.) (holding that adoption could not constitutionally be limited to heterosexual married couples); *Minister of Home Affs. & Another v. Fourie & Another* 2005 10/05 (CC) at 49–50 para. 78 (S. Afr.) (holding unconstitutional the law limiting marriage to heterosexual partners).

484. *See* STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 218.

485. *See, e.g.*, *Nigeria Passes Law to Stop Discrimination Related to HIV*, UNAIDS (Feb. 11, 2015), <https://perma.cc/TN72-SMF4>. *But see* *Nigeria Anti-Gay Laws: Fears Over New Legislation*, BBC (Jan. 14, 2014), <https://perma.cc/NZ5Y-Z9TZ> (pointing out the effect of anti-same-sex sexual activity statutes on HIV prevention services in trying to reach men who have sex with men).

486. *See generally* *Nigeria Anti-Gay Laws*, *supra* note 485.

Despite limited statutory protections and an overwhelmingly negative societal perception of LGBTI individuals, the legislators are unwilling to create protections for LGBTI individuals, while the courts have been willing to go in the opposite direction.⁴⁸⁷ In countries where violent incidents of arrest and persecution are common, courts may acquit an individual accused of engaging in illegal same-sex sexual activity rather than enforce the laws.⁴⁸⁸ In Nigeria, for example, an LGBTI activist targeted and detained by the police under its criminalization statute not only was acquitted, but they successfully brought suit against law enforcement.⁴⁸⁹ Similarly, fifteen individuals who were arrested shortly following the passage of a new criminalization statute in The Gambia were acquitted and released after spending several months in prison.⁴⁹⁰ In Zambia, an activist who spoke out on television against the country's anti-sodomy laws was detained on a nuisance charge, but the court later threw out the case due to the weak evidence presented by the Zambian government.⁴⁹¹ A report on cases pursued by Ugandan officials in Kampala found there were no convictions for any criminal charges brought for "consensual same sex conduct" between 2007 and 2011.⁴⁹²

Courts also have addressed violations of constitutionally protected rights without addressing the sexual orientation or gender identity of the individual affected.⁴⁹³ A Kenyan court held in 2008 that police violated the constitutional rights of a well-known LGBTI activist when police subjected her to sexual harassment, physical examination, and other abuse in her home.⁴⁹⁴ After a civil servant in Zimbabwe was terminated from his job pursuant to his arrest under the criminalization statute, a court held that employment discrimination based on perceived or purported sexual orientation was prohibited, even though Zimbabwe has no laws explicitly protecting individuals from discrimination based on sexual orientation or gender identity.⁴⁹⁵ In 2011, a Kenyan court awarded compensation

487. See, e.g., *Eric Gitari v. NGO Coordination Bd.*, *infra* note 500.

488. See *id.*

489. Colin Stewart, *Cheers and Praise for Victory in Nigerian Court*, ERASING 76CRIMES (Mar. 30, 2016), <https://perma.cc/B2HY-JXED> (celebrating release of prominent LGBTI rights activist who was detained without reason, after court held that his constitutional rights were violated in the arrest).

490. *Id.*

491. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 150; see also *People v. Kasonkomona* (2015) HPA 53/2014 (Zambia).

492. See *Oloka-Onyango*, *supra* note 50, at 35.

493. See *id.* at 36–37.

494. *Id.* (citing Miscellaneous Cause No. 2 of 2006 UGHC (Nov. 22, 2008)). The victim was a well-known LGBTI activist who could have just as easily been charged with engaging in illegal same-sex sexual activity in this instance, but the court framed the case as one about the right to dignity and to be free from inhumane treatment, without mentioning homosexuality.

495. See *Zimbabwe*, HUM. DIGNITY TR., <https://perma.cc/E6QX-33NB> (last updated Jan. 25, 2023, 11:02 AM). *But see* U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Zimbabwe 48–49 (2021), <https://perma.cc/P7SC-SLW4> (reporting NGOs say that LGBTQI+ people are discriminated against when seeking employment, leave school early due to discrimination, may be expelled from higher education based on their sexual orientation, have higher rates of unemployment, and blackmailers often threaten to reveal victims' sexual orientation to their employers).

to an intersex individual who faced discrimination in prison facilities, even as the court failed to grant legal recognition to non-binary sex (as opposed to “male” or “female”).⁴⁹⁶ Even in Uganda, a country notorious for its Anti-Homosexuality Act, the High Court held that police have violated the constitutional rights of LGBTI individuals in several instances.⁴⁹⁷

Finally, courts have acted as a counter-majoritarian force to invalidate laws or other government actions that fail to follow other provisions of the State’s constitution that protect free speech, dignity, and human rights.⁴⁹⁸ For instance, in 2016, a court in Botswana held the government’s refusal to register an LGBTI organization to operate within the country unconstitutional, based on the protected right to freedom of expression.⁴⁹⁹ Kenya’s High Court has also held that the government must allow several LGBTI organizations to register and operate openly under the protected right to freedom of association in Kenya’s Bill of Rights.⁵⁰⁰ In 2015, the High Court of Kenya declared part of its HIV criminalization statute unconstitutional because of the lack of legal certainty and the population’s inability to predict when it would be enforced against them.⁵⁰¹ Most famously, the High Court of Uganda struck down the Anti-Homosexuality Act in 2014, although based not on the constitutional rights it violated, but instead on the Ugandan Parliament’s failure to meet quorum in the vote that passed it.⁵⁰²

496. *African Activist: Kenya’s Landmark Intersex Case*, OII INTERSEX NETWORK (Dec. 12, 2011), <https://perma.cc/D2KC-ZEDW>.

497. *Country of Origin Report: Sexual and Gender Minorities - Uganda 23*, Organization for Refuge, Asylum, & Migration, REFworld (2014).

498. *Thuto Rammoge v. Att’y Gen. of Botswana*, H.C.C. MAHGB-000175-13 (Nov. 14, 2014).

499. *Id.* This judgment was upheld by the Botswana Court of Appeal on March 16, 2016. ENDING VIOLENCE, *supra* note 90, at 84.

500. *Eric Gitari v. NGO Coordination Bd. & Attorney General* (2013) 440 HHO C.R.K 168, at 98–99 (Kenya) (holding the grounds on which the board denied the organization registration to work in Kenya violated the Kenyan Bill of Rights and infringed on the organization’s freedom of association); *see also* Oloka-Onyango, *supra* note 50, at 48 (holding that the National Gay and Lesbian Human Rights Commission must be granted registration, after their application was denied five times); Daniel Wesangula, *Homophobia in Kenya: Is a Change Going to Come?*, THE GUARDIAN, <https://perma.cc/S4RH-TB89>. A Kenyan court also held that the refusal to grant registration to the organization called Transgender Education and Advocacy on the grounds that the organizer’s gender did not match the gender on her passport was unconstitutional. Oloka-Onyango, *supra* note 50, at 53. The court ruled that there was no requirement in the authorizing statute for an applicant to state their gender, and therefore, the board had considered an irrelevant factor. *Id.* Furthermore, the court found “apart from the foregoing . . . to discriminate against persons and deny them freedom of association on the basis of sex or gender is clearly unconstitutional.” *Id.*

501. *Kenya*, HIV JUSTICE NETWORK, <https://perma.cc/UB5J-GLPS>. In 2022, Zimbabwe became the second African country to fully repeal its HIV criminalization statute, with the passage of a marriage bill. The Zimbabwean Parliament found that criminalization of HIV transmission was “ineffective, discriminatory and undermines efforts” to curb infections. Michael Hollingdale, *UNAIDS Welcomes Parliament’s Decision to Repeal the Law That Criminalizes HIV Transmission to Zimbabwe*, UNAIDS (Mar. 18, 2022), <https://perma.cc/K86K-DPF9>; Emma Nhancumba, *High Court Stops HIV Transmission Case*, NEWSDAY (Apr. 12, 2023).

502. *Oloka-Onyango v. Att’y Gen.*, Const. Pet. No. 8 of 2014 (Const. Ct. Uganda Aug. 1, 2014), <https://perma.cc/CVW8-QZSW>.

Despite the victories in court for LGBTI activists and organizations, courts do not uniformly protect the rights of LGBTI individuals.⁵⁰³ The same Kenyan High Court that declared HIV criminalization unconstitutional and awarded compensation to an intersex person in June 2016 ruled that a forced anal examination adjacent to an arrest for “unnatural offences” was not torture or cruel, inhumane, and degrading treatment, even though the examinee had signed the consent form for the exam under duress.⁵⁰⁴ In 2011, a Cameroonian court convicted a man who allegedly engaged in same-sex sexual activity based on a text message he sent that read “I am very much in love with you.”⁵⁰⁵ In 2012, a Ugandan court found that the government had not violated the rights of a Ugandan organization that advocates for the rights of sexual minorities when the government broke up a meeting of the organization.⁵⁰⁶ The court declined to protect the group’s right to freedom of assembly, stating that if the exercise of the right is contrary to the law then it becomes prejudicial to the public interest and there can be a valid restriction on the exercise of the right.⁵⁰⁷ It is possible that the Ugandan court was influenced by public opinion leading up to the passage of the Anti-Homosexuality Act in 2014.⁵⁰⁸

c. Legal Recognition of Gender Change. Only South Africa and Namibia legally recognize an individual’s right to change their gender or sex on State-issued identification documents.⁵⁰⁹ Although many other African countries do not explicitly prevent individuals from changing their gender or sex on identity documents, it is difficult and practically impossible in practice.⁵¹⁰ For example, a Kenyan court held that a transgender woman was legally entitled to have her name and gender change recognized in 2014.⁵¹¹ However, she has faced

503. Compare Stewart, *supra* note 489 with Chonghaile, *infra* note 505.

504. GHOSHAL, DIGNITY DEBASED, *supra* note 113, at 3–4, 31; Edwin J. Bernard, Alison Symington, & Sylvie Beaumont, *Punishing Vulnerability Through HIV Criminalization*, 112 AM. J. PUB. HEALTH S395, S396 (2022).

505. Clár Ní Chonghaile, *Cameroonian Lawyer Urges World to Join Her in Fight Against Anti-Gay Legislation*, THE GUARDIAN (Mar. 10, 2015), <https://perma.cc/8DJG-UVRD>.

506. See Oloka-Onyango, *supra* note 50, at 43–44.

507. See *id.* (citing Jacqueline Kasha Nabagesera & 3 Ors. v. Att’y Gen. & Anor, Misc. Cause No. 33 of 2012, [2014] UGHC 49).

508. See Oloka-Onyango, *supra* note 50, at 45; see also AENGUS CARROLL, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS 91 (Oct. 2016), <https://perma.cc/TL5C-R7RL> (citing a survey that found a majority of Ugandans would be uncomfortable with a lesbian or gay neighbor and believe that being LGBTI should be a crime).

509. See Mariel Ferragamo & Kali Robinson, *Africa’s Struggle Towards Inclusive LGBTQ+ Laws*, COUNCIL ON FOREIGN RELATIONS (June 13, 2023), <https://perma.cc/D9PY-7KZM>; Alteration of Sex Description and Sex Status Act 49 of 2003 (S. Afr.), <https://perma.cc/8D3V-7PUT>. However, it may be difficult to access effective medical care. See Ziphezinhle Msimango, *Born in the Wrong Body: The Fight for Transgender Surgery in SA*, SUNDAY TIMES (Oct. 18, 2018), <https://perma.cc/Y7VA-FLGM>.

510. See *Area 1 | Legal Frameworks | Legal Gender Recognition*, ILGA WORLD DATABASE, <https://perma.cc/PC66-T6AT> (Feb. 2024).

511. *Kenya Court Victory for Transgender Activist Audrey Mbugua*, BBC NEWS (Oct. 7, 2014), <https://perma.cc/EQ4Q-7M3K>.

continued challenges getting her name and gender change actually recognized, and no legislation has been passed to make this explicit since.⁵¹²

Even in South Africa, which has a statutorily mandated process that individuals seeking a gender or sex change must follow, activists have lobbied the government to change the way in which the legal recognition process is implemented.⁵¹³

d. Legal Protections for Individuals Who Are Intersex. Very little appears in the laws of African countries governing the treatment of individuals who are intersex.⁵¹⁴ One particular concern is the use of compulsory surgery to alter the anatomy of infants whose sex characteristics do not conform to a binary function (male or female).⁵¹⁵ During its discussion of the Registration of Persons Bill of 2014, the Ugandan Parliament debated introducing a mandate to alter the anatomy of individuals born with intersex conditions.⁵¹⁶ Although the mandate was ultimately not included in the bill, the debate highlights lawmakers' ignorance of issues affecting trans and intersex individuals.⁵¹⁷

There are, however, signs of progress in various instances in which issues that affect intersex people have been recognized.⁵¹⁸ In 2013, for example, a Kenyan Court declared that all surgery on infants born with intersex conditions that are not therapeutic must first be approved by the court.⁵¹⁹ In 2010, the same court held that the Kenyan Constitution's blanket prohibition of discrimination on any ground includes protection for individuals who are intersex.⁵²⁰ South Africa included "intersex" under the definition of "sex" in its antidiscrimination statute enacted in 2005.⁵²¹ In 2023, the Kenya National Commission on Human Rights, along with the Kenya Law Reform Commission and the Office of the Attorney General, introduced a bill in Kenya's parliament to expand legal protections for intersex individuals.⁵²² If passed, the bill would "ensure inclusivity for intersex

512. *Legal Gender Recognition*, *supra* note 510. See Anita Chepkoech, *Audrey Mbungua: I Like the Woman I Have Become, I am Dating and Happy!*, NATION (June 28, 2020), perma.cc/8QEM-6FBC.

513. Graeme Reid, *Transgender ID a Hostile Affair*, MAIL & GUARDIAN (Oct. 4, 2013), <https://perma.cc/WP9U-YPSG>.

514. The Centre for Human Rights at the University of Pretoria notes that South Africa, Kenya, and Uganda are the only countries in Africa with laws regarding the treatment of intersex people. TAPIWA MAMHARE, FACT SHEET ON INTERSEX PERSONS 2 (Centre for Human Rights, University of Pretoria).

515. See HUMAN RIGHTS COUNCIL, UNITED NATIONS GENERAL ASSEMBLY, DISCRIMINATION AND VIOLENCE AGAINST INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY 6 (May 4, 2015).

516. See Oloka-Onyango, *supra* note 50, at 50–51.

517. See *id.* at 51.

518. See, e.g., Allan Ngari, *African Human Rights Commission Affirms Intersex People's Rights: Ending Unnecessary Surgeries, Respecting Bodily Diversity at Core of Resolution*, HUM. RTS. WATCH (Apr. 6, 2023), <https://perma.cc/6ZHH-9WDM>; *Baby A & The Cradle v. Att'y Gen.* (2013) Pet. 266 K.L.R. 66–67 paras. at 17–18 (Kenya), <https://perma.cc/JB3M-BWB3>.

519. *Baby A*, at 2.

520. See Oloka-Onyango, *supra* note 50, at 54.

521. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 8 (S. Afr.).

522. *KNHRC Champions Intersex Bill to Protect Rights*, Kenya News Agency (May 28, 2023), <https://perma.cc/7K5J-XF7D>.

people in the areas of employment, health services, the justice system, and education, among others.⁵²³ Additionally, in March 2023, the African Commission on Human and Peoples' Rights passed a resolution affirming the rights of intersex people, stating that human rights violations against intersex people are contrary to human rights frameworks agreed to by the Commission previously in the African Charter on Human and People's Rights, the African Charter on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child.⁵²⁴

2. The Americas

Despite discrimination against the LGBTI community, legal advances and protections for the LGBTI community are being made in various parts of the Americas.⁵²⁵ For example, same-sex marriage and unions are becoming increasingly legal and most countries have provisions for employment discrimination protection.⁵²⁶ Protections for non-normative gender identity and openness in military service, however, are less pervasive.⁵²⁷

a. Recognition of Unions. Recognition of same-sex marriage and unions has come through a mixture of court and legislative action in different countries.⁵²⁸ Canada, Mexico, and the U.S. recognize same-sex marriage.⁵²⁹ In Mexico and the U.S., Supreme Court rulings legalized same-sex marriage, whereas in Canada, Parliament passed legislation in 2005 that legalized same-sex marriage.⁵³⁰

In South America, same-sex marriage is legal in Argentina, Brazil, Chile, Colombia, Costa Rica, and Uruguay.⁵³¹ Uruguay was the first country in Latin America to legislatively legalize same-sex unions—it passed a Civil Union Law in December 2007, giving same-sex unions similar rights to those of heterosexual marriages.⁵³² However, the law was restrictive because it required couples to be together for at least five years.⁵³³ Argentina was the first Latin American country to legalize same-sex marriage in 2010.⁵³⁴ In Brazil and Colombia, rights for

523. *Id.*

524. Ngari, *supra* note 518. Since the Resolution on the Promotion and Protection of the Rights of Intersex Persons in Africa was passed, there has been no new federal legislation by any Commission member to codify protection for intersex people. *Id.* See Matuba Mahlatjie, *South Africa's Intersex Rights at a Crossroads: Navigating Political Uncertainty and Safeguarding Intersex Rights*, OUTRIGHT INT'L (MAR. 5, 2024), <https://perma.cc/EBV9-EB4E>.

525. See *supra* notes 520; see *infra* note 536.

526. See *supra* notes 520, 524.

527. See *infra* notes 558, 564, 561 and accompanying text. See *infra* sections III.B.2.d, III.B.2.e.

528. See Glickhouse & Keller, *supra* note 185.

529. See *Recognition Map*, *supra* note 166.

530. Glickhouse & Keller, *supra* note 185; Eulich, *supra* note 170; Stephen Smith, *Canada Legalizes Gay Marriage*, CBS NEWS (July 20, 2005), <https://perma.cc/E4EC-8FQY>.

531. *Marriage Equality Around the World*, HUM. RTS. CAMPAIGN, <https://perma.cc/43QB-2RD7>.

532. Glickhouse & Keller, *supra* note 185.

533. Glickhouse & Keller, *supra* note 185.

534. *Id.*

same-sex couples came through court rulings, in 2011 and 2009, respectively.⁵³⁵ Chile legalized same sex marriage through legislation in 2021, while the Costa Rican Supreme Court ruled for marriage equality in 2020.⁵³⁶

b. Protection from Employment Discrimination. Many countries protect LGBTI citizens from workplace discrimination.⁵³⁷ For example, the U.S. and Costa Rica have statutory or other provisions specifying sexual orientation as a basis for nondiscrimination.⁵³⁸ Costa Rica has progressed in recent years towards stronger legal protections against workplace discrimination for LGBTI citizens.⁵³⁹ In 2015, former Costa Rican Vice President Ana Helena Chacón enacted an executive order that prohibited discrimination by public institutions and workers, although this was limited in scope of application.⁵⁴⁰ In 2016, Article 404 of the Labour Code was amended to include sexual orientation among the grounds that are prohibited for discrimination in employment and in 2023, a political party put forth a bill that would recognize trans, non-binary, gender diverse, and inter-sex identities.⁵⁴¹

Other countries, including Bolivia, Canada, Ecuador, and Mexico, have constitutionally-based prohibitions on discrimination based on sexual orientation.⁵⁴² Canada also has statutory provisions protecting individuals against discrimination based on sexual orientation.⁵⁴³ Most of these countries' laws focus primarily on sexual orientation, although Bolivia, Canada and Mexico City, Mexico, specifically protect transgender individuals from discrimination as well, and in 2023, the United States put forth a bill to protect transgender and nonbinary identities on a national scale.⁵⁴⁴ Ecuador's 2008 Constitution also focuses primarily on sexual orientation and generally prohibits discrimination on these grounds but still

535. Glickhouse & Keller, *supra* note 185.

536. *Marriage Equality Around the World*, *supra* note 531.

537. *Protections against Discriminations in Employment*, ILGA WORLD DATABASE (last updated Jan. 2024), <https://perma.cc/PW4J-3QZE>. Many countries in the Americas protect LGBTI citizens against workplace discrimination including, but not limited to, Bolivia, Brazil, Canada, Colombia, Costa Rica, Ecuador, Mexico, Nicaragua, United States, Uruguay, and Venezuela. *Id.*

538. *Id.*

539. *Id.*

540. *Id.*

541. *Id.*

542. *Protections against Discriminations in Employment*, *supra* note 537; *Same-Sex Marriage Is Legal in Ecuador, but Will All Ecuadorians Accept It?*, WORLD POLS. REV. (July 15, 2019), <https://perma.cc/ZB58-DXS8>.

543. See *Protections against Discriminations in Employment*, *supra* note 537.

544. In Bolivia, the constitution and statutes prohibit discrimination based on sexual orientation and gender identity. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Bolivia (2023) <https://perma.cc/DXK9-JXRT> [hereinafter Bolivia 2022]. Mexican law prohibits discrimination against LGBTI individuals, but only Mexico City provides for protections based on gender identity. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Mexico (2023) <https://perma.cc/HXW5-AMUE> [hereinafter Mexico 2022]. Canada added "gender identity or expression" as additional grounds on which discrimination is prohibited. *Bill C-16*, 42nd Parliament, 1st Session (June 19, 2017). See also *Transgender Bill of Rights*, H.R. 269, 118th Cong. (2023).

carries some discriminatory provisions, such as Article 68 that prevents same-sex couples from adopting a child.⁵⁴⁵ Some other countries prohibit discrimination in employment but may not specifically identify sexual orientation as a protected category.⁵⁴⁶

c. Hate Crimes. Among the countries that protect individuals against hate crimes, the levels of protection vary.⁵⁴⁷ Some punish individuals for committing hate crimes based on sexual orientation, while others also punish individuals for inciting hatred based on sexual orientation.⁵⁴⁸ Still others, at a minimum, have a national human rights institution that focuses on sexual orientation in its human rights work.⁵⁴⁹

Some countries have more advanced hate crime protections.⁵⁵⁰ Uruguay, for example, prohibits prejudice based on sexual orientation and identity.⁵⁵¹ Uruguay also established a commission to examine discriminatory practices and recommend new legislation to protect LGBTI individuals.⁵⁵² Similarly, in Canada, the criminal code sanctions and protects against hate, bias, and prejudice based on sexual orientation.⁵⁵³ Certain Canadian territories also include additional protections based on gender identity and gender expression.⁵⁵⁴

d. Gender Identity-Related Issues. Countries vary in the legal protections they afford transgender individuals and in their treatment of gender identity issues. Argentina has progressive policies: it allows people to change their legal gender on government documents for free, regardless of whether an individual has had medical procedures intended to change their sex characteristics.⁵⁵⁵ Moreover,

545. Violations in Ecuador in relation to non-discrimination and equality laws (Article 2, paragraph 1 and Articles 3, 25 and 26), 117th Session of the Human Rights Committee in Geneva (May 2016), <https://perma.cc/HLR9-W7GU>.

546. See *Protections against Discriminations in Employment*, *supra* note 537 (reporting some countries with general non-discrimination laws include Colombia, Guatemala, Nicaragua, Venezuela, Ecuador, Brazil, Argentina, Chile, and Haiti).

547. See *Area 1 | Legal Frameworks | Hate Crime Law*, ILGA WORLD DATABASE, <https://perma.cc/U72F-X5AF> (Feb. 2024).

548. See *Area 1 | Legal Frameworks | Prohibition of Incitement to Violence, Hatred or Discrimination*, ILGA WORLD DATABASE, <https://perma.cc/TZR3-K5NA> (Oct. 2023). Some countries that prohibit incitement to hatred based on sexual orientation include Bolivia, Mexico, Canada, U.S., Uruguay, and Colombia. *Id.* Some countries that consider hate crimes based on sexual orientation an aggravating circumstance include Argentina, Brazil, Canada, Ecuador, Mexico, Nicaragua, U.S., and Uruguay. *Id.*

549. See *id.*

550. *Id.*

551. *Id.*; See U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Uruguay (2023), <https://perma.cc/RWA2-8UTN>.

552. See *Declaration of National Interest: Fight Against Racism, Xenophobia, and All Other Forms of Discrimination*, Law No. 17817 (Sept. 14, 2004) (Uru.).

553. *Bill C-16*, 42nd Parliament, 1st Session (June 19, 2017).

554. *Rights of LGBTI persons*, GOV'T OF CAN., <https://perma.cc/FK6E-Q3LE> (Nov. 2, 2023).

555. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Argentina (2023), <https://perma.cc/8GFK-E2CA> [hereinafter Argentina 2022]; Marcela Valente, *New Law in Argentina Could Change Lives in the Transgender community*, WORLD

Cuba has sponsored sex reassignment surgery free of charge since 2008.⁵⁵⁶ Other countries allow for changes on government IDs as well, but some may require going to court first, or having surgery prior to allowing such an ID change.⁵⁵⁷ Bolivia, for example, allows citizens to change their name and gender on official identification, but the process is often delayed and individuals are subject to discrimination by judicial authorities.⁵⁵⁸

e. Military. Some countries in the Americas limit the ability of LGBTI members to serve openly in the military.⁵⁵⁹ Those in Latin America and North America that do allow LGBTI persons to serve openly in the military include Argentina, Brazil, Cuba, Chile, Colombia, Canada, Ecuador, Uruguay, Venezuela, and the U.S.⁵⁶⁰ Canada, which also provides protection against gender-based discrimination, has allowed transgender individuals to serve in the military since 1992.⁵⁶¹ Similarly, in 2009, Peru's Constitutional Court ruled that LGB Peruvians can serve in the police and the armed forces.⁵⁶² In contrast, LGBTI service members in Mexico have faced discrimination from other soldiers, similar to LGBTI citizens across Mexico more broadly.⁵⁶³

ECON. F. (June 29, 2021), <https://perma.cc/655J-BRYL>; *Transgender people in Argentina and Colombia fight for equal rights*, GOV'T OF THE NETH. (Mar. 31, 2022, 8:03 AM), <https://perma.cc/4U8M-SZRB>.

556. Glickhouse & Keller, *supra* note 185; Yarlenis M. Malfran, *Inclusion and integrality for whom? Paradoxes of Resolution 126/2008*, ALAS TENSAS (Aug. 22, 2023), <https://perma.cc/VK9R-QPF6>.

557. Compare U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Canada (2022), with *Peru: Country Overview*, OUTRIGHT INT'L, <https://perma.cc/X4QC-EC76> (Apr. 2023). In Canada, procedures vary for changing legal gender for different provinces and territories; Ontario, Nova Scotia, and British Columbia allow for an applicant to change gender identity without undergoing sex reassignment surgery, but require either a doctor's or social worker's letter in support; other provinces and territories require physicians to certify that applicant has completed gender reassignment surgery before allowing legal gender change. Meanwhile, in Peru, transgender people have to go to the judiciary to update their name and gender marker on a national identity card, a process that is expensive, complicated, and can take a long time. Colombia allows for change without surgery, but there have been complaints that it was difficult for transgender individuals to change gender designation on national ID documents and that those with male ID cards were required to show proof they had completed mandatory military service or were waived from that requirement. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Colombia (2023), <https://perma.cc/JNW2-2D5L>.

558. See BOLIVIA 2022, *supra* note 544.

559. See *Serving Openly in the Military*, EQUALDEX, <https://perma.cc/SF3E-6M8J> (Mar. 16, 2023);

560. *Id.*; see also *Pride in Service*, GOV'T OF CANADA, <https://perma.cc/CQ9Z-UGXX> (Dec. 28, 2023).

561. Rachel E. Gross, *What Other Countries Can Teach America About Transgender Military Service*, SLATE (Aug. 10, 2015), <https://perma.cc/QES5-HEUP>. See *Pride in Service*, *supra* note 560.

562. See *Serving Openly in the Military*, *supra* note 559; Sentencia 00926-2007-AA, CONSTITUCIONAL TRIBUNAL OF PERU (Nov. 3, 2009).

563. Glickhouse & Keller, *supra* note 185, at 2; see also Mexico 2022, *supra* note 544; see, e.g., Guillermo Rivera, *Living with HIV in the Mexican Army: There are More Than a Hundred and They have No Right to 'Cry'*, VICENEWS (Sept. 14, 2017), <https://perma.cc/EL8S-J885>.

3. Asia and the Pacific

Asia is a diverse region with varying degrees of protection for LGBTI individuals across different countries.⁵⁶⁴ The region is currently experiencing a greater push to accept LGBTI people into the society.⁵⁶⁵ Though LGBTI discourse in Asia is particularly complicated by its diverse contexts, the region has recently witnessed many advancements in securing the legal rights of LGBTI persons.⁵⁶⁶

a. LGBTI Recognition and Protection. Thailand does not have any laws that criminalize sexual orientation or expression, or same-sex consensual relationships, but there have been reports that the media portrays LGBTI citizens in a stereotypical light and that the government has attempted conversion therapy on LGBTI persons.⁵⁶⁷ The 2007 Thai Constitution amended in 2017 mentions that “all persons are equal before the law, and shall have rights and liberties and be protected equally under the law.”⁵⁶⁸ However, the Thai Courts have ruled that laws that only recognize a marriage between a man and a woman do not violate the Constitution.⁵⁶⁹ In New Zealand, same-sex sexual activity was decriminalized in 1986, and in 1993, “post-operative transsexuals” were allowed to marry as their new sexual orientation; less than 10 years later, New Zealand legalized same-sex marriage and banned conversion therapy in 2022.⁵⁷⁰ In 2013, Australia revised the Sex Discrimination Act 1984 to include the prohibition on “discrimination on the basis of a person’s sexual orientation, gender identity and intersex status.”⁵⁷¹ This discrimination is prohibited in areas such as “employment, housing, family law, taxes, child support, immigration, pensions, care of elderly persons, and social security.”⁵⁷² In 2023, Australia passed further laws to protect the interests of LGBTI citizens, namely protections from nonconsensual surgeries on intersex people, the ability to update national documents, and making gender optional on birth certificates in Tasmania.⁵⁷³

564. See *infra* section III.B.3.a.

565. See Emma Kenny, *Explainer: Advances in LGBTQIA+ rights across Asia and the Pacific*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE (Sept. 28, 2023), <https://perma.cc/QE8G-C938>.

566. *Id.*

567. See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Thailand (2023), <https://perma.cc/SCL5-64EP>; Anuchit Nguyen, *Thailand to Be Southeast Asia’s Pioneer With Same-Sex Union Bill*, BLOOMBERG (June 7, 2022, 6:20 AM), <https://perma.cc/H864-TPM3>.

568. See *Thailand Constitution*, CONSTITUTE (2017), <https://perma.cc/3L58-LYGG>; see also *Thailand: Historic Same-Sex Marriage Bills are Moment of Hope for LGBTI Rights*, AMNESTY INT’L (Dec. 21, 2023), <https://perma.cc/KWY7-6JYE>.

569. *Thailand: Historic Same-Sex Marriage Bills are Moment of Hope for LGBTI Rights*, *supra* note 568.

570. Randolph Hollingsworth, *Milestones: Legal Status and Sexual Orientation/Identity*, Nat’l Council of Women of N.Z. (Dec. 15, 2022), <https://perma.cc/3LSH-FQS4>.

571. *Face the Facts: Lesbian, gay, bisexual, trans and intersex people*, AUSTL. HUM. RTS. COMM’N (2014), <https://perma.cc/UD98-4FBX>.

572. See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2022 Country Reports on Human Rights Practices: Australia (2023), perma.cc/M2FE-TE3N.

573. See *Act Introduces Australian-First Laws To Protect Intersex People From Surgeries Without Their Consent*, EQUAL. AUSTL. (Mar. 21, 2023), <https://perma.cc/8WW2-4C73>. See also Tobias Jurs-

Asia has made progress in the past two decades regarding the advancement of LGBTI rights, notably transgender rights.⁵⁷⁴ In 2005, the Hong Kong Special Administrative Region (SAR) Court ruled that homosexual men possess equal rights and also protection from discrimination.⁵⁷⁵ The Hong Kong Legislative Council decided to bring same-sex partners who live together under the protection of its domestic violence laws and, in 2023, granted equal inheritance rights to same-sex couples, widening the scope of legal protection for same-sex couples.⁵⁷⁶ Following a slew of recent lawsuits regarding protections for same-sex couples, Hong Kong also granted rights to LGBT citizens through the courts, ordering the government to come up with a framework to recognize same-sex marriages within two years, and discarding the requirement of conversion therapy to change gender on identification cards.⁵⁷⁷ The government in Nepal was ordered by the Supreme Court in a landmark ruling to recognize transgender individuals as citizens under law.⁵⁷⁸ Notably, transgender individuals are permitted to identify themselves as a “third gender” at voter registration, although this order has been inconsistently applied by the Nepali government.⁵⁷⁹ In November 2023, the Nepali government recognized a same-sex marriage for the first time, but has since failed to do so for many other same-sex couples.⁵⁸⁰ Similarly, South Korea’s Supreme Court has held that “transsexuals have the right to be recognized for their current sex.”⁵⁸¹ Nevertheless, legal reforms are slow moving in the region.⁵⁸²

Traditionally, the laws of Mongolia have not explicitly discriminated against LGBTI individuals nor provided them protection; however, there is some

Lewis, *Trans And Gender-Diverse Queenslanders Can Now Change Birth Certificate Without Sexual Reassignment Surgery*, ABCNEWS (Jun. 14, 2023), <https://perma.cc/ZT7M-LY9E>; Alexandra Humphries & Ellen Coulter, *Tasmania Makes Gender Optional On Birth Certificates After Liberal Crosses Floor*, ABCNEWS (Apr. 10, 2019), <https://perma.cc/GK9L-UZQX>.

574. See Holning Lau, *Courts, the Law, and LGBT Rights in Asia*, OXFORD RSCH. ENCYC. POLS. (May 29, 2020), <https://perma.cc/R4ZS-E4BG>; REGIONAL DIALOGUE, *supra* note 200, at 2; Isabella Steger, *Hong Kong’s Gay Rights Advocates Fear Civil Crackdown May Undo Progress*, BLOOMBERG (June 21, 2022, 5:00 PM), <https://perma.cc/CR25-RLU4>; Sanju Gurung, *Nepal, the Beacon of LGBTQ+ Rights in Asia? Not Quite.*, DIPLOMAT (Feb. 10, 2021), <https://perma.cc/XR6S-B7EE>.

575. LEAVE NO ONE BEHIND, *supra* note 197, at 6.

576. Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 U.C. DAVIS L. REV. 773, 779 (2011); see also Kanis Leung, *A Hong Kong Court Upholds a Ruling in Favor of Equal Inheritance Rights for Same-Sex Couples*, ASSOC. PRESS, <https://perma.cc/533C-SCR7> (Oct. 24, 2023, 6:04 AM).

577. See Leung, *supra* note 576. See also Cindy Sui, *Hong Kong’s LGBTQ Community Scores Legal Victories*, VOICE OF AM. (Dec. 2, 2023), <https://perma.cc/VA9V-8KBQ>.

578. See REGIONAL DIALOGUE, *supra* note 200, at 2; see also Holly Young, *Trans Rights: Meet the Face of Nepal’s Progressive ‘Third Gender’ Movement*, GUARDIAN, <https://perma.cc/M23A-DPS6> (Oct. 6, 2017, 12:14 AM). See Kyle Knight, *Did Nepal Achieve Marriage Equality? Not Quite Yet*, HUM. RTS. WATCH (Dec. 14, 2023, 11:53 AM), <https://perma.cc/Z7K6-MAKK>.

579. *Id.*

580. See Knight, *supra* note 578.

581. Lau, *supra* note 576, at 774; see also *In re Change of Name and Correction of Family Register* [S. Ct.], June 22, 2006, 2004Seu42 (S. Kor.), <https://perma.cc/CGM6-9VAG>.

582. See REGIONAL DIALOGUE, *supra* note 200, at 2.

progress towards legal recognition.⁵⁸³ In 2009, Article 20(1) of the Civil Registration Law was amended to allow for the registration of sex changes on identity documents when accompanied by medical certification.⁵⁸⁴ The Democratic People's Republic of Korea does not explicitly ban same-sex sexuality, but there have been reports of punishment and execution of LGBTI people.⁵⁸⁵

b. Marriage and Adoption. Asia has historically been far behind Europe and the Americas in recognizing marriage rights, except for nations such as New Zealand and Australia.⁵⁸⁶ New Zealand legalized same-sex unions in 2013—the first in the region.⁵⁸⁷ Australia legalized same-sex marriage in 2017.⁵⁸⁸ In Japan, Tokyo's Shibuya Ward began issuing non-legally binding partnership certificates to same-sex couples in 2015.⁵⁸⁹ Currently, Japan does not nationally recognize same-sex marriage; however, there is a noticeable trend towards acceptance as two Japanese courts concurrently recognized same-sex marriage in March 2024 and found the present ban on same-sex marriage as unconstitutional, contrasting with a 2022 decision stating otherwise.⁵⁹⁰

In South Korea, LGBTI rights entered the public spotlight in 2014 when the mayor of Seoul told the *San Francisco Examiner* during an interview that he “personally agree[d] with the rights of homosexuals” and expressed hopes for legalization of same-sex marriage in South Korea.⁵⁹¹ Although the mayor eventually withdrew his pledge to adopt the “Seoul City Charter of Human Rights” due to fierce opposition from conservative groups, the interview generated much-needed attention to LGBTI issues.⁵⁹² Despite the attention, as of 2022, same-sex partnerships still do not have legislative or judicial recognition in South Korea.⁵⁹³

583. See UNDP & USAID, BEING LGBT IN ASIA: MONGOLIA COUNTRY REPORT 1, 6 (2014) [hereinafter Mongolia Country Report]; Aubrey Menard & Khaliun Bayartsogt, *Charges in Mongolia LGBT Attack Hint at Changing Attitudes*, ALJAZEERA (Oct. 9, 2019), <https://perma.cc/UCG8-D83Q>.

584. MONGOLIA COUNTRY REPORT, *supra* note 583, at 6.

585. *LGBT Rights in North Korea*, EQUALDEX (2023), <https://perma.cc/K58N-N9BG> (last updated Dec. 13, 2023).

586. See *supra* Section III.A.3.

587. Jenna Fisher, *New Zealand Becomes First Country in Asia-Pacific to Legalize Same-Sex Marriage*, CHRISTIAN SCI. MONITOR (Apr. 17, 2013), <https://perma.cc/8UUN-V2E2>; *LGBT Rights in New Zealand*, EQUALDEX (2022), <https://perma.cc/3VMM-BQ7T>.

588. See *Marriage Equality in Australia*, AUSTL. GOV'T ATT'Y-GEN.'S DEP'T, <https://perma.cc/5PR5-4KL7>.

589. *Tokyo Ward Shibuya Certifies Same-Sex Partnerships*, BBC (Mar. 31, 2015), <https://perma.cc/6BEW-K5J8>.

590. *Japan: Groundbreaking Same-Sex Marriage Rulings A Long-Awaited Victory For LGBTI Rights*, AMNESTY INTERNATIONAL (Mar. 14, 2024), <https://perma.cc/73GK-T6PR>; *Japan Court Says Ban on Same-Sex Marriage Is Constitutional*, ASSOC. PRESS (June 20, 2022, 11:43 PM), <https://perma.cc/49BE-WYL3>.

591. See *Seoul Mayor Park Won-soon Wants Same-Sex Marriage in Korea as First in Asia*, SAN FRANCISCO EXAMINER (Oct. 12, 2014), <https://perma.cc/WHV8-8ZJ6>.

592. See Nick Duffy, *South Korea: Seoul Mayor Apologizes for Axing Human Rights Charter*, PINKNEWS (Dec. 13, 2014), <https://perma.cc/VQ2G-VHEJ>.

593. See Ryan Thoreson, *South Korean Court Declines to Recognize Same-Sex Partners*, HUM. RTS. WATCH (Jan. 10, 2022, 4:45 AM), <https://perma.cc/4YD5-A9YJ>.

However, in February 2023, the Seoul High Court ruled same-sex couples were entitled to the same public health care benefits as heterosexual couples.⁵⁹⁴ In Cambodia, the Civil Code does not explicitly limit the definition of marriage as the union between a heterosexual couple, indicating a possibility that same-sex marriage may be recognized.⁵⁹⁵ And, in the last several years, LGBTI-friendly NGOs, restaurants, shops, and magazines have continued to pop up around the country.⁵⁹⁶ In 2023, a UN expert who conducted a ten-day visit in Cambodia to talk to State agents and LGBTI persons concluded the country is “poised to make strides” in fully integrating LGBTI persons into Cambodian society.⁵⁹⁷ Taiwan legalized same-sex marriage in 2019, which made it the first country in Asia to do so, and in 2022, it started recognizing transnational same-sex marriages, which include spouses from countries that do not recognize same-sex marriage.⁵⁹⁸

c. The Role of Technology. Amidst social pressure against open LGBTI conduct, media and technology have become crucial in enabling the Asian LGBTI community to connect with others and organize the LGBTI rights movement.⁵⁹⁹ Internet sites are often used to openly discuss sexuality-related topics.⁶⁰⁰ In Pakistan, for example, LGBTI people were able to view worldwide celebrations of 2021 Pride on TikTok, Facebook, and Instagram.⁶⁰¹ However, Pakistan’s Telecommunications Authority has banned mainstream dating apps for meeting other LGBTI people, such as Grindr and Tinder, since 2020.⁶⁰² Other media, such as the television, also play an important part by fostering positive public discourse.⁶⁰³ One example of this is the television show “Love Patrol,” which left the viewers in the Pacific Islands with a better understanding of LGBTI individuals and helped create a positive public opinion towards LGBTI people.⁶⁰⁴ For populations of Asia with access, technology provides the mobility and privacy necessary for organizing strategic LGBTI movements.⁶⁰⁵

594. Joel Guinto & Damin Jung, *South Korea Court Recognises Same-Sex Couple Rights for the First Time*, BBC NEWS (Feb. 21, 2023), <https://perma.cc/R7MH-RR96>.

595. CAMBODIA COUNTRY REPORT, *supra* note 218, at 8.

596. See Molyn Pann, *Cambodian LGBT Comes Out of the Shadows*, VOA NEWS (Mar. 21, 2017, 5:01 AM), <https://perma.cc/3GEK-XDRM>.

597. *Cambodia Positioned to Fully Integrate LGBT People Into Society, UN Expert Says*, UN NEWS (Jan. 20, 2023) <https://perma.cc/V43N-499L>.

598. Thompson Chau, *Taiwan Recognizes Transnational Same-Sex Marriage*, NIKKEI ASIA (Jan. 22, 2023), <https://perma.cc/C98X-3A53>.

599. CHINA COUNTRY REPORT, *supra* note 206, at 12.

600. See, e.g., Pelangi Campaign, *Internet and Sexuality: LGBTQ Experience in Malaysia*, MEDIUM (June 12, 2018), <https://perma.cc/43CD-P723>.

601. See Anonymous, *For Queer People in Pakistan, Pride Flags on Social Media May Be Doing More Harm than Good*, GENDERIT (Aug. 23, 2022), <https://perma.cc/V99G-AFTY>.

602. See Gibran Naiyyar Peshimam, *Dating App Grindr ‘Disappointed’ by Pakistan Block*, REUTERS (Sept. 3, 2020, 8:21 AM), <https://perma.cc/JP39-YKCB>.

603. REGIONAL DIALOGUE, *supra* note 200, at 2.

604. See *id.*

605. See LEAVE NO ONE BEHIND, *supra* note 197, at 10.

4. Europe

There have been some significant triumphs across Europe involving the recognition of transgender/intersex rights over the last few years,⁶⁰⁶ and as of January 25, 2023, several European countries are debating additional important protections for transgender individuals.⁶⁰⁷

a. Recognition of the Human Rights of Transgender People. While many legal challenges continue to confront transgender individuals, several recent developments deserve note here.⁶⁰⁸ Despite negative public opinion and a rise in anti-trans speech from some officials,⁶⁰⁹ governments throughout Europe have nevertheless remained dedicated to providing avenues of legal gender recognition for trans individuals.⁶¹⁰ Andorra, Belgium, Finland, Scotland, and Spain have all made changes that either simplified their name changing processes or allowed for individuals to utilize self-determination in legal gender recognition.⁶¹¹ This allows for individuals to legally change their gender identity without having to undergo the invasive medical and psychiatric procedures previously required.⁶¹² Germany and Iceland have also introduced similar measures to their respective legislatures.⁶¹³

Further, these legal advancements have often been accompanied by measures that combat discrimination in various aspects of social culture. For example, Spain's new LGBTI law also includes employment protections, protections for trans migrants, and protections against discrimination based on gender expression.⁶¹⁴ In sports, Ireland and Spain have taken measures to improve inclusion and ban discrimination against LGBTI individuals with Ireland's Ladies Football

606. See Myles Williamson, *A Global Analysis of Transgender Rights: Introducing the Trans Rights Indicator Project (TRIP)*, PERSPECTIVES ON POLITICS 1, 8 (2023), <https://perma.cc/Z2NS-ZZLF> (explaining that, as of 2021, Western Europe was the frontrunner in allowing legally binding gender marker changes); Yessica Mestre, *The Human Rights Situation of Intersex People: An Analysis of Europe and Latin America*, 11 SOC. SCI. 1, 7 (2022), <https://perma.cc/38LJ-LNN3> (listing Malta, Portugal, Germany, and Iceland as countries that have created protections against medically unnecessary procedures for children with intersex characteristics, and identifying Belgium and Spain as two countries that, as of 2022, were in the process of adopting legal protections for intersex people).

607. See Enrique Anarte, *FEATURE-Europe Moves Towards Trans Self-ID Despite Controversy*, REUTERS (Jan. 25, 2023, 7:01 AM), <https://perma.cc/V2H3-6YWH>.

608. ILGA-EUR., ANNUAL REVIEW 2023, *supra* note 269.

609. Paul Tugwell, *Anti-Trans Hate Speech Surged in Europe in 2023, Report Says*, BLOOMBERG (Feb. 29, 2024, 3:00 AM), <https://perma.cc/6M5D-T32C>.

610. ILGA-EUR., ANNUAL REVIEW 2024, *supra* note 264, at 11.

611. *Id.*

612. See, e.g., *Finland: New Gender Recognition Law 'A Major Step Towards Protecting Trans Rights'*, AMNESTY INT'L (Feb. 1, 2023), <https://perma.cc/F62P-LKMY>.

613. See Kirsten Grieshaber, *Germany Proposes Rule to Ease Legal Changes of Gender*, ASSOC. PRESS (May 9, 2023, 8:33 PM), <https://perma.cc/7XMA-KU2Z>; ILGA-EUR., ANNUAL REVIEW 2024, *supra* note 264, at 11.

614. Jamie Wareham, *Trans Rights Increased in Europe Despite Growing Backlash in 2022*, FORBES (May 11, 2023, 7:35 AM), <https://perma.cc/V6VY-RVUV>.

team approving its first trans applicant.⁶¹⁵ In healthcare, Switzerland published recommendations for gender-affirming care and introduced a new HIV program that includes trans people for the first time.⁶¹⁶

Overall, while challenges remain, there have been beneficial developments that provide more protections for and recognize the rights of trans individuals. On an institutional level, there are also indicators that the European Parliament and the Council of Europe, along with several individual country leaders, recognize the need to implement more protections for trans individuals and are working towards measures that create a more inclusive and safer environment.⁶¹⁷

b. Recognition of the Human Rights of Individuals Who Are Intersex. An increased cognizance of intersex-related issues has been evidenced through several important developments in national European institutions.⁶¹⁸ One of the most significant legislative measures to date was the passage of Malta's Gender Identity, Gender Expression and Sex Characteristics Act in 2015.⁶¹⁹ The Act required doctors to obtain an intersex individual's consent prior to performing any modifying procedures,⁶²⁰ thus establishing a "new benchmark in Europe" for affirming the right of self-determination.⁶²¹ The Act was also a departure from traditional EU birth registration legislation—which obliged Member States to record an infant's sex on their birth certificates—and instead allows parents to postpone assigning a gender marker until the child is older.⁶²² Malta later de-pathologized gender identities through ACT No. LVI of 2016, which amended the former Act and ensures that gender identity is not considered to constitute a medical or mental health condition.⁶²³

Similar developments were also seen in Greece. In May of 2022, Greece banned "conversion practices" on minors that attempt to change their sexual orientation or gender identity.⁶²⁴ Further, in July of 2022, the government banned non-consensual surgeries performed on intersex children and implemented

615. ILGA-EUR., ANNUAL REVIEW 2024, *supra* note 264, at 11.

616. *Id.* at 10.

617. *See id.* at 12–20.

618. ILGA-EUR., ANNUAL REVIEW 2023, *supra* note 269, at 9.

619. *See generally* Malta Criminalises Conversion Practices and Depathologises Sexual Orientation, THE MALTA INDEP. (Dec. 5, 2016), <https://perma.cc/C747-KDYY>; Kyle Knight, *Dispatches: Malta's Inspiring Gender Recognition Law*, HUM. RTS. WATCH (Apr. 1, 2015, 5:59 PM), <https://perma.cc/F5YG-7JW8>.

620. Knight, *supra* note 619.

621. Press Release, *Transgender Europe, Malta Adopts Ground-Breaking Trans and Intersex Law* (Apr. 1, 2015), <https://perma.cc/VB54-S7HJ>.

622. FRA 2015 Update, *supra* note 274, at 72–73. "Eighteen EU Member States allow specific delays in registering new births: a week in Austria, Belgium, Bulgaria, France, Luxembourg and Slovakia; and longer than that in Cyprus, Denmark, Greece, Hungary, Ireland, Italy, Malta, Portugal, Romania, Slovenia, Spain, and the United Kingdom." *Id.*

623. Gender Identity, Gender Expression and Sex Characteristics (Amendment) Act, 2016 (LVI of 2016) (Malta).

624. ILGA-EUR., ANNUAL REVIEW 2023, *supra* note 269, at 9. Similar legislation was adopted in France, Spain, Portugal, Cyprus, and Iceland and several drafts of similar bills are in progress in the

measures for prosecution against doctors that carry out such procedures.⁶²⁵ The Prime Minister further apologized for abuses carried out by doctors to date.⁶²⁶

Public officials in various European countries have also recognized the importance of increasing public exposure to the rights of intersex persons, and several individuals in leadership positions and on an institutional level have voiced support for the rights of intersex persons.⁶²⁷ For example, in 2022, the European Commission gathered data for a study specifically focused on the lives of intersex people and their parents.⁶²⁸ Further, the Council of Europe's Steering Committee on Bioethics held a seminar on promoting the rights of intersex children in the context of early medical interventions.⁶²⁹

5. The Middle East

Though Anti-LGBTI sentiments continue to grow across the Middle East,⁶³⁰ progress has been made in the recognition of same-sex relationships in the region, as seen in Lebanon and Tunisia.⁶³¹

Although Lebanon's Penal Code still allows law enforcement to prosecute consensual same-sex conduct, a District Court of Appeals issued a historic ruling in 2018, stating that consensual sex between two people of the same sex is not unlawful.⁶³² In addition, protests demanding a change in Article 534 of the Penal Code have taken place in Lebanon since the court's earlier decisions in 2014.⁶³³ Further, in 2013, the Lebanese Psychiatric Society published a release stating that

Netherlands, Norway, Portugal, Spain, and parts of Switzerland. See ILGA-EUR., ANNUAL REVIEW 2024, *supra* note 264, at 8.

625. ILGA-EUR., ANNUAL REVIEW 2023, *supra* note 269, at 70.

626. *Id.*

627. See generally ILGA-EUR., ANNUAL REVIEW 2024, *supra* note 264, at 12–20.

628. ILGA-EUR., ANNUAL REVIEW 2023, *supra* note 269, at 9. The initial findings of the study were presented at a panel on “Equal rights for intersex people.” ILGA-EUR., ANNUAL REVIEW 2024, *supra* note 264, at 12.

629. ILGA-EUR., ANNUAL REVIEW 2023, *supra* note 269, at 9.

630. See generally Mohamad El Chamaa, *Anti-LGBTQ Backlash Grows Across Middle East, Echoing U.S. Culture Wars*, THE WASH. POST (Aug. 3, 2023, 2:00 AM), <https://perma.cc/9KLH-CG8F>.

631. See *Lebanon: Same-Sex Relations Not Illegal*, HUM. RTS. WATCH (July 19, 2018, 12:00 AM), <https://perma.cc/6EGL-D6HX> [hereinafter *Lebanon Court*].

632. Legislative Decree 340 of 1 Mar. 1943 (Penal Code) (Leb.), art. 534, available at <https://perma.cc/XK7P-U7G9>; *Lebanon Court*, *supra* note 631 (discussing a case in which nine LGBT people were acquitted of the crime of “unnatural offenses.”). *But see Lebanon: Attack on Freedoms Targets LGBTI People*, HUM. RTS. WATCH (Sept. 5, 2023, 12:01 AM), <https://perma.cc/XY9Y-X6NW> (“In August 2023, two Lebanese officials introduced separate bills that would explicitly criminalize same-sex relations between consenting adults and punish anyone who ‘promotes homosexuality’ with up to three years’ in prison . . . [t]hese attacks are taking place during a crippling economic crisis that has had disastrous consequences for human rights . . . particularly impacting marginalized groups.”).

633. *Lebanese Sit-In*, *supra* note 409; *cf. Lebanon: Unlawful Crackdown on LGBTI Gatherings*, HUM. RTS. WATCH (July 4, 2022, 12:01 AM), <https://perma.cc/928H-63FW>. See also *Lebanon: Attack on Freedoms Targets LGBTI People*, HUM. RTS. WATCH (Sept. 5, 2023, 12:01 AM), <https://perma.cc/XY9Y-X6NW> (“In July 2023, nine members of parliament submitted a draft law to repeal article 534. The draft law’s signatories have since been subjected to an online harassment campaign from political and religious authorities, resulting in one parliament member withdrawing his signature.”).

the organization recognized that homosexuality is not a mental disorder, and that homosexuality is not a disease that needs to be treated.⁶³⁴ Following the original release, the Society amended the statement in 2015 demanding the abolishment of Article 534 of the Penal Code.⁶³⁵

Similarly, though Article 230 of the Tunisian Penal Code criminalizes same-sex relations, in 2018, the *Commission des libertés individuelles et de l'égalité* appointed by the President recommended to repeal the article.⁶³⁶ The article has yet to be repealed; however, the direction taken by the Commission indicates a subtle shift in societal attitudes that ultimately may lead to more concrete changes. Wider acceptance of LGBTI individuals in Tunisia is also further evidenced by the launching of an annual Tunisian LGBTI film festival in 2018, and the 2019 Presidential candidacy of Mounir Baatour, an openly gay man.⁶³⁷

Although there have been positive developments in Lebanon and Tunisia for the decriminalization of same-sex sexual acts, members of the LGBTI community throughout the rest of the Middle East frequently face prejudice, violence, and a lack of State protection.⁶³⁸ Members of the public as well as government officials still target the LGBTI community with violence and discriminatory practices, even in countries where the State legalizes same-sex sexual acts.⁶³⁹ The availability of social media has also made it easier to surveil and target LGBTI individuals, with some Middle Eastern governments and private citizens even going so far as to create fake dating profiles on same-sex dating sites in order to “out” people suspected of being LGBTI.⁶⁴⁰ Same-sex marriage is still illegal in every Middle Eastern country, and Israel’s basic protections against discrimination for the LGBTI community are relatively recent: the country created anti-discrimination protections in employment in 1992, recognized partnerships in 1994, established broad protections from 2000 to 2014, permitted joint adoption in 2018, and allowed surrogacy in 2022.⁶⁴¹

634. Joseph El-Khoury & Andres Barkil-Oteo, *Lebanese Psychiatrists Take Stand on Homosexuality*, PSYCHIATRIC NEWS (Oct. 9, 2013), <https://perma.cc/E4L7-M9WL>.

635. Graeme Reid, *Lebanon Edges Closer to Decriminalizing Same-Sex Conduct*, HUM. RTS. WATCH (Feb. 2, 2017, 1:40 PM), <https://perma.cc/7GGW-XMG9>.

636. OUTRIGHT INT’L, *Activism and Resilience: LGBTQ Progress in the Middle East and North Africa* 3–5 (Sept. 28, 2018), <https://perma.cc/VP7U-VUWX>.

637. Noa Avishag Schnall, *A Queer Film Festival in Tunisia - Where Being Gay is Illegal*, N.Y. TIMES (May 14, 2019), <https://perma.cc/98FH-R5KY>; Leah Asmelah & Brian Ries, *This Tunisian Lawyer is Hoping to Be the Country’s First Openly Gay President*, CNN (Aug. 9, 2019, 1:17 PM), <https://perma.cc/4KB5-2E4T>.

638. See Cathrin Schaer, *LGBTQ Communities Face Threats in Middle East*, DW (July 16, 2022), <https://perma.cc/5XSS-BUAW>.

639. Rasha Younes, “Clean the Streets of Faggots,” HUM. RTS. WATCH (Aug. 4, 2021, 1:38 PM), <https://perma.cc/2XGG-UDW5>.

640. *Id.*; see also *Middle East, North Africa: Digital Targeting of LGBT People*, HUM. RTS. WATCH (Feb. 21, 2023, 1:00 AM), <https://perma.cc/U4NT-PQB7>; Ahmed Shihab-Eldin, *How Egyptian Police Hunt LGBT People on Dating Apps*, BBC (Jan. 30, 2023), <https://perma.cc/G3WX-PSZL>.

641. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 204, 225, 298, 311, 327–28.

There is a wide range of viewpoints about the LGBTI community around the Middle East, ranging from acceptance to discrimination and punishment.⁶⁴² Although some trends can be extrapolated as applying to most countries, an understanding of the ever-shifting dynamics within each country is critical to an understanding of the protections and challenges facing the LGBTI communities in each Middle Eastern country.⁶⁴³

C. CONFLICT WITH INTERNATIONAL LAW

1. Africa

Despite the restrictions and legal obstacles discussed in Section I herein, all African countries are members of the UN,⁶⁴⁴ and have thus agreed to international treaties that have been interpreted to prevent discrimination on the basis of sexual orientation and gender identity.⁶⁴⁵ Moreover, all African countries are members of the African Union⁶⁴⁶ and all, except Morocco, have adopted the African Charter on Human and Peoples' Rights, which may signal an obligation to protect all individuals, including LGBTI individuals, from discrimination.⁶⁴⁷

African countries that fail to protect individuals, or that openly discriminate against individuals based on sexual orientation, gender identity, or sexual anatomy, do so in violation of several significant UN treaties.⁶⁴⁸ The International Covenant on Civil and Political Rights ("ICCPR") provides that each signatory is

642. See generally discussion *supra* Sections III.A.5, III.B.5.

643. *Id.*

644. See *United Nations Regional Groups of Member States*, U.N., <https://perma.cc/TMH9-VWTC>].

645. See, e.g., *Toonen v. Australia*, Commc'n No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) (interpreting Article 26 of the ICCPR as banning discrimination on the basis of sexual orientation); see also U.N. OFF. OF THE HIGH COMM'R ON HUM. RTS., *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, 41–42, U.N. Doc. HR/PUB/12/06 (Sept. 2012).

646. See *Member States of the AU*, AFR. UNION, <https://perma.cc/8HAJ-PD9A>.

647. *Ratification Table: African Charter on Human and Peoples' Rights*, AFR. UNION, <https://perma.cc/7GR8-NXWL>.

648. See Julie A. Greenberg, *International Legal Developments Protecting the Autonomy Rights of Sexual Minorities: Who Should Decide the Appropriate Treatment for an Intersex Child?*, ETHICS & INTERSEX 87, 93 (2006) (citing Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 as protecting the right of intersex children not to undergo involuntary cosmetic surgery); U.N. COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General recommendation No. 27 on Older Women and Protection of Their Human Rights*, CEDAW/C/GC/27 (Dec. 16, 2010) (interpreting Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 as preventing discrimination based on gender identity and sexual orientation); U.N. COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28 (Dec. 16, 2010) (interpreting Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women as preventing discrimination based on gender identity and sexual orientation); International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966, 999 U.N.T.S. 171 (providing protections against discrimination based on sex, which includes sexual orientation as interpreted by *Toonen v. Australia*); GHOSHAL, DIGNITY DEBASED, *supra* note 113, at 59 (citing Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, as prohibiting forced anal examinations).

obligated to ensure all citizens have their rights recognized without regard to sex, which includes sexual orientation.⁶⁴⁹ Countries that criminalize LGB sexual orientations appear to be in violation of this provision.⁶⁵⁰ The ICCPR also provides the right to freedom of expression, association, and assembly.⁶⁵¹ While countries that prevent organizations that serve LGBTI individuals from operating within their borders may in effect be violating this provision, countries like Uganda that purposefully shut down gatherings of LGBTI individuals are violating the ICCPR beyond doubt.⁶⁵²

Other international treaties indicate further instances where the laws of some African countries may contravene their UN obligations.⁶⁵³ The practice of conducting anal examinations, for example, is likely a violation of the Convention against Torture.⁶⁵⁴ Furthermore, nonconsensual cosmetic surgery performed on intersex infants may violate the Convention on the Rights of the Child.⁶⁵⁵ The UN Committee on the Elimination of Discrimination against Women (“CEDAW”) recognizes that, in order to protect the rights of women and girls, State signatories must include in their legal protections a consideration of how sexual orientation and gender identity affect violence against women.⁶⁵⁶ Of the fifty-one African countries that received recommendations related to protecting LGBTI individuals in the Third Cycle (2017–2022) of the UN-sponsored Universal Periodic Review,⁶⁵⁷ twenty-two accepted recommendations that signaled positive movement toward protecting the rights of LGBTI citizens, such as prosecuting perpetrators of violence against LGBTI individuals and improving access to healthcare for LGBTI individuals.⁶⁵⁸

In addition to UN-based obligations, all but one of the Member States of the African Union have agreed to additional obligations under the African Charter on

649. International Covenant on Civil and Political Rights, art. 2.1, Dec. 16, 1966, 999 U.N.T.S. 171.

650. *See id.* at art. 2.

651. *See id.* at art. 19, 21–22.

652. *Cf.* Peter Bouckaert, *Uganda's Obligations Under International Law, in HOSTILE TO DEMOCRACY: THE MOVEMENT SYSTEM AND POLITICAL REPRESSION IN UGANDA* (1999), <https://perma.cc/9K9Y-WF52>; *see also Uganda Government Shuts Down Pride for Second Consecutive Year*, HUM. RTS. CAMPAIGN (Aug. 17, 2017), <https://perma.cc/H2HH-ZJUJ>.

653. *See* GHOSHAL, *DIGNITY DEBASED*, *supra* note 113, at 59.

654. *See id.* (citing Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 as prohibiting forced anal examinations).

655. Greenberg, *supra* note 648, at 93.

656. *See generally General Recommendation No. 28, supra* note 648.

657. *See UPR Sexual Rights Database, supra* note 57 (follow the same instructions except select “Recommendation” in the “Reference type” dropdown and in the “Issue” dropdown select “Criminal laws on same-sex sexual practices,” “Discrimination based on sexual orientation,” “Intersex persons’ rights,” “Rights of same-sex desiring persons,” “Transgender persons’ rights,” and “Violence on the basis of sexual orientation”).

658. *See id.* (including Angola, Burkina Faso, Cabo Verde, Central African Republic, Equatorial Guinea, Eswatini, Gabon, Ghana, Kenya, Lesotho, Liberia, Morocco, Namibia, Nigeria, São Tomé and Príncipe, Seychelles, Sierra Leone, South Africa, Togo, Tunisia, Uganda, and Zimbabwe, and also reporting Algeria and Egypt “partially accepted” recommendations).

Human and Peoples' Rights.⁶⁵⁹ The African Charter, ratified by all members of the African Union except for Morocco,⁶⁶⁰ requires Member States to report on the state of human rights and freedoms within their borders according to the guidelines in the Charter.⁶⁶¹ The African Charter does not expressly mention sexual orientation or gender identity as categories to be protected against discrimination.⁶⁶² However, general protection against discrimination has been interpreted by the judicial body of the African Union, the African Commission on Human and Peoples' Rights, to include protection against discrimination based on sexual orientation.⁶⁶³ Most notably, in 2014, the Commission adopted Resolution 275, "Protection Against Violence and Other Human Rights Violations Against Persons on the Basis of Real or Imputed Sexual Orientation or Gender Identity."⁶⁶⁴ Resolution 275 condemns State-sanctioned violence against LGBTI individuals and the failure of States to protect individuals because of sexual orientation and gender identity.⁶⁶⁵ Resolution 275 calls on States to ensure that human rights organizations can conduct outreach and improve the environment for LGBTI individuals in Africa without fear of prosecution.⁶⁶⁶ Although the Resolution does not impose obligations on members of the African Union, or make any commitments on behalf of Member States, it is still significant in that it is a public statement of the position of Member States' representatives; it is also the first mention of gender identity in any international organization of African countries.⁶⁶⁷

2. Americas

Many American nations have consented to various international human rights obligations, which consider LGBTI issues to be human rights concerns.⁶⁶⁸ These

659. See *Ratification Table: African Charter on Human and Peoples' Rights*, *supra* note 647.

660. *Id.*

661. African Charter on Human and Peoples' Rights, art. 62, June 27, 1981, 1520 U.N.T.S. 217. When submitting State reports under the African Charter, the Commission's guidelines do not instruct the reporting countries to make any information on sexual orientation or gender identity, though Commissioners may inquire on behalf of NGOs at oral examination. *ENDING VIOLENCE*, *supra* note 90, at 36.

662. African Charter on Human and Peoples' Rights, *supra* note 661.

663. Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/02, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 169 (May 15, 2006), <https://perma.cc/5F9Z-3BSY> (specifying sexual orientation as a ground of non-discrimination when affirming that the aim of the non-discrimination principle in art. 2 of the charter is to "ensure equality of treatment for individuals irrespective of . . . sexual orientation.").

664. Afr. Comm'n H.P.R., Res. 275, *Resolution on Protection against Violence and Other Human Rights Violations Against Persons on the Basis of their Real or Imputed Sexual Orientation or Gender Identity* (May 12, 2014), <https://perma.cc/BJB2-6QNX>.

665. *Id.*

666. *Id.*

667. Clément Voule, *African Commission Adopts Landmark Resolution on LGBT Rights*, INT'L SERV. FOR HUM. RTS. (May 22, 2014), <https://perma.cc/YCJ2-69N6>.

668. See Emine Saner, *Gay Rights Around the World: The Best and Worst Countries for Equality*, THE GUARDIAN (July 30, 2013), <https://perma.cc/4UX6-GMQ8>; American Convention on Human

obligations come in the form of regional and UN treaties.⁶⁶⁹ The Inter-American Court of Human Rights also plays a role in defining and upholding international human rights obligations.⁶⁷⁰ The decisions of the Court are binding.⁶⁷¹ In conjunction with the American Convention on Human Rights, the Court seeks to ensure domestic law is consistent with the Convention's requirements.⁶⁷² In a landmark 2012 ruling, the Court overturned a Chilean Supreme Court decision that took away a lesbian mother's custody of her children on the basis that the children's "unique family" was a "situation of risk" for them.⁶⁷³ This decision effectively stated that sexual orientation and gender identity are protected under international human rights law.⁶⁷⁴

Despite many countries belonging to international human rights organizations, many are in violation of the obligations that come with that membership.⁶⁷⁵ Laws prohibiting same-sex unions, criminalizing LGBTI identity, and allowing discrimination against LGBTI individuals, for example, all violate various international treaties.⁶⁷⁶ A 2016 Inter-American Court of Human Rights ruling supports the interpretation that countries that discriminate based on LGBTI identity violate international law.⁶⁷⁷ The Court ruled that the Colombian State discriminated against a gay man by not allowing him to receive the pension of his deceased

Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (interpreted as applying to sexual orientation in *Atala Riffo & Daughters v. Chile*, Inter-Am. Ct. H.R. (ser. C), ¶ 91 (Feb. 24, 2012)); Organization of American States, Inter-American Convention Against All Forms of Discrimination and Intolerance, June 5, 2013, A-69, <https://perma.cc/5QV9-6D9Y> [hereinafter *Convention Against Discrimination*].

669. Saner, *supra* note 668; *Convention Against Discrimination*, *supra* note 668.

670. Cecilia Toledo, *Human Rights in Latin America*, ELLA 6 (2013), <https://perma.cc/77PC-N2UR>.

671. *Id.* at 7.

672. *Id.* at 6.

673. *LGBT Rights Upheld in Historic Inter-American Court Ruling*, MADRE (Mar. 22, 2012), <https://perma.cc/E4FB-28NP>.

674. *Id.*

675. Paul J. Angelo & Dominic Bocci, *Are Latin American Nations Turning Their Backs on LGBTQ+ Rights?*, COUNCIL ON FOREIGN RELATIONS (Feb. 9, 2021), <https://perma.cc/M89D-J47G>.

676. See *Convention Against Discrimination*, *supra* note 668. The Universal Declaration of Human Rights carves out protections in international human rights law for all people, regardless of sex, sexual orientation, or gender identity:

The core legal obligations of States with respect to protecting the human rights of LGBT people include obligations to: Protect individuals from homophobic and transphobic violence. Prevent torture and cruel, inhuman and degrading treatment. Repeal laws criminalizing homosexuality and transgender people. Prohibit discrimination based on sexual orientation and gender identity. Safeguard freedom of expression, association and peaceful assembly for all LGBTI people.

About LGBTI People and Human Rights, U.N. OFF. OF THE HIGH COMM'R ON HUM. RTS., <https://perma.cc/3WZD-CY2N>. The Inter-American Convention Against All Forms of Discrimination and Intolerance explicitly mentions gender, sexual orientation, gender identity and gender expression as protected categories in Ch. 1, Art. 1. *Convention Against Discrimination*, *supra* note 668.

677. Lauren Mayes, *Duque v. Colombia*, 42 LOY. L.A. INT'L & COMP. L. REV. 1241, 1241 (2017).

partner of ten years.⁶⁷⁸ Note that the Court's rulings are only binding upon consenting countries.⁶⁷⁹

3. Asia

Amidst the fervent international advocacy striving to secure the fundamental rights of LGBTI individuals, numerous objections from all corners of society continue to impede the success of these movements—including those from countries bound by the obligations of international human rights treaties.⁶⁸⁰ The ICCPR declares the “law. . . shall guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶⁸¹ Because Singapore has not signed the ICCPR,⁶⁸² Section 377A of the Singapore Penal Code, forbidding sex between men and “effectively. . . homosexuality,” remained protected against the pressure from external legal obligations, but the provision was recently repealed due to increased acceptance of LGBTI people within the country.⁶⁸³ Four countries—Maldives, Sri Lanka, Turkmenistan, and Uzbekistan—have ratified the ICCPR and accepted the obligations of the Covenant,⁶⁸⁴ but continue to criminalize or condemn homosexual activity within their borders.⁶⁸⁵ A “shadow report” submitted to the UN Human Rights Committee, which monitors the State-level implementations of ICCPR, indicated that Japan continues to exclude same-sex couples from receiving public housing and refuse to grant them protection under the Prevention of Spousal Violence law.⁶⁸⁶ These conflicting domestic laws are but some of the ongoing

678. *Inter-American Court: Colombian Same-Sex Partners Entitled to Equal Social Benefits*, INT'L JUST. RES. CTR. (Apr. 25, 2016, 6:48 PM), <https://perma.cc/D3CU-TY2R>.

679. *Inter-American Human Rights System*, INT'L JUST. RES. CTR., <https://perma.cc/HA2P-L6MR>. Of the twenty-four countries that ratified the American Convention on Human Rights, twenty have consented to the Court's jurisdiction. Those twenty countries are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay. *Id.*

680. See GRACE POORE, HUMAN RIGHTS ABUSES IN ASIA ON THE BASIS OF SEXUAL ORIENTATION, GENDER IDENTITY & GENDER EXPRESSION 3–4 (2009), <https://perma.cc/GP6X-VL4Y>.

681. International Covenant on Civil and Political Rights, art. XXVI, Dec. 16, 1966, 999 U.N.T.S. 171.

682. Ratification Status for Singapore, UNITED NATIONS HUMAN RIGHTS TREATY BODIES, <https://perma.cc/9U6A-Y5N8>.

683. Tessa Wong, 377A: Singapore to End Ban on Gay Sex, BBC NEWS (Aug. 22, 2022), <https://perma.cc/ASM3-XU95>.

684. *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://perma.cc/3B3J-HYTK> (select “International Covenant on Civil and Political Rights” from the “Treaty” drop down menu to view countries that have ratified).

685. Paula Gerber, *Countries Where Homosexuality is Still a Crime—Asia*, COUNTRIES THAT STILL CRIMINALISE HOMOSEXUALITY, <https://perma.cc/PVW6-QAXY>.

686. KALEIDOSCOPE AUSTRALIA HUMAN RIGHTS FOUNDATION, THE RIGHTS OF LESBIAN, BISEXUAL, TRANSGENDER, & INTERSEX (LBTI) WOMEN IN JAPAN 7, 9 (2015).

violations of ICCPR in Asia, as demonstrated by the previous section on legal obstacles against LGBTI individuals.⁶⁸⁷

At the moment, “Asian states have not adopted a human rights treaty that covers the region in its entirety. Accordingly, there is no human rights commission or court that sets human rights standards or processes for the region as a whole.”⁶⁸⁸ Within Asia, the Asia Pacific Forum of National Human Rights Institutions (“APF”)⁶⁸⁹ may be the closest counterpart to other regional organizations that survey human rights violations, such as the African Commission on Human and Peoples’ Rights and the Inter-American Commission of Human Rights.⁶⁹⁰ While the Association of Southeast Asian Nations (“ASEAN”) Intergovernmental Commission on Human Rights (“AICHR”) managed to create the ASEAN Human Rights Declaration, the Declaration was widely criticized; for example, the International Gay and Lesbian Human Rights Commission (“IGLHRC”) expressed that AICHR is “blam[ing] religion and culture for holding back its commitment to recognizing that. . . LGBT rights are human rights.”⁶⁹¹ Other monitoring bodies such as CEDAW, ICCPR, and the International Covenant on Economic, Social and Cultural Rights receive similar complaints as human rights violations towards LGBTI individuals continue to grow.⁶⁹²

In light of the shortcomings of various international treaties, the Yogyakarta Principles⁶⁹³ provide a firm basis for LGBTI advocacy in Asia.⁶⁹⁴ The Principles have appeared in a number of important court decisions regarding LGBTI rights, including those of India, Nepal, and the Philippines.⁶⁹⁵ According to the IGLHRC Regional Coordinator’s questionnaire sent out to LGBT rights activists in Asia, countries have yet to incorporate the Yogyakarta Principles into their

687. See *supra* Section III.A.3; see also LEAVE NO ONE BEHIND, *supra* note 197, at 7.

688. Debra L. DeLaet, *An Emerging Asian Human Rights Regime as a Tool for Protecting the Vulnerable in Asia?*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS IN ASIA 37 (Ferdinand de Varennes & Christie M. Gardiner eds., 2018).

689. The APF provides a framework for national human rights institutions to work together and cooperate on a regional basis through a wide range of services. The full members of the APF are National Human Rights Institutions (NHRIs) from the following countries: Afghanistan, Australia, India, Indonesia, Iraq, Jordan, Korea, Malaysia, Mongolia, Nepal, New Zealand, Palestine, Philippines, Qatar, Samoa, Sri Lanka, Thailand, and Timor-Leste. In addition, the NHRIs from Bahrain, Bangladesh, Fiji, Kazakhstan, Kyrgyz Republic, the Maldives, Myanmar, and Oman are associate Members. See *Our Members*, ASIA PACIFIC FORUM, <https://perma.cc/FPD4-YNDL>; Poore, *supra* note 680, at 1 n.2.

690. Poore, *supra* note 680, at 3.

691. John Cheo, *Gay and Lesbian Rights in Confucian Asia: The Cases of Hong Kong, Singapore, and Taiwan*, UNIV. OF PENN. SCHOLARLY COMMONS 73 (2014).

692. See Poore, *supra* note 680, at 4.

693. See *supra* Section II.A; see also YOGYAKARTA PRINCIPLES, *supra* note 1, at 6–7; YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 4.

694. See Poore, *supra* note 680, at 4.

695. PAULA L. ETTTELBRICK & ALIA TRABUCCO ZERÁN, THE IMPACT OF THE YOGYAKARTA PRINCIPLES ON INTERNATIONAL HUMAN RIGHTS LAW DEVELOPMENT: A STUDY OF NOV. 2007–JUNE 2010, 46–51 (2010); see *Naz Found. v. Gov’t of NCT of Delhi*, 160 (2009) DLT 277 (India); *Sunil Babu Pant v. Nepal Gov’t*, 59 Writ No. 917 (S. Ct. 2007) (Nepal); *Ang Ladlad LGBT Party v. Comm’n on Elections*, G.R. No. 190582, 618 S.C.R.A. 32 (Apr. 8, 2010) (Phil.).

rulemaking.⁶⁹⁶ In addition, Asia as a region does not currently possess its own human rights treaties like the Americas, Africa, and Europe do.⁶⁹⁷ However, the Asia Pacific Forum continues to utilize the Yogyakarta Principles as a basis for monitoring the domestic law of member countries.⁶⁹⁸

4. Europe

Most European countries are also UN Member States and are thus subject to the UN's Universal Periodic Review, which involves each State periodically reviewing other countries' human rights records and "pos[ing] questions, comments and/or mak[ing] recommendations to the States under review" in order to "prompt, support, and expand the promotion and protection of human rights."⁶⁹⁹ Despite these international obligations to implement the recommendations, countries often fail to make any domestic reforms to their legislation.⁷⁰⁰ As Aengus Carroll noted, "There is no guarantee that a recommendation accepted will actually be implemented. . . . Sometimes national developments mean that an accepted recommendation is not implemented. . . ."⁷⁰¹ For example, Poland has still declined to implement two of the recommendations it accepted or partially accepted in 2017 in the latest UPR round regarding its problems of hate speech and hate crime.⁷⁰²

In some European countries like Serbia and Kosovo, where the domestic laws affecting LGBTI persons mostly align with international human rights standards, the presence of these legal protections does not necessarily correlate with an increased sense of safety, acceptance, or equal opportunity for LGBTI individuals.⁷⁰³ Additionally, victims of homophobic and transphobic violence still have no legal recourse in a number of European countries where legislation forbidding

696. Ettelbrick & Zerán, *supra* note 695, at 6, 44. See, e.g., Kyle Knight, "We Have to Beg So Many People": Human Rights Violations in Nepal's Legal Gender Recognition Practices, HUM. RTS. WATCH (Feb. 15, 2024), <https://perma.cc/E6LM-T8KK>.

697. See Ana Ballesteros Peiró, *Human Rights in Asia*, CENTRE D'ESTUDIS DE TEMES CONTEMPORANIS (Oct. 3, 2021), <https://perma.cc/TAA2-HHSZ>.

698. See Ettelbrick & Zerán, *supra* note 695, at 44.

699. *Basic Facts about the UPR*, U.N. HUM. RTS. COUNCIL, <https://perma.cc/MBN4-42NN>; *How the European Union and the United Nations Cooperate*, UNITED NATIONS REGIONAL INFORMATION CENTRE FOR WESTERN EUROPE (Jan. 2007), <https://perma.cc/93MM-NW9X>.

700. See, e.g., *Human Rights Watch Submission to the Universal Periodic Review of France*, HUM. RTS. WATCH (Oct. 2022), <https://perma.cc/U9ZA-W7P5>.

701. CARROLL, *supra* note 508, at 22.

702. *Compare UPR Sexual Rights Database*, *supra* note 57 (choose "Poland" from the "State under Review" dropdown; then choose "Recommendation" from the "Reference type" dropdown; then choose "Discrimination based on sexual orientation" and "Violence on the basis of sexual orientation" from the "Issue" dropdown; then click "Show Advanced Filters"; then choose "Third Cycle" from the "Cycle or Session" dropdown; then click "Apply") (including recommendations from Belgium, Brazil, Iceland, Norway, Canada, Mexico, the Czech Republic, the UK, Ireland, and the U.S.), *with* IGLA-EUR., ANNUAL REVIEW 2023, *supra* note 269, at 114 (describing incidents of bias-motivated speech in Poland), *and* STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 251, 329 (noting Poland's lack of laws prohibiting actions "incit[ing] hatred, violence or discrimination based on sexual orientation").

703. See IGLA-Eur., Annual Review 2023, *supra* note 269, at 85–86, 128–30.

hate speech targeting an individual's sexual orientation and/or gender identity does not exist.⁷⁰⁴

5. The Middle East

Many Middle Eastern countries have been “passionately opposed to the application of international human rights principles to LGBTI people.”⁷⁰⁵ Popular belief in the region is that this should not be a valid area of concern when it comes to addressing human rights abuses.⁷⁰⁶ Middle Eastern countries have vehemently opposed international efforts to discuss and implement human rights protections for the LGBT community.⁷⁰⁷ The Yogyakarta Principles universally include the rights to privacy, a life free from discrimination, basic human rights, freedom from torture, and the freedom of expression.⁷⁰⁸ However, as the discussions above have addressed, many countries in the Middle East not only fail to protect members (and suspected members) of the LGBTI community, but some countries also perpetrate acts of violence and deprive victims of basic human rights in direct violation of the Yogyakarta Principles.⁷⁰⁹ Countries that still punish same-sex sexual acts with the death penalty, such as Iran and Saudi Arabia, violate the basic right to life protected by both the Yogyakarta Principles and the Universal Declaration of Human Rights.⁷¹⁰ Furthermore, although the Human Rights Commission held in the 1994 *Toonen* decision that all States are required to protect citizens from discrimination on the basis of sexual orientation,⁷¹¹ many States in the Middle East still fail to provide these protections.⁷¹²

704. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 328–29.

705. Jayesh Needham, Note, *After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?*, 20 DUKE GENDER L. & POL. 288, 307 (2013). See also Edna Tarigan, Mariam Fam & David Cray, *Across Vast Muslim World, LGBTQ People Remain Marginalized*, ASSOC. PRESS (Dec. 6, 2022, 8:03 AM), <https://perma.cc/ZLR9-BLPQ>.

706. *Id.*

707. *Id.* at 307–08. Again, it is important to note here that some of these countries do not criminalize same-sex sexual acts but nevertheless do not support international efforts to protect the LGBT community from discriminatory practices. See STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 101–39.

708. YOGYAKARTA PRINCIPLES, *supra* note 1, at 10, 14, 17, 24, 29 (establishing Principles 1, 2, 6, 10, 19, and 27); YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 8, 11, 13, 17–19, 21, 24 (establishing Principles 30, 33, and 36, and updating Principles 2, 6, 10, 19, and 27).

709. See generally discussion *supra* Section III.A.5. The Nineteenth Principle requires that people be able to share and receive information and ideas, which many countries have actively suppressed in the Middle East, while the Ninth and Tenth establish a right to humane treatment in detention and forbid any form of torture or inhuman or degrading treatment. YOGYAKARTA PRINCIPLES, *supra* note 1, at 16, 17, 24; YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 18, 19, 21. The Thirtieth Principle establishes a right to “State protection from violence, discrimination and other harm, whether by government officials or by any individual group” and the Thirty-Third prohibits criminalization and sanction based on sexual orientation, gender identity, gender expression, or sex characteristics. YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 8, 11.

710. YOGYAKARTA PRINCIPLES, *supra* note 1, at 12; See Article 3, Universal Declaration of Human Rights, *supra* note 13.

711. See *Toonen v. Australia*, Commc’n No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

712. STATE-SPONSORED HOMOPHOBIA, *supra* note 39, at 129–39; see also Whitaker, *supra* note 364.

The Yogyakarta Principles explicitly state that no person should be denied asylum or refugee status based on sexual orientation and/or gender identity.⁷¹³ However, even in countries that are tolerant of the LGBTIQ community, the ability to seek asylum for persecution based on gender identity or sexual orientation is extremely difficult.⁷¹⁴

IV. CONCLUSION

The rights and recognition of LGBTIQ individuals in both international and foreign domestic law around the world is far from uniform.⁷¹⁵ This Article sheds light on a developing body of law that in the past thirty years has taken shape and attracted widespread attention as a political issue across the globe. The United Nations and many intergovernmental organizations have taken steps to recognize and address domestic laws that conflict with international standards and are detrimental to LGBTIQ individuals living in those countries.⁷¹⁶ Domestically, many nations go beyond the protections suggested in international law to provide positive rights to LGBTIQ individuals, such as non-discrimination provisions and the legal recognition of relationships, name and gender change, and non-binary sex.⁷¹⁷ Nevertheless, many nations have responded to greater visibility of LGBTIQ individuals and issues with punishment and criminalization.⁷¹⁸ International and local organizations continue to work to heighten the legal standard of protection for LGBTIQ rights as fundamental human rights across borders.⁷¹⁹ The next thirty years will likely bring more attention to the different legal issues faced by LGBTIQ individuals around the world.

713. YOGYAKARTA PRINCIPLES, *supra* note 1, at 27 (establishing Principle 23: The Right to Seek Asylum); YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 22 (updating Principle 23).

714. *See New Study on LGBTIQ+ Refugees and Asylum Seekers Highlights the Need for Data and Research*, WILLIAMS INST. (June 7, 2022), <https://perma.cc/K88F-ZNAE>.

715. *Compare supra* Section II with ILGA-EUR., ANNUAL REVIEW 2022, *supra* note 267.

716. *See, e.g.*, Graeme Reid, *International Law and the Uncertainty of Rights for LGBT People*, HUM. RTS. WATCH (Sept. 6, 2014), <https://perma.cc/6GH2-7EZW>.

717. *See Protection Map*, *supra* note 166.

718. *See, e.g.*, discussion *supra* Part III.A.1.b.

719. *See, e.g., Egypt: 117 NGOs Slam HIV-Based Arrests and Trials*, *supra* note 90.