

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

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I.	INTRODUCTION . . . . .	597
II.	CURRENT STATE OF INTERNATIONAL LAW . . . . .	598
	A. YOGYAKARTA PRINCIPLES . . . . .	598
	B. UN RESOLUTIONS . . . . .	599
	C. INTERNATIONAL JURISPRUDENCE . . . . .	601
	D. ASYLUM . . . . .	601
III.	CURRENT STATE OF FOREIGN DOMESTIC LAW . . . . .	602
	A. LEGAL OBSTACLES FACING THE LGBTI COMMUNITY . . . . .	602
	1. Africa . . . . .	602
	a. <i>Criminalization of Same-Sex Sexual Activity</i> . . . . .	604
	b. <i>Criminalization of Perceived Identity or Activity</i> . . . . .	607
	c. <i>Criminalization of HIV Status</i> . . . . .	608
	d. <i>Criminalization of Sex Work</i> . . . . .	610
	e. <i>Failure to Recognize Gender Change</i> . . . . .	611
	f. <i>Forced Anal Examinations Used to Penalize Sexual Activity</i> . . . . .	612
	g. <i>Limits on Freedom of Expression and Association</i> . . . . .	613
	h. <i>Continued Efforts to Criminalize Same-Sex Sexual Activity</i> . . . . .	615
	2. The Americas . . . . .	617
	a. <i>Social Attitudes</i> . . . . .	618
	b. <i>Violence</i> . . . . .	618
	c. <i>Criminalization of Same-Sex Relations</i> . . . . .	620
	3. Asia . . . . .	621
	a. <i>Tradition of Patriarchy</i> . . . . .	621
	b. <i>Religious Fundamentalism</i> . . . . .	622
	c. <i>Lack of Legal Recognition and Protection</i> . . . . .	622
	d. <i>Criminalization of Homosexual and Gender- Expansive Activity</i> . . . . .	623
	e. <i>Violence Towards LGBTI Persons</i> . . . . .	624
	f. <i>Employment Discrimination</i> . . . . .	625
	4. Europe . . . . .	626
	a. <i>Barriers to Asylum and Recognition of LGBT Families</i> . . . . .	627

b.	<i>Violence Against and Non-Inclusion of LGBT Youth in Schools</i> . . . . .	630
c.	<i>Hate Speech and Hate Crimes</i> . . . . .	632
d.	<i>Barriers to Gender Recognition for Transgender Individuals</i> . . . . .	634
e.	<i>The Pathologization of Intersex Individuals</i> . . . . .	635
5.	The Middle East . . . . .	636
a.	<i>Legal Obstacles Facing the LGBTI Community</i> . . . . .	636
b.	<i>Marriage</i> . . . . .	637
c.	<i>Sources of Law</i> . . . . .	637
d.	<i>Punishment</i> . . . . .	639
e.	<i>Discriminatory Practices Targeting the LGBTI Community</i> . . . . .	640
f.	<i>Regulation of Gender Identity</i> . . . . .	642
B.	LEGAL DEVELOPMENTS TOWARDS LGBTI EQUALITY . . . . .	642
1.	Africa . . . . .	642
a.	<i>Decriminalization Efforts</i> . . . . .	644
b.	<i>Recent Protections</i> . . . . .	646
c.	<i>Legal Recognition of Gender Change</i> . . . . .	650
d.	<i>Legal Protections for Individuals Who Are Intersex</i> . . . . .	651
2.	The Americas . . . . .	652
a.	<i>Recognition of Unions</i> . . . . .	652
b.	<i>Protection from Employment Discrimination</i> . . . . .	653
c.	<i>Hate Crimes</i> . . . . .	653
d.	<i>Gender Identity-Related Issues</i> . . . . .	654
e.	<i>Military</i> . . . . .	655
3.	Asia and the Pacific . . . . .	655
a.	<i>LGBTI Recognition and Protection</i> . . . . .	655
b.	<i>Marriage and Adoption</i> . . . . .	657
c.	<i>The Role of Technology</i> . . . . .	658
4.	Europe . . . . .	658
a.	<i>Recognition of the Human Rights of Transgender People</i> . . . . .	658
b.	<i>Recognition of the Human Rights of Individuals Who Are Intersex</i> . . . . .	659
5.	The Middle East . . . . .	660
C.	CONFLICT WITH INTERNATIONAL LAW . . . . .	661
1.	Africa . . . . .	661
2.	Americas . . . . .	664
3.	Asia . . . . .	665
4.	Europe . . . . .	667
5.	The Middle East . . . . .	668
IV.	CONCLUSION . . . . .	669

## I. INTRODUCTION

Lesbian, gay, bisexual, transgender, and intersex (LGBTI)<sup>1</sup> persons continue to experience human rights violations directly linked to lack of acceptance by society and States of their sexual orientation,<sup>2</sup> gender expression,<sup>3</sup> and/or gender identity.<sup>4</sup> 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 section serves as a starting point for understanding the

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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 “how 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/R6VF-RWNR> [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 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.1; see also YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1, at 6 (affirming the 2007 version’s definition of gender identity).

regulatory framework addressing sexual orientation and gender identity. Part III 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 PRINCIPLES<sup>5</sup>

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.<sup>6</sup> For instance, self-definition of both gender identity and sexual orientation free from coercion is a basic right under the Yogyakarta Principles.<sup>7</sup> Moreover, the Principles assert that all people should be protected from persecution and the denial of basic human rights based

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5. The Yogyakarta Principles has 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 “all 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>.

on sexual orientation or gender identity.<sup>8</sup> However, the Principles are not a treaty and therefore are not legally binding international human rights law.<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

## B. UN RESOLUTIONS

The UDHR states that “all humans are born free and equal in dignity and rights.”<sup>13</sup> Since 2010, the United Nations (UN) has adopted multiple resolutions relating to the rights of the LGBTI community and the obligations of member-States to protect people from discrimination and persecution based on gender identity and sexual orientation.<sup>14</sup> In 2010, the Secretary General made an official statement against all discriminatory practices based on sexual orientation.<sup>15</sup> Five resolutions dedicated specifically to the rights of the LGBTI community passed between 2011 and 2022, though none passed unanimously.<sup>16</sup> In 2011, Resolution 17/19 was passed, commissioning a study to investigate the prevalence of acts of violence based on sexual orientation and

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

9. Cviklová, *supra* note 6, at 48.

10. *Id.* at 58.

11. See YOGYAKARTA PRINCIPLES, *supra* note 1, at 10, 12, 14, 24, 29 (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, 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). The tenth Principle includes the right to freedom from torture and cruel, inhuman and degrading punishment, and the thirty-third 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, 19, 20, 22, 23.

gender identity.<sup>17</sup> In 2014, Resolution 27/32 was passed, requesting the previously commissioned study be updated with the goal of sharing effective practices to protect against discrimination and violence.<sup>18</sup> In 2016, an “Independent Expert on the 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.<sup>19</sup> The Expert was also to provide support for States and facilitate the cooperation of States, stakeholders, and services.<sup>20</sup> The mandate of this Independent Expert was extended for another three years in 2019,<sup>21</sup> and for three more years in 2022.<sup>22</sup>

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.<sup>23</sup> In 2019, the Human Rights Council passed a resolution on the death penalty which said

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).

19. Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (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, at 4 (July 7, 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 (June 14, 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) (Dec. 15, 2022).

the death penalty should never be a punishment for homosexuality.<sup>24</sup> On December 16, 2021, a resolution about democracy and elections became the first resolution to reference “sexual orientation and gender identity” and be adopted with consensus.<sup>25</sup> 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.”<sup>26</sup>

### C. INTERNATIONAL JURISPRUDENCE

One of the most important cases concerning LGBT rights in international jurisprudence, *Toonen v. Australia*, came from the Human Rights Committee in 1994.<sup>27</sup> In this case, the Human Rights Committee held that States are obligated to protect individuals from discrimination on the basis of sexual orientation.<sup>28</sup> 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.<sup>29</sup>

### D. ASYLUM

The UDHR provides that “no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.”<sup>30</sup> 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.<sup>31</sup> UN Guidelines for asylum follow this approach, recommending against even international flight or relocation alternatives if there is risk of persecution.<sup>32</sup> The United Nations High Commissioner for Refugees’

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.”).

25. G.A. Res. 76/176, ¶ 7 (Dec. 16, 2021); 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> (last visited Mar. 5, 2023).

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

28. See *Important International Jurisprudence Concerning LGBT Rights*, HUM. RTS. WATCH (May 25, 2009, 12:30 PM), <https://perma.cc/PQ9L-SNV2>; see also *Toonen*, *supra* note 27, at 9.

29. See *Toonen*, *supra* note 27, at 9; G.A. Res. 2200A, International Covenant on Civil and Political Rights, at 10 (Dec. 16, 1966).

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

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

32. 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*, ¶¶ 51–56, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012), <https://perma.cc/X3PY-UPZD> [hereinafter UNHCR Guidelines].

(UNHCR) Guidelines on International Protection No. 9 provides that a State should not generally deny refugee recognition because an individual may have hidden their sexual orientation or gender identity.<sup>33</sup> 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.<sup>34</sup> This jurisdictional principle was accepted and became Article 5 of CAT.<sup>35</sup> 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.”<sup>36</sup> The UNHCR Guidelines provide examples of torture that especially target LGBTI individuals and may qualify a person for asylum.<sup>37</sup>

### 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, and non-binary sexual anatomy typically operates to the detriment of LGBTI-identified or -perceived individuals.<sup>38</sup> Not all African countries have laws that directly regulate sexual and gender identity or sexual activity.<sup>39</sup> Countries that do address sexual orientation, gender, or sexual identity are more likely to

33. *Id.* ¶ 59.

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

35. *Id.* art. 5.

36. *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, General Comment No. 2, ¶ 21, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008).

37. See UNHCR Guidelines, *supra* note 32, ¶¶ 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”).

38. See LUCAS RAMON MENDOS, KELLYN BOTHA, RAFAEL CARRANO LELIS, ENRIQUE LÓPEZ DE LA PEÑA, ILIA SAVELEV, & DARON TAN, STATE-SPONSORED HOMOPHOBIA: GLOBAL LEGISLATION OVERVIEW UPDATE 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 . . .”).

39. 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 rather than provide these individuals with rights or protections.<sup>40</sup> Some African countries have adopted laws as recently as 2017, and have tried to adopt laws as recently as 2023, allowing State actors to arrest and jail people who are perceived to be in same-sex relationships, participating in same-sex sexual activity, or failing to display gender-typical behavior,<sup>41</sup> despite not having or not enforcing these laws in the past.<sup>42</sup> 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.<sup>43</sup>

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 effect: (1) required disclosure or criminalization of HIV status;<sup>44</sup> (2) criminalization of sex work;<sup>45</sup> (3) lack of legal gender or sex recognition for individuals who are transgender or intersex;<sup>46</sup> (4) forced anal examinations;<sup>47</sup> and (5) limited freedom of expression and association.<sup>48</sup> 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 otherwise non-normative,<sup>49</sup> most countries do not address these practices in their

40. *Id.* at 325–26. States that have statutes on the books that criminalize same-sex sexual activity directly or indirectly, as compared to two States (Angola and South Africa) that offer general protection against discrimination for LGBTI individuals, and nine States (Angola, Botswana, Cabo Verde, Liberia, Mauritius, Mozambique, Sao Tome e Principe, 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 (June 25, 2013) [hereinafter MAKING LOVE A CRIME].

41. *See, e.g.*, STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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)); Joto La Jiwe, *Ugandan parliament is close to approving repressive anti-gay bill*, ERASING 76 CRIMES (Mar. 1, 2023), <https://perma.cc/TAL3-AUSS>; Muhumuza, *infra* note 73; 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).

42. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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-Floris, *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).

43. 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>.

44. *See* discussion *infra* part III.A.1.iii.

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

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

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

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

49. 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

legal framework.<sup>50</sup> All but one African country (South Africa)<sup>51</sup> 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.<sup>52</sup> 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,” “sodomy,” or “gross indecency.”<sup>53</sup> Twenty-three African countries use the words “same-sex” in their statutes to make clear that they target non-heterosexual behavior.<sup>54</sup> 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.<sup>55</sup>

Despite the fact that most African countries have criminalization statutes currently in effect, and most refuse to address UN recommendations to repeal these laws,<sup>56</sup> five out of the thirty-two countries have not enforced the laws or have not sought to impose penalties on LGBTI individuals in recent years.<sup>57</sup> However,

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 in East Africa identify themselves.” *Id.*

50. *See id.*

51. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 278, 292.

52. Alteration of Sex Description and Sex Status Act 49 of 2003 § 2 (S. Afr.); Alex Müller, *Legal Gender Recognition in Botswana*, S. AFR. LEGISLATION CTR., 23–25 (2020), <https://perma.cc/9EVA-5DRX>.

53. *See generally* STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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. Egypt does not have a specific criminalization statute, but persecutes LGBTI individuals under its “law against debauchery.” *Id.*

54. Algeria, Burundi, Cameroon, Chad, Comoros, Eritrea, Ethiopia, Gambia, Guinea, Kenya, Liberia, Malawi, Mauritania, Morocco, Nigeria, Senegal, Somalia, Sudan, Tanzania, Togo, Tunisia, Zambia, and Zimbabwe. *Id.*

55. *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 . . .”).

56. During the Third Cycle of the Universal Periodic Review, 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, Namibia, Sierra Leone, and Togo indicated their openness to changing their restrictive laws. *UPR Sexual Rights Database*, SEXUAL RTS. INITIATIVE, <https://perma.cc/7SEW-CDKS> (last visited Mar. 5, 2023) (choose “Criminal laws on same-sex sexual practices” from the “Issue” dropdown; then click “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”).

57. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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

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.<sup>58</sup> The continued existence of these laws also often prevents the introduction of legal protections for LGBTI individuals into the law in most instances.<sup>59</sup> Some African countries, like Uganda, where public opinion of LGBTI individuals is overwhelmingly negative, have seen a great deal of violence against LGBTI individuals.<sup>60</sup> 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-identified individuals to live in fear.<sup>61</sup>

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.<sup>62</sup> In 2015, two men were convicted under Morocco's criminalization statute based on a photograph, which showed them embracing each other.<sup>63</sup> Likewise, most

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these laws. *See id.*; *see generally id.* at 9, 13, 14, 113 (describing methodology of discovering and determining "enforcement").

58. 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 2022*, FREEDOM HOUSE (Mar. 2, 2022, 7:18 PM), <https://perma.cc/97YN-HW4S>.

59. 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 40, at 20. Some States that have criminalization statutes still on the books also ban discrimination in employment based on sexual orientation (Liberia and Mauritius). STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 325.

60. *See* Elias Biryabarema, *LGBT Ugandans face backlash as parliament launches schools investigation*, REUTERS (Mar. 3, 2023, 12:39 PM), <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 49, at 9–10. *See also* Cameroon: *Rising Violence Against LGBTI People*, HUM. RTS. WATCH (May 11, 2022, 12:00 AM), <https://perma.cc/5DHZ-Q3Y2>.

61. *See Ethiopia 2021 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R., & LAB. (2021), <https://perma.cc/ERZ2-GC84>; DUTCH COUNCIL FOR REFUGEES, COUNTRY OF ORIGIN REPORT ETHIOPIA 59–60 (2016).

62. Queer theory suggests that homophobia is actually rooted in a societal taboo against gender transgression. Bond, *supra* note 59, 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 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 40, at 21. Documented examples exist in Cameroon where in 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 in the law." *Id.* at 23; *see generally* Cameroon: *Freedom in the World 2022*, FREEDOM HOUSE (Feb. 23, 2022, 7:34 PM), <https://perma.cc/LS4X-Y954>.

63. FREEDOM HOUSE, *Morocco*, in *FREEDOM IN THE WORLD: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 2016*, at 467, 471 (2016), <https://perma.cc/RJ9F-9PKM>.

notable cases of persecution for same-sex sexual activity in the past year involve what the State perceives as affection between two men,<sup>64</sup> and nine African countries' laws explicitly criminalize same-sex sexual activity only between men.<sup>65</sup> 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.<sup>66</sup>

Confirmed consensual encounters between two people of the same sex also result in persecution.<sup>67</sup> For example, in 2016, two men were convicted under Morocco's criminal statute after admitting to police that they had sex with each other.<sup>68</sup> 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,<sup>69</sup> or even the death penalty.<sup>70</sup> Such strict punishments have become law in several countries<sup>71</sup> due to the adoption of Sharia law,<sup>72</sup> a reaction to the

64. See discussion *infra* part III.B.1.ii.

65. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 114–25.

66. “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 49, at 5. 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 (2d ed. 2016) (discussing oppositional sexism). This theory is evidenced by the fact that several States (nine 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 38, at 114–25; see also Press Release, Amnesty International, 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.”).

67. See *Morocco: Victims of Attack Jailed for “Homosexual Acts”*, HUM. RTS. WATCH (Apr. 8, 2016, 1:45 AM), <https://perma.cc/Q9DU-AG86>.

68. *Id.*

69. See, e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 114 (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, or 3.67–14.67 U.S. dollars), 123; 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).

70. Parts of Nigeria and Somalia, and Mauritania impose the death penalty. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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 TRUST, <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, 12:35 PM), <https://perma.cc/VS3E-Q4GQ>; Ardo Hazzad, *Nigerian Islamic court orders death by stoning for men convicted of homosexuality*, REUTERS (July 2, 2022, 6:51 AM), <https://perma.cc/W8J4-L2WU>.

71. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38. But see Nico Lang, *Sudan Repeals Death Penalty For Gay Sex*, THEM (July 16, 2020, 8:17 PM), <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>.

72. See *Somalia*, *supra* note 70 (noting parts of Somalia under al-Shabaab's control follow a strict interpretation of Sharia law); *Mauritania*, HUM. DIGNITY TRUST, <https://perma.cc/MKC2-98GS> (Jan. 25, 2023, 10:49 AM) (noting the Constitution of Mauritania designates Sharia as the “sole source of law”);

perceived openness of Western culture, and resistance to what is seen as “imported” behavior.<sup>73</sup>

*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.”<sup>74</sup> Currently, there are only twenty-two African countries that neither directly nor indirectly criminalize same-sex sexual activity.<sup>75</sup>

Most countries with laws that criminalize same-sex sexual activity inherited these laws from their colonizing countries.<sup>76</sup> In many cases, the statutes remain in effect because the public is opposed to removing them.<sup>77</sup> Most often, such statutory language punishes “acts against nature” or “indecent” and “unnatural acts,” and is understood to capture or address people who are perceived to be engaging in same-sex sexual activity.<sup>78</sup> Alternatively, the criminalization of same-sex sexual activity may have been instituted when the country adopted Sharia law.<sup>79</sup> Some countries are updating these laws to explicitly and more vigorously punish same-sex sexual activity.<sup>80</sup>

Nigeria, HUM. DIGNITY TRUST (Jan. 25, 2023, 10:51 AM), <https://perma.cc/P3H6-SNB3> (reporting twelve northern states adopted Sharia law that permitted death by stoning).

73. 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 2:53 PM), <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); La Jiwe, *supra* note 41 (“[President] Museveni 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.’”).

74. Comoros, Egypt, Ghana, Guinea, Kenya, Malawi, Morocco, Senegal, South Sudan, Tanzania, Togo, Uganda, and Zambia. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 114–25.

75. 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.

76. 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 59, at 120. Only Botswana, Lesotho, and Seychelles have since decriminalized it. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 90, 92–93.

77. See e.g., Jacob Poushter & Nicholas Kent, *The Global Divide on Homosexuality Persists*, PEW RSCH. CTR. (June 25, 2020) (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).

78. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 115–18, 120, 123, 125.

79. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 119–20 (noting Mauritania’s Sharia-based criminal code and 12 Northern Nigerian states’ Sharia penal codes that criminalize same-sex sexual activity).

80. Burundi in 2009 made the law more explicitly addressed to individuals engaged in same-sex sexual activity. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 114. In 2015, Eritrea increased the penalty for same-sex sexual acts from a maximum of three years to “not less than [five] years and not

Enforcement of criminalization statutes is, in many cases, a relatively recent response<sup>81</sup> to the perception of LGBTI identity being a Western cultural export.<sup>82</sup> 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 same-sex, non-normative, or extra-marital sexual or romantic activity or gender expression that exists in some African countries.<sup>83</sup> Of the thirty-two African countries that have criminalization laws currently in effect, twenty-seven currently enforce them by arresting and detaining individuals.<sup>84</sup> As discussed in Part B 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.<sup>85</sup> 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.<sup>86</sup>

*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.<sup>87</sup> Whether a person “knowingly” transmits HIV is

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more than [seven] years.” See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 116. Ethiopia and The Gambia have also expanded criminal penalties for same-sex sexual acts. *Id.*

81. Bond, *supra* note 59, 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 93–94 (“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 73, at 100, 128 (suggesting that the backlash to 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 was now illegal).

84. According to the International Lesbian, Gay, Bisexual, Transgender, and Intersex Association, Algeria, Burundi, Cameroon, Chad, Egypt, Ethiopia, 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 38, at 114–25. According to the U.S. Department of State, the following countries have also persecuted LGBTI individuals under criminalization statutes or other public decency laws: Burkina Faso and Democratic Republic of the Congo. See U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Burkina Faso (2021); U.S. Dep’t of State, Bureau of Democracy, H.R. and Lab., 2021 Country Reports on Human Rights Practices: Democratic Republic of the Congo (2021).

85. See *infra* part III.B.1.ii; see also Agence France-Presse, *Ghana court frees 21 arrested for attending May LGBTQ+ event*, THE GUARDIAN (Aug. 5, 2021, 2:04 PM), <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, THE ISSUE IS VIOLENCE].

87. Edwin J. Bernard & Alison Symington, *Advancing HIV Justice 4: Understanding Commonalities, Seizing Opportunities*, HIV JUSTICE NETWORK 11 (July 2022), <https://perma.cc/JGB2->

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.<sup>88</sup> 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.<sup>89</sup> 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.<sup>90</sup> Some countries more severely penalize those who are arrested for suspicion of same-sex sexual activity and subsequently test positive for HIV.<sup>91</sup>

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 the confidentiality of their medical status if the doctors suspect them of engaging in same-sex sexual activity.<sup>92</sup> Therefore, individuals who suspect they may be HIV-

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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-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> [hereinafter *Ethiopian Government Cancels Anti-Gay Rally*]. 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 act alone. *Id.* Nigeria and The Gambia also criminalize "aggravated homosexuality," which is defined as transmitting HIV during a same-sex sexual act. *Gambian Leader Approves Anti-Gay Law*, THE GUARDIAN (Nov. 21, 2014), <https://perma.cc/XQ3L-3LQF>.

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 12. 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 38, 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*, HOUSE OF COMMONS LIBRARY (Dec. 21, 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.

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.<sup>93</sup> Countries that enforce laws that criminalize same-sex sexual activity may also refuse to include robust treatment services and outreach as part of their HIV/AIDS prevention policies, due to the stigma associated with HIV and its assumed connection to same-sex activity.<sup>94</sup> Some countries actively hamper HIV-prevention outreach to LGBT individuals or those engaged in same-sex sexual activity.<sup>95</sup>

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.<sup>96</sup> Some organizations may primarily target “men who have sex with men” (MSM) in their outreach, which fails to reach women and transgender or gender non-conforming people.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> A lack of State interference and legal protections against discrimination leaves HIV-positive people and LGBTI individuals at risk of greater health disparities than gender- and sex-normative individuals.<sup>100</sup>

*d. Criminalization of Sex Work.* Sex work is illegal by statute in sixteen African countries.<sup>101</sup> LGBTI individuals, and transgender women in particular, participate in the sex trade industry at a higher rate than the rest of the

93. See Onishi, *supra* note 43.

94. See MAKING LOVE A CRIME, *supra* note 40, at 60–61.

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 INFO. & GUIDANCE: KENYA: SEXUAL ORIENTATION & GENDER IDENTITY 20 (2016), <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 80.

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

97. *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, HUM. RTS. WATCH (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. Global Commission on HIV and the Law, Regional Issue Brief: Criminal Law And HIV 17 (Aug. 4, 2011) (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*].



population.<sup>102</sup> Participation in sex work can affect an individual's access to appropriate health care, especially in the face of marginalization resulting from engaging in same-sex sexual activity or other gender non-conforming behavior.<sup>103</sup> Whether participating in sex work out of need, choice, or indifference, transgender and gender-non-conforming sex workers can risk arrest, extortion, and violence by police<sup>104</sup> 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.<sup>105</sup> Transgender women in Namibia have reported arrests merely based on the law enforcement official's perception of the person as being transgender.<sup>106</sup> In Burkina Faso, the High Court of Bobo-Dioulasso heard a case in 2013 of a gender-non-conforming individual who was being prosecuted for street solicitation, even though the Court would not typically hear a street solicitation case.<sup>107</sup> 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.<sup>108</sup>

*e. Failure to Recognize Gender Change.* Most African countries do not recognize transgender and gender-nonconforming individuals as such, or acknowledge adjacent issues.<sup>109</sup> Health systems are usually not required to cover transition-related care, and access to trans-specific health care is extremely limited in most

102. See Amnesty Int'l, *Amnesty International Policy on State Obligations to Respect, Protect, and Fulfill the Human Rights of Sex Workers*, POL 30/4062/2016, at 5–6 (May 26, 2016).

103. *Id.* at 5. 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*, OPEN SOC'Y INST. PUB. HEALTH PROGRAM 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, *Rights Not Rescue: A Report on Female, Male, and Trans Sex Workers' Human Rights in Botswana, Namibia, and South Africa*, *supra* note 103, at 39. 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.

105. See, e.g., *id.* at 39.

106. *Id.*

107. *Burkina Faso: Treatment of sexual minorities, including legislation, state protection and support services (2014-April 2016)*, CAN.: IMMIGR. & REFUGEE BD. OF CAN. (Apr. 20, 2016), <https://perma.cc/B9ZA-SS37>.

108. See GHOSHAL & TABENGWA, *THE ISSUE IS VIOLENCE*, *supra* note 86; 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)(iii) for discussion of recognition of gender identity in African countries.

African countries.<sup>110</sup> Trans people who seek legal recognition or health care using documents that identify their legal sex may find themselves at risk of persecution under laws against same-sex behavior, loitering, or public nuisance.<sup>111</sup> 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 “heterosexual” partners before issuing updated documents.<sup>112</sup>

*f. Forced Anal Examinations Used to Penalize Sexual Activity.* In some countries, like Zambia and Tanzania, 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 Uganda and Kenya.<sup>113</sup> In Egypt, Tunisia, Cameroon, 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 Uganda.<sup>114</sup> 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 acts.”<sup>115</sup> Despite this alleged purpose, there is no factual or scientific connection between the results of an anal examination and the individual’s sexual history.<sup>116</sup> In several countries, evidence even suggests that doctors have either been coerced or have on their own accord written false positive reports based on the perception that the individual before them is someone who has engaged in same-sex sexual activity.<sup>117</sup>

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.<sup>118</sup> In Cameroon, police conduct exams of their own accord, which are

110. See ARNOTT & CRAGO, *supra* note 103, at 50. There is limited information and research documenting health care availability to transgender patients in African countries outside of South Africa. See e.g. 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>.

111. See MAKING LOVE A CRIME, *supra* note 40, 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>. See also 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>.

114. NEELA GHOSHAL, *Dignity Debased: Forced Anal Examinations in Homosexuality Prosecutions*, HUM. RTS. WATCH (July 12, 2016), <https://perma.cc/AWM6-TUMB> [hereinafter GHOSHAL, DIGNITY DEBASED].

115. *Id.* at 69.

116. *Id.* at 70.

117. *Id.* at 22, 27, 52 (naming Cameroon, Egypt, and Uganda as countries where this has occurred).

118. *Id.* at 22.

then used as the sole piece of proof to convict individuals under the criminalization statute.<sup>119</sup> In Egypt and Tunisia, prosecutors routinely order the examination as part of the conviction process.<sup>120</sup> 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 seen a decrease of arrests and examinations.<sup>121</sup> 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.<sup>122</sup> In Zambia, convictions are only sometimes based solely on an anal examination, but the threat of the examination remains even without the conviction.<sup>123</sup> In 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.<sup>124</sup> 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.<sup>125</sup>

*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.<sup>126</sup> 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 access recognition of their non-heterosexual relationships.<sup>127</sup>

Seven African countries limit meeting, publication, and expression of same-sex desire or sexual behavior in statute.<sup>128</sup> 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

119. *Id.* at 24, 40.

120. *Id.* at 11, 50.

121. *Id.* at 54. See also Marika Malaea, *LGBT Activists in Uganda Taken Into Custody for Their Protection Subjected to Forced Anal Examinations*, NEWSWEEK (Oct. 24, 2019, 8:32 PM), <https://perma.cc/N4HL-X6X9>.

122. GHOSHAL, *DIGNITY DEBASED*, *supra* note 114, at 3, 22, 56.

123. *Id.* at 17.

124. *Id.*

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

126. See 2022 *Human Rights Violations Report Based on Real or Perceived Sexual Orientation and Gender Identity in Nigeria*, at 16 (discussing impact of Nigeria's criminalization statute); cf. Mansur Abubakar, *Islamic police raid 'gay wedding' in Nigeria's Kano city*, BBC NEWS (Dec. 20, 2022), <https://perma.cc/5TD4-Z6FS>.

127. See, e.g., Obaji, *Hunting Down Gays in Nigeria*, *supra* note 92; *Uganda: Police Attack LGBTI Pride Event*, HUM. RTS. WATCH (Aug. 5, 2016, 1:15 PM), <https://perma.cc/X35P-K256>.

128. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 146–50 (noting that Algeria, Burundi, Cameroon, Côte d'Ivoire, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Kenya, Libya, Mauritania, Morocco, Nigeria, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, and Zambia have laws either directly or indirectly restricting LGBTI individuals' freedom of expression).

country.<sup>129</sup> In Uganda, a new bill prevents organizations that engage in activity “contrary to the dignity of the people of Uganda” from operating, which many believe will criminalize or at least severely limit the ability of LGBTI rights organizations to form and conduct activities.<sup>130</sup>

Lack of legal protections or recourse for LGBTI individuals also acts as a barrier to public gathering.<sup>131</sup> Police in many African nations conduct raids, arrests, and attacks on open gatherings of LGBTI individuals.<sup>132</sup> Even if an arrest does not lead to prosecution under the criminalization statute, arrests may nonetheless be extremely violent in nature.<sup>133</sup> The fact that the criminalization statute exists sanctions this violent activity by both State and non-State actors.<sup>134</sup>

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 against individuals facing State-sponsored discrimination.<sup>135</sup> For example, the High Court in Kenya recently ruled that the government’s denial of NGO registration to a human rights organization that serves transgender individuals was discriminatory and unconstitutional.<sup>136</sup>

Finally, countries that do not criminalize same-sex sexual activity statutorily may nonetheless treat LGBTI individuals, expressions, and relationships asymmetrically in the law.<sup>137</sup> Four African countries have an age of consent codified for same-sex sexual activity that differs from that for heterosexual sexual activity.<sup>138</sup> Seven countries’ constitutions explicitly make same-sex marriages illegal

129. See Eric Gitari, *Equality of LGBTIQ Persons in Africa*, HENRICH BÖLL STIFTUNG: GREEN POL. FOUND. (Mar. 20, 2015), <https://perma.cc/2H42-NLCH>. LGBTI rights organizations have been de-registered, delayed, or refused registration in Tanzania, Burkina Faso, Zimbabwe, and others. *Id.* Mozambique, which decriminalized same-sex sexual activity in 2014, 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.’” *Mozambique 2021 Human Rights Report*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. 13 (2021), <https://perma.cc/X76T-UMLU>; see also *Mozambique: Freedom in the World 2022*, FREEDOM HOUSE (Feb. 23, 2022, 7:34 PM), <https://perma.cc/Q664-9JDJ>. Most notably, the Mozambican Association for the Defense of Sexual Minorities’ persistent attempts to register have been ignored since 2008 and the Administrative Tribunal claims it has no record of their filed requests to compel government response. *Id.*

130. Anna Leach, *NGO Alert: Ugandan Parliament Debates Controversial NGO Bill*, THE GUARDIAN (Dec. 3, 2015), <https://perma.cc/UVP3-8TC4>.

131. See *Uganda: Police Attack LGBTI Pride Event*, *supra* note 127.

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

133. *Id.*

134. See *UK Home Office*, *supra* note 95, at 10–11 (citing two cases within a year brought by two different NGOs seeking to register and conduct affairs openly in Kenya, which has a notoriously negative climate for sexual and gender minorities).

135. See, e.g., Lavers, *supra* note 113.

136. Gitari, *supra* note 129. See *infra* part III.B.1.ii below for more details on court enforcement of applications on behalf of LGBTI organizations.

137. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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).

138. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 91–92.

as of 2023,<sup>139</sup> and eleven countries constitutionally restrict the right to marry to couples consisting of a man and a woman, by omission refusing to recognize what the State views as non-heterosexual couples.<sup>140</sup> Only Nigeria goes so far as to criminalize the legal recognition of a same-sex relationship.<sup>141</sup>

*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.<sup>142</sup> 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.<sup>143</sup> Later, Zimbabwe's former President Robert Mugabe led an opposition to a burgeoning movement to grant rights to LGBTI individuals by

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139. Those countries are Burundi, Democratic Republic of the Congo, Kenya, Rwanda, South Sudan, Uganda, and Zimbabwe. Twenty-three percent of constitutions in sub-Saharan Africa clarify that marriage is defined as between a man and a woman. *What is the constitutional status of same-sex marriage?*, WORLD POL'Y CTR., <https://perma.cc/KX3U-GQQC> (last updated Jan. 2022); see also 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 YALE J.L. & FEMINISM 149, 158–59 (2016). Notably, in 2013, Nigeria passed Same-Sex Marriage (Prohibition) Act and in 2015, Malawi passed the Marriage, Divorce and Family Relations Act; both prohibited same-sex via statute. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 120; Malawi, HUM. DIGNITY TRUST, <https://perma.cc/D7HB-89Y3> (last updated Dec. 8, 2022, 5:01 PM).

140. Raub, Cassola, Latz, & Heymann, *supra* note 139, 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. 26 (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.")

141. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 120.

142. See *infra* part III.B.1.i.

143. 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).

law, and ultimately led the country to pass a constitutional provision that banned homosexual conduct.<sup>144</sup> 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 activities including open discussion or gatherings of LGBTI individuals.<sup>145</sup> Following the passage of that bill, Nigeria,<sup>146</sup> The Gambia,<sup>147</sup> Ethiopia,<sup>148</sup> Kenya,<sup>149</sup> and Tanzania<sup>150</sup> considered copycat bills, with each country’s head of state openly condemning or denying the existence of LGBTI individuals or same-sex activity in the country and supporting the new law.<sup>151</sup> Bills passed in Nigeria<sup>152</sup> and The Gambia<sup>153</sup> (with the provisions pulling directly from the now-defunct Uganda law),<sup>154</sup> and Namibia repealed protections for discrimination on the basis of sexual orientation that were enacted in 1992.<sup>155</sup> Finally, even as Uganda’s own Anti-Homosexuality Act was struck down by its High Court in 2015, Uganda had previously passed other provisions that criminalize and persecute individuals who identify as or are perceived as LGBTI, including a new provision in its penal code in 2000 that increases the punishment for same-sex sexual activity to life imprisonment,<sup>156</sup> a constitutional amendment in 2005 that banned same-sex marriage,<sup>157</sup> 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.<sup>158</sup>

Several African countries have also both formally and informally adopted parts of Sharia law, Islamic religious law.<sup>159</sup> Sharia law mandates the criminalization

144. *Id.* at 24–25.

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

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

147. *Gambian Leader Approves Anti-Gay Law*, *supra* note 88.

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

149. Alita Byrd, *Kenyan Adventist Politician Proposes Extreme Anti-Gay Bill*, THE SPECTRUM (Aug. 14, 2014), <https://perma.cc/LU4S-D6M8>.

150. See Oloka-Onyango, *supra* note 49, at 19 (citing Emmanuel Muga, *Dar Plans to Introduce Tougher Anti-Gay Bill*, EASTAFRICAN (Mar. 29, 2014), <https://perma.cc/9HGC-UBGB>).

151. See, e.g., *Gambian Leader Approves Anti-Gay Law*, *supra* note 88.

152. Felix Onuah, *Nigerian Leader Signs Anti-Gay Law, Drawing U.S. Fire*, REUTERS (Jan. 14, 2014), <https://perma.cc/5QM4-CSDT>.

153. See, e.g., *Gambian Leader Approves Anti-Gay Law*, *supra* note 88.

154. *Id.*; Kretz, *supra* note 143, at 234 n.156 (“Nigerian parliamentarians introduced a copycat Bill.”).

155. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 219.

156. Kretz, *supra* note 143, at 219 (discussing revision of penal code by Penal Code Amendment Act of 2000).

157. See Oloka-Onyango, *supra* note 49, at 11.

158. See *id.*

159. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 36–38.

of same-sex sexual behavior between men, punishable by death by stoning.<sup>160</sup> Parts of Nigeria and parts of Somalia have adopted Sharia law and impose the death penalty on those convicted of same-sex sexual activity.<sup>161</sup>

At least thirty countries in Africa criminalized HIV as of 2021; while ten countries have enforced such statutes, two enforcing countries have repealed their HIV-specific statutes since 2018.<sup>162</sup> Moreover, while 2020–2022 saw a global decline in reported prosecutions of HIV-positive individuals, breastfeeding and comfort nursing cases in 2022 were concentrated in four African countries: Kenya, Uganda, Zambia, and Zimbabwe.<sup>163</sup>

## 2. The Americas

Across the Americas, countries have varying levels of legal protections for LGBTI individuals.<sup>164</sup> In North America, the United States and Canada afford more legal protections to the LGBTI community than other countries in the region.<sup>165</sup> Latin America, once highly restrictive, has become increasingly progressive in regard to the protections its countries provide for the LGBTI community.<sup>166</sup> Meanwhile, the Caribbean nations still deny the LGBTI community many basic rights.<sup>167</sup>

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

160. *Id.* at 36–37.

161. *Id.* at 38.

162. 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. HIV JUST. NETWORK, ADVANCING HIV JUSTICE 4: UNDERSTANDING COMMONALITIES, SEIZING OPPORTUNITIES, 11–12, 50 (2022) <https://perma.cc/LXD3-M5AM>. The Democratic Republic of Congo was the first to repeal its law (2018), and Zimbabwe, the second (2022). *2022 in review: A turning point for HIV justice?*, HIV JUST. NETWORK (Dec. 16, 2022), <https://perma.cc/68MM-QYW9>.

163. *2022 in review*, *supra* note 162; ADVANCING HIV JUSTICE, *supra* note 162, at 16.

164. *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 2021 Country Reports on Human Rights Practices*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/L5K5-2MBZ> (detailing legal protections for LGBTI individuals and rights violations by country).

165. *See Protection Map*, *supra* note 164.

166. 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>.

167. *See, e.g., 2021 Country Reports on Human Rights Practices*, *supra* note 164; *Protection Map*, *supra* note 164; Corrales, *supra* note 166, at 14, 15.

American nations.<sup>168</sup> 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.<sup>169</sup> Local NGOs in those Central American nations also reported that LGBTI migrants were fleeing.<sup>170</sup>

Latin American progressiveness was spurred by countries emerging from military dictatorships and a rise in democracy beginning in the 1980s.<sup>171</sup> These countries developed new constitutions that used human rights language stated in the 1948 UDHR.<sup>172</sup> Although that language does not explicitly protect LGBTI individuals, it has been interpreted to include LGBTI rights.<sup>173</sup> Those protections did not always come from public opinion—courts and legislatures occasionally made legal changes before public opinion was favorable to protections.<sup>174</sup> In contrast, a major change of public opinion in the U.S. led to LGBTI friendly court rulings and legislation.<sup>175</sup>

*a. Social Attitudes.* Despite legal advances and formalized protections for the LGBTI community in Latin America, members still experience social stigma.<sup>176</sup> 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.<sup>177</sup> In addition, violence and harassment towards LGBTI individuals occurs even in countries with formalized LGBTI protections.<sup>178</sup>

*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.<sup>179</sup> In late 1980s Brazil, there was a tremendous amount of violence directed at those perceived as gay.<sup>180</sup> 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.<sup>181</sup> Data on homophobic

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

169. *Id.*

170. *Id.*

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

172. *Id.*

173. *Id.*

174. Eulich, *supra* note 168.

175. *Id.*

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

177. *Id.*

178. *Id.*

179. *Id.*; Eulich, *supra* note 168.

180. Encarnación, *supra* note 171.

181. *Id.*



violence in Latin America shows that, on average, one LGBTI-identity-related homicide occurs per day.<sup>182</sup> Violence against LGBTI individuals has been common in Guatemala; there are many documented murders of transgender individuals between 2004 and 2006.<sup>183</sup> As recently as 2021, LGBTI rights groups in Guatemala alleged that gay and transgender individuals experienced high rates of police violence.<sup>184</sup>

In many countries, the police themselves harass or discriminate against LGBTI individuals, leaving little recourse for those individuals.<sup>185</sup> Individuals may be

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182. Torres, *supra* note 176.

183. Rachel Glickhouse & Mark Keller, *Explainer: LGBT Rights in Latin America and the Caribbean*, AMS. SOC'Y/COUNCIL OF THE AMS. (last updated May 16, 2013), <https://perma.cc/YJ3W-XKR3>.

184. *2021 Country Reports on Human Rights Practices: Guatemala*, U.S. DEP'T OF STATE, <https://perma.cc/75QY-L2KD> (last visited Mar. 22, 2023).

185. 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 *2021 Country Reports on Human Rights Practices: Argentina*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/TG3R-YTQQ> [hereinafter Argentina 2021]; *2021 Country Reports on Human Rights Practices: Barbados*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/RL32-K2K5>; *2021 Country Reports on Human Rights Practices: Belize*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/BFJ4-JEFH>; *2021 Country Reports on Human Rights Practices: Bolivia*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022) <https://perma.cc/45RY-7ZBA> [hereinafter Bolivia 2021]; *2021 Country Reports on Human Rights Practices: Brazil*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022) <https://perma.cc/EAB9-XXXG>; *2021 Country Reports on Human Rights Practices: Chile*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022) <https://perma.cc/5TAW-VATY>; *2021 Country Reports on Human Rights Practices: Colombia*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/U3FT-L5LJ>; *2021 Country Reports on Human Rights Practices: Costa Rica*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/MWQ9-XZM3>; *2021 Country Reports on Human Rights Practices: Dominica*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/2CUY-PCY9>; *2021 Country Reports on Human Rights Practices: Dominican Republic*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/7UVZ-KF5Z> [hereinafter Dominican Republic 2021]; *2021 Country Reports on Human Rights Practices: Ecuador*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/97EM-DSK9>; *2021 Country Reports on Human Rights Practices: El Salvador*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/S7Z7-SS6P>; *2021 Country Reports on Human Rights Practices: Guatemala*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/RM7G-5AM7>; *2021 Country Reports on Human Rights Practices: Haiti*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. &

reluctant to report due to fear of retribution for their LGBTI status, or fear that they may face arbitrary police violence and harassment.<sup>186</sup> As a result, underreporting of crimes against LGBTI individuals continues to be a problem.<sup>187</sup> For example, in Belize, LGBTI individuals do not report crimes for fear of harassment while reporting.<sup>188</sup> At times, police in Belize refused to take reports at all.<sup>189</sup>

*c. Criminalization of Same-Sex Relations.* Few countries in the Americas have legalized either marriage or same-sex unions for LGBTI individuals.<sup>190</sup> In fact, many countries in the Caribbean and some in Central America criminalize same-sex relationships.<sup>191</sup> For example, in Dominica, criminalization of same-sex relationships is enshrined in its Constitution, which prohibits cohabitation as well as marriage between same-sex couples.<sup>192</sup> As noted above, this type of criminalization causes underreporting and fear of retribution from police.<sup>193</sup> It is perhaps worth noting that some countries only criminalize male relationships.<sup>194</sup>

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LAB. (Apr. 12, 2022), <https://perma.cc/9ZH2-RWX2>; *2021 Country Reports on Human Rights Practices: Jamaica*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/L23M-LQ5H>; *2021 Country Reports on Human Rights Practices: Mexico*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/EEG5-QLHX> [hereinafter *Mexico 2021*]; *2021 Country Reports on Human Rights Practices: Nicaragua*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB., (Apr. 12, 2022), <https://perma.cc/W985-KXG4>; *2021 Country Reports on Human Rights Practices: Peru*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/GU9U-NMUB>; *2021 Country Reports on Human Rights Practices: Venezuela*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/Y6B2-N2FT>.

186. See Dominican Republic 2021, *supra* note 185.

187. See *id.*; Torres, *supra* note 176.

188. See *Belize 2015 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. <https://perma.cc/H3WW-PXEQ> (last visited Mar. 22, 2023).

189. *Id.*

190. *Marriage Equality Around the World*, HUM. RTS. CAMPAIGN, <https://perma.cc/8BNP-7HK8> (last visited Mar. 22, 2023). Countries that have legalized same-sex marriage include Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, Mexico, U.S., and Uruguay.

191. #*Outlawed "The Love That Dare Not Speak Its Name"*, HUM. RTS. WATCH, <https://perma.cc/J99P-TJKL> (last visited Mar. 21, 2023). Countries define these relationships as "unnatural/indecent acts" or as "buggery" and have varying sanctions. Countries in which same-sex relationships are "buggery" include Barbados, Dominica, Guyana, Jamaica, St. Lucia, and St. Vincent. Countries in which same-sex relationships are "unnatural/indecent acts" include Barbados, Dominica, Grenada, and Guyana. The punishments for "buggery" and/or "unnatural/indecent acts" are life in prison in Barbados, 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.

192. Glickhouse & Keller, *supra* note 183.

193. See *id.* at 183–85.

194. See #*Outlawed "The Love That Dare Not Speak Its Name"*, *supra* note 191 (those countries include: Guyana and Jamaica).

### 3. Asia

Currently, LGBTI individuals remain at the margins of society in Asia.<sup>195</sup> Asia is home to various notions of sexual orientation and gender identity that are just as diverse as the region's cultures and religions.<sup>196</sup> 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.<sup>197</sup> The region exhibits little progress in reforming its laws to better protect LGBTI individuals from criminalization<sup>198</sup> 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. For example, an LGBTI person becomes more vulnerable when they also belong to socially excluded groups such as immigrants, sex workers, or the poor.<sup>199</sup> Nevertheless, some parts of Asia exhibit major advancements in LGBT rights.<sup>200</sup> This survey of LGBTI discourse in Asia will reveal the varying levels of progress made by its different nations.

*a. Tradition of Patriarchy.* Traditional patriarchal structures in many Asian cultures often foster negative societal reactions towards LGBTI individuals.<sup>201</sup> The traditional notion of patriarchy, in which men marry and produce children, may marginalize LGBTI individuals who do not conform to the existing model.<sup>202</sup> An example comes from China, where the idea of "phallocentrism" or "sex without a male partner [is] not considered an actual sexual act" has long prevailed.<sup>203</sup> In Pakistan, same-sex marriage is punishable by up to ten years in prison.<sup>204</sup> 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.<sup>205</sup> 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."<sup>206</sup> In Afghanistan, for example, it is a taboo to

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195. U.N. Dev. Programme, *Leave No One Behind: Advancing Social, Economic, Cultural and Political Inclusion of LGBTI People in Asia and the Pacific - Summary*, at 1 (2015), <https://perma.cc/4DC4-8XU8> [hereinafter *Leave No One Behind*].

196. *See id.* at 2.

197. *See id.* at 11.

198. U.N. Dev. Programme, *Report of the Regional Dialogue on LGBTI Human Rights and Health in Asia-Pacific*, at 3 (2015), <https://perma.cc/59CZ-FPYP> [hereinafter *Regional Dialogue*].

199. *Leave No One Behind*, *supra* note 195, at 7.

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

201. *See Leave No One Behind*, *supra* note 195, at 10.

202. *Id.* at 5.

203. *See* U.N. Dev. Programme, & U.S. Agency for Int'l Dev., *Being LGBT in Asia: China Country Report*, at 8 (2014), <https://perma.cc/5D9N-G4HZ> [hereinafter *China Country Report*].

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

205. *See Regional Dialogue*, *supra* note 198, at 4.

206. *Id.*

be homosexual.<sup>207</sup> Until recently, the term *seidôitsusei shôgai* (gender identity disorder)—which carries a negative connotation—was very much a part of Japan’s regular vocabulary in describing transgender individuals.<sup>208</sup> 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.<sup>209</sup>

*b. Religious Fundamentalism.* Asia’s religious landscape is one of the most diverse in the world.<sup>210</sup> This diversity influences each local population differently; as such, regional differences in animosity towards LGBTI communities and activities may be correlated with the presence of religious fundamentalism.<sup>211</sup> Religious doctrines that treat homosexuality as a wrong reinforce the hostile environment towards LGBTI individuals.<sup>212</sup> For example, countries adopting Sharia law into their legal system, such as the Aceh province in Indonesia, may accordingly criminalize homosexual activities.<sup>213</sup> However, not all aspects of religions such as Islam or Buddhism are hostile towards LGBTI people.<sup>214</sup> For example, Theravada Buddhism in Cambodia generally does not discriminate against homosexuality in its doctrine.<sup>215</sup>

*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.<sup>216</sup> 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.<sup>217</sup> Malaysia has domestic laws criminalizing “a male person posing as a

207. *Afghanistan 2021 Human Rights Report*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB., at 50 (Apr. 12, 2022), <https://perma.cc/4E9D-37TW> [hereinafter *Afghanistan 2021*].

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

209. 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.

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

211. 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 209.

212. Regional Dialogue, *supra* note 198, at 1.

213. 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>.

214. China Country Report, *supra* note 203, at 11, 30.

215. *Being LGBT in Asia: Cambodia Country Report*, U.N. DEV. PROGRAMME 8 (2014), <https://perma.cc/C9QF-EMK3> [hereinafter *Cambodia Country Report*].

216. Leave No One Behind, *supra* note 195, at 8.

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

woman” or “a female person posing as a man” and has been enforcing those laws against transgender women.<sup>218</sup>

The Chinese government has been taking a passive stance towards issues of sexual orientation and gender identity.<sup>219</sup> No particular department is in charge of LGBTI matters at the moment.<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup> In Cambodia, no domestic law punishes violations of LGBTI rights.<sup>223</sup> In Vietnam, laws that are unfavorable towards LGBTI issues and harsher views from conservative Vietnamese culture fuel the social stigma towards LGBTI persons.<sup>224</sup>

The rest of Southeast Asia likewise remains passive in legal recognition of LGBTI rights, if not hostile towards the idea.<sup>225</sup> As of 2023, same-sex sexual activity between males is illegal in Brunei, Indonesia, Malaysia, and Myanmar.<sup>226</sup> Same-sex marriage is illegal in Indonesia, and although same-sex sexual activity and relationships are not illegal, the 2022 passage of a law criminalizing consensual sex outside of marriage has effectively made all same-sex conduct illegal.<sup>227</sup> 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.<sup>228</sup>

*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.<sup>229</sup> Many Asian countries have had arrests and/or prosecutions targeting same-sex sexual activity since 2013 (Russia, India,

218. *Id.*

219. See China Country Report, *supra* note 203, at 11.

220. *Id.*

221. *World Report 2022: South Korea*, HUM. RTS. WATCH, <https://perma.cc/HM47-H7XF> (last modified Jan. 12, 2022, 11:42 PM).

222. *Id.*

223. Cambodia Country Report, *supra* note 215, at 8.

224. 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>.

225. 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>; see also *LGBTQ Rights in Southeast Asia Slow to Improve*, UNIV. AT ALBANY: SUNY (June 3, 2021), <https://perma.cc/V8ZU-P7T4>.

226. *Map of Countries that Criminalise LGBT People*, HUM. DIGNITY TRUST, <https://perma.cc/KS59-5KB3> (last visited Mar. 6, 2023).

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

228. U.N. Dev. Programme, & U.S. Agency for Int’l Dev., *Being LGBT in Asia: Indonesia Country Report*, at 8 (2014), <https://perma.cc/D9FR-9SXX> [hereinafter Indonesia Country Report].

229. Leave No One Behind, *supra* note 195, at 8.

Pakistan, Bhutan, Myanmar, Bangladesh, Maldives, Malaysia, Brunei, and Papua New Guinea).<sup>230</sup> Some countries only criminalize relationships between males (Bangladesh, Myanmar, Pakistan, Turkmenistan, and Uzbekistan).<sup>231</sup> Several criminalize relationships between males and between females (Afghanistan, Brunei, Indonesia, Malaysia, Maldives, and Sri Lanka).<sup>232</sup>

The justifications for laws that criminalize gender-expansive and same-sex sexual activity vary by country.<sup>233</sup> For example, the Taliban in Afghanistan criminalize consensual same-sex sexual activity under Sharia law.<sup>234</sup> In Brunei, the Sharia-based penal code “prohibits men from dressing as women or women dressing as men.”<sup>235</sup> 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.<sup>236</sup>

*e. Violence Towards LGBTI Persons.* In Asia, the police are too often the perpetrators of violence towards LGBTI individuals.<sup>237</sup> Reports in Afghanistan state that LGBTQI+ individuals face “harassment and violence . . . by . . . police . . . [and t]he Taliban takeover of the country increased fears of repression and violence.”<sup>238</sup> 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.”<sup>239</sup> In Nepal, “*metis* (feminine men, cross-dressing men)” and transgender men especially suffer from police violence.<sup>240</sup> LGBTI individuals in Burma have reported that the police threaten to prosecute them for bribes.<sup>241</sup> 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.<sup>242</sup> Transgender women in Malaysia

230. *Criminalisation Map*, *supra* note 164; see STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 129–39.

231. *Map of Countries that Criminalise LGBT People*, *supra* note 226.

232. *Id.*

233. See *infra* notes 234–40.

234. 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>.

235. *Brunei 2021 Human Rights Report*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (2021), <https://perma.cc/YM87-JDA8>.

236. *In the Shadows: Systemic Injustice Based on Sexual Orientation and Identity/Expression in Myanmar*, INT’L COMM’N OF JURISTS 7–8 (2019), <https://perma.cc/2CVA-B6WL>.

237. See *Afghanistan 2021*, *supra* note 207, at 60.

238. *Id.*

239. *Indonesia Country Report*, *supra* note 228, at 8.

240. *Violence On the Basis of Sexual Orientation, Gender Identity, and Gender Expression Against Non-Heteronormative Women in Asia: Summary Report*, INT’L GAY & LESBIAN HUM. RTS. COMM’N 7 (Feb. 2010), <https://perma.cc/MQY8-WY4B>.

241. *In the Shadows: Systemic Injustice Based on Sexual Orientation and Identity/Expression in Myanmar*, *supra* note 236, at 31, 33.

242. *China Country Report*, *supra* note 203, at 8.

are often subject to capricious arrests by the police.<sup>243</sup> In Kyrgyzstan, authorities reportedly surveil online LGBTI communities to punish and extort LGBTI individuals.<sup>244</sup>

LGBT individuals in Asia may also experience violence and abuse from their own family.<sup>245</sup> In Kyrgyzstan, for example, police returned a bisexual teenager to her parents after she escaped an attempted forced marriage.<sup>246</sup> 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.<sup>247</sup> Police may also refuse to do anything about family violence when asked for assistance.<sup>248</sup> LGBT 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.<sup>249</sup>

*f. Employment Discrimination.* LGBTI individuals regularly face discrimination at their workplace, and no national law protects them from such human rights violations.<sup>250</sup> 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.<sup>251</sup> LGBTI persons in Cambodia also express discomfort in revealing their sexual orientation and fear that discrimination may impact their job prospects.<sup>252</sup>

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.<sup>253</sup> 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.”<sup>254</sup> LGBTI individuals also face difficulties during the recruitment process, where they may be asked improper questions about their

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243. Knight, *supra* note 217.

244. *Kyrgyz Republic 2021 Human Rights Report*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/DZA6-XZAV>.

245. Alisa Tang, *Asia’s LGBT people migrate to escape violence at home*, REUTERS (Apr. 8, 2015), <https://perma.cc/X55N-BHS4>.

246. *Kyrgyz Republic 2021 Human Rights Report*, *supra* note 244.

247. See Mosbergen, *supra* note 225.

248. See Tang, *supra* note 245.

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

250. See China Country Report, *supra* note 203, at 9.

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

252. See Cambodia Country Report, *supra* note 215, at 9.

253. See *Being LGBT in Asia: Thailand Country Report*, U.N. DEV. PROGRAMME 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/3P5G-Y3YM>.

254. ADITI SHETTY, KYLE KNIGHT, THANITA WONGPRASERT, & SAWITA RATTIVARAKORN, “PEOPLE CAN’T BE FIT INTO BOXES” THAILAND’S NEED FOR LEGAL GENDER RECOGNITION (2021), <https://perma.cc/K3YR-CWQY>.

sexual orientation or gender identity.<sup>255</sup> LGBTI individuals in the Philippines also face discrimination from employers, including being sexually harassed.<sup>256</sup> Meanwhile, a study of LGBTI employees in India revealed discrimination and harassment for employees who were open about their sexuality.<sup>257</sup>

#### 4. Europe

The laws in Europe, and particularly those governing the European Union (EU),<sup>258</sup> are considered among the friendliest in the world for LGBTI individuals.<sup>259</sup> In 2022, 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.<sup>260</sup> However, the rate and type of progress varies substantially across Europe.<sup>261</sup> As important legal and policy changes continue to sweep the continent, there is emerging an increasingly differentiated pattern of developments in LGBTI rights across Europe.<sup>262</sup> While some countries are advancing standard-setting actions,<sup>263</sup> others have grown passive or complacent, and some have even regressed.<sup>264</sup> Consequently, the various protections, obstacles, and public opinions affecting the lives of LGBTI

255. *Id.*

256. See *LGBTI People and Employment*, U.N. DEV. PROGRAMME 9 (2018), <https://perma.cc/U9FE-2QZ3>.

257. Abhay Mane, *Experience of LGBT+ Employees at the Workplace in India: Diversity and Inclusion*, 9 INT'L J. SOC. SCI. RES. 164, 169–174 (2021).

258. 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, “Any discrimination based on any ground such as sex, race, color, ethnic or social origin, genetic features, language, religion or belief, political or 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), Dec. 18, 2000, 2000 O.J. (C 364) 1.

259. *Rainbow Europe Country Index (2016)*, ILGA-EUR. (2016), <https://perma.cc/9WS9-5LQM> [hereinafter ILGA-Europe, Rainbow Index 2016].

260. *Country Ranking*, RAINBOW EUR., <https://perma.cc/J6DJ-NWNL> (last visited Mar. 10, 2023).

261. *Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe and Central Asia (2022)*, ILGA-EUR. (2022), <https://perma.cc/LEV6-US7W> [hereinafter ILGA-Europe, Annual Review 2022].

262. 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), <https://perma.cc/9M5P-JYY9>.

263. 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.*

264. For instance, there has been legal gender recognition regression in Greece, Poland, Portugal, and Russia. ILGA-Europe, Annual Review 2022, *supra* note 261, at 8.



individuals living in different parts of Europe are growing more disparate.<sup>265</sup> 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.<sup>266</sup>

*a. Barriers to Asylum and Recognition of LGBT<sup>267</sup> Families.* In 2015, more than one million people sought refuge in the EU.<sup>268</sup> 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 within their native countries.<sup>269</sup> The Charter of Fundamental Rights of the European Union assures a person's right to asylum, and, 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."<sup>270</sup> 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."<sup>271</sup> 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.<sup>272</sup> Despite these obligations placed upon Member States, LGBTI asylees face unequal treatment compared to individuals who are granted asylum on other protected grounds.<sup>273</sup>

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

266. See *Annual Review 2023*, IGLA-EUR. (Feb. 20, 2023), <https://perma.cc/XEN2-EZ4Y>.

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

268. Emma Luxton, *A Record 1.3 Million People Sought Asylum in Europe in 2015*, WORLD ECON. F. (Oct. 10, 2016), <https://perma.cc/SUH4-PM5S>.

269. Johannes L. Gartner, *(In)credibly Queer: Sexuality-based Asylum in the European Union*, HUMAN. IN ACTION (Feb. 2015), <https://perma.cc/5VYM-XU5N>. 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 legalize same-sex sexual activity and eleven still impose the death penalty as punishment. *Map of Countries that Criminalise LGBT People*, *supra* note 226.

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

271. *Protection Against Discrimination on Grounds of Sexual Orientation, Gender Identity and Sex Characteristics in the EU: Comparative legal analysis Update 2015* 100–101, FRA (2015), <https://perma.cc/4JPC-5FWG> [hereinafter FRA 2015 Update].

272. *Id.* at 100.

273. 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*, Warnings Report, EURONEWS (Feb. 15, 2022), <https://perma.cc/V3GH-TUNR> [hereinafter *Double Discrimination*].

Europe's refugee law developed around the principles articulated in the 1951 Convention Relating to the Status of Refugees (Refugee Convention)<sup>274</sup> and the 1967 Protocol to the Geneva Convention (Protocol).<sup>275</sup> 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.<sup>276</sup> 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."<sup>277</sup> Furthermore, the UN High Commissioner offers countries little guidance on how to make their determinations of who qualifies for refugee status.<sup>278</sup> 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 Identity<sup>279</sup> and broadly defines persecution as "serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm."<sup>280</sup> 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 . . . ."<sup>281</sup> While these definitions provide countries with a framework for assessing persecution, the UNHCR's guidance is not ultimately building upon the countries.<sup>282</sup>

LGBTI asylum-seekers fleeing countries that do not recognize same-sex marriage may also face significant roadblocks when trying to bring their partner with

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

275. 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 274, at 152 (emphasis added).

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

277. *Id.*

278. *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*, UNHCR 3 (Oct. 23, 2012), <https://perma.cc/9Y3G-GJAE>.

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

280. *Guidelines on International Protection No. 9*, *supra* note 278, at 6.

281. *Id.* at 8. 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).

282. See *id.* at 2.

them to a Member State within the EU.<sup>283</sup> EU law regulates freedom of movement and family unification through the Free Movement Directive<sup>284</sup> and Family Reunification Directive.<sup>285</sup> The Free Movement Directive sets forth that all EU citizens and their family members possess the right to move freely within EU territory.<sup>286</sup> 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.”<sup>287</sup> 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.<sup>288</sup> 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.<sup>289</sup>

The Court of Justice of the European Union (CJEU)<sup>290</sup> has tried to explicate how asylum claims based on the protected ground of sexual orientation should be assessed.<sup>291</sup> 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.<sup>292</sup> 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.<sup>293</sup> Nevertheless,

283. FRA 2015 Update, *supra* note 271, at 88.

284. 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/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) 77, 77–123 [hereinafter Free Movement Directive].

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

286. Free Movement Directive, *supra* note 284, at 87–88.

287. See FRA 2015 Update, *supra* note 271, at 10.

288. *Id.*

289. *Id.* at 81–82.

290. “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-Europe, Annual Review 2016, *supra* note 263, at 177.

291. In A, B and 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 (C-148/13), B (C-149/13), C (C-150/13) v. Staatsecretaris van Veiligheid en Justitie, CURIA (Dec. 2, 2014), <https://perma.cc/W7PS-LPW5>.

292. Prior to 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.*

293. *Id.*

significant discrepancies remain in how LGBT asylum claims are processed among Member States.<sup>294</sup>

*b. Violence Against and Non-Inclusion of LGBT<sup>295</sup> 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.<sup>296</sup> Studies suggest that the prevalence of homophobic and transphobic violence correlates with the lack of protections for at-risk students.<sup>297</sup> 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.<sup>298</sup> 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.”<sup>299</sup> Another 2015 survey conducted in Norway estimated that 48% of LGBTI youth experienced violence as compared to 7% of their heterosexual peers.<sup>300</sup> As a result of school authorities’ inattention to the violence against their LGBT youth, these students face a hostile environment for learning.<sup>301</sup> Unsurprisingly, the rate of school dropouts is higher among LGBTI students, who are also statistically more likely to confess suicidal feelings<sup>302</sup> and avoid participating in school activities.<sup>303</sup> These reports attest to

294. *Seeking refuge without harassment, detention or return to a “safe country:” ILGA-Eur. Briefing On LGBTI Refugees And Asylum*, ILGA-EUR. (Feb. 2016), <https://perma.cc/LD6J-WYGS>. See also Sabine Jansen, *Good Practices Related to LGBTI Asylum Applicants in Europe*, ILGA-EUR. (May 2014), <https://perma.cc/4HB7-NNX8>; 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*, REFWORLD 27 (Dec. 2015), <https://perma.cc/SP8L-7ZKW>; see also *Double Discrimination*, *supra* note 273.

295. 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.

296. 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.

297. 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.

298. *Professionally speaking: challenges to achieving equality for LGBT people*, FRA 10 (2016), <https://perma.cc/CY9M-GENV>; see also *Over half of LGBTI students in Europe bullied in schools*, *Says UNESCO report*, UNESCO (May 17, 2021), <https://perma.cc/RZ9Z-P286>.

299. *Over Half of LGBTI Students in Europe Bullied in Schools*, *supra* note 298.

300. UNESCO, Summary Report, *supra* note 3, at 43.

301. See *id.* at 28.

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

303. For example, survey results from Ireland, Italy, Denmark, Croatia, and Poland revealed that 49% of LGBT respondents disclosed being afraid to participate in class questions or discussions. Eleanor Formby, *The Impact of Homophobic Bullying on Education and Employment*, SHEFFIELD

the need for more robust strategies within schools, and that the schools which do have policies need more effective implementation.<sup>304</sup>

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.<sup>305</sup> 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.<sup>306</sup> 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.<sup>307</sup>

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.<sup>308</sup> 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.<sup>309</sup> In addition, the Netherlands has sought to provide better training for teachers to facilitate these conversations in the classroom.<sup>310</sup> 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.<sup>311</sup>

HALLAM UNIV. RSCH. ARCHIVE (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>.

304. 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.

305. See UNESCO, Summary Report, *supra* note 3.

306. *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 LGBTI students in Europe bullied in schools*, *supra* note 298.

307. 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>.

308. In a report issued by the European Parliament, it urged the European Commission “to support the inclusion of objective information on LGBTI issues in school curricula.” ILGA-Europe, *Annual Review 2016*, *supra* note 263, at 24.

309. UNESCO, Summary Report, *supra* note 3, at 90.

310. *Id.* at 111.

311. *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 303; 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/8MSW-AWST>.

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.<sup>312</sup> Researchers reviewed 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.<sup>313</sup> 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.<sup>314</sup>

*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.<sup>315</sup> In more traditionally conservative countries, societal views toward LGBTI self-identified or perceived individuals are often antagonistic.<sup>316</sup> The general public's boldness in displaying hostile sentiments often correlates with how the State's legislation treats hate speech and hate crimes.<sup>317</sup> In this regard, there is a growing disparity between Western and Eastern European countries.<sup>318</sup> Formerly Soviet-controlled countries are especially lacking in protections for LGBTI individuals from hate speech and hate crimes.<sup>319</sup> For example, Russia federally bans the distribution of LGBTI-supportive materials, asserting that such "propaganda" of non-traditional relationships constitutes a criminal offense.<sup>320</sup> Similar propaganda laws have been proposed in Ukraine, Belarus, Bulgaria,

312. UNESCO, Summary Report, *supra* note 3, at 112.

313. 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. RSH. (Sept. 2014), <https://perma.cc/GFX3-MPPW>.

314. See *Overview of Youth Discrimination in the European Union*, EUR. COMM'N (2015), <https://perma.cc/WT7U-F64X>; see also *Over half of LGBTI students in Europe bullied in schools*, *supra* note 298.

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

316. See FRA 2015 Update, *supra* note 271, at 47. See generally David W. Austin, *Sexual Orientation and Gender Identity*, 46 INT'L L. 447 (2012).

317. 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>.

318. ILGA-Europe, Rainbow Index 2016, *supra* note 259. According to this index, Azerbaijan, Armenia, and Russia ranked lowest in meeting the organization's criteria for protecting LGBT 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>.

319. ILGA-Europe, Rainbow Index 2016, *supra* note 259. See also Wesolowky, *supra* note 318.

320. Laura Mills, *How Russia Enforces Its Ban on 'Gay Propaganda'*, GLOB. NEWS (Feb. 6, 2014), <https://perma.cc/5P3U-FD4E>. 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>. Schools in Russia have expelled students who voice support for LGBT individuals. *Id.* Fines have also been imposed on peaceful protestors with some resulting in arrest and detention. John Bercow, *John Bercow: This Isn't Just About Sexuality. It's About Basic Humanity*, INDEPENDENT (May 17, 2012), <https://perma.cc/6AB6-ZEVZ>.

Latvia, Kazakhstan, Hungary, and Romania.<sup>321</sup> In Kyrgyzstan, the parliament approved a bill penalizing the “promotion of homosexuality” and imposing a prison sentence for violators.<sup>322</sup> 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.<sup>323</sup> Georgia, Poland, Uzbekistan, Turkey, and Russia are a few of the countries where heightened policing continues to restrict public demonstrations of LGBTI solidarity, thus cramping the space for civil society and obstructing the work of advocates.<sup>324</sup> In Bulgaria, France, Italy, Sweden, Turkey, and other countries, high-ranking officials have made openly pejorative statements toward LGBTI individuals.<sup>325</sup>

These regressions in the respect for LGBTI rights at the State level are perhaps more surprising because of their simultaneous emergence with other positive reforms on the international level.<sup>326</sup> In *Alekseyev v. Russia*,<sup>327</sup> 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.<sup>328</sup> Thus, the decision represents an unambiguous consecration of the rights of sexual minorities to the freedom of assembly.<sup>329</sup> In another progressive step toward recognizing LGBTI rights, the Council of Europe passed resolutions to its forty-seven Member States to end discrimination and violence.<sup>330</sup> 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.<sup>331</sup> 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.”<sup>332</sup> Despite

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321. 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>.

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

323. IGLA-Europe, *Annual Review 2023*, *supra* note 266.

324. *See id.*

325. *Id.*

326. *Id.*

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

328. *Id.* at 28–29.

329. *Id.*

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

331. *See* Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221.

332. FRA 2015 Update, *supra* note 271, at 48.

these protective measures, however, enforcement is lacking and instances of physical violence and hate speech toward LGBT individuals continue to keep the community vulnerable.<sup>333</sup> Unless enforcement authorities take seriously the need to implement established protections, achieving progress in safeguarding LGBTI rights will be limited.<sup>334</sup>

*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.<sup>335</sup> Courts often require proof that the individual has received medical treatment, including a psychiatric diagnosis of gender identity disorder.<sup>336</sup> 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.<sup>337</sup> Other countries lack any provisions that govern the process for legal recognition of preferred gender.<sup>338</sup> The Commissioner for Human Rights of the Council of Europe has stated that these omissions contravene ECtHR jurisprudence for legal certainty.<sup>339</sup>

For transgender individuals who choose to undergo sex-reassignment surgery, many must finance the procedure themselves, in addition to the costs associated with documentation changes.<sup>340</sup> Alternatively, obtaining State funding may be predicated on the individual demonstrating that they first received counseling from medical personnel.<sup>341</sup> For transgender individuals under the age of eighteen, the challenges to being authorized for sex-reassignment surgery are even more complex.<sup>342</sup> This dilemma is similarly true for transgender individuals who are incarcerated.<sup>343</sup> Consequently, transgender Europeans remain uniquely vulnerable to discrimination

333. *Id.* at 49.

334. See IGLA-Europe, Annual Review 2023, *supra* note 266.

335. FRA 2015 Update, *supra* note 271, at 16.

336. 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.* at 16.

337. Thomas Hammarberg, Commissioner for Human Rights, *Human Rights and Gender Identity*, COUNCIL OF EUR. (July 29, 2009), <https://perma.cc/25GQ-5M8R>.

338. For a chart of which countries have legal requirements that individuals must fulfill before obtaining gender reassignment under the law, see Cristina Castagnoli, *Transgender Persons’ Rights in the EU Member States*, EUR. PARLIAMENT 16–18 (Nov. 2010), <https://perma.cc/XP6F-L77J>. See also *New Report on Legal Gender Recognition in Europe*, COUNCIL OF EUR. PORTAL (July 7, 2022), <https://perma.cc/E3UZ-9AFK>.

339. Castagnoli, *supra* note 338, at 6.

340. 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. FRA 2015 Update, *supra* note 271, at 17. Then, they must undergo a costly and lengthy process of obtaining national documentation that aligns with their reassigned gender. *Id.*

341. Romania required individuals to present themselves before a forensic psychiatric commission because the Romanian National Institute of Legal Medicine considers “transsexualism . . . a mental disorder.” *Id.* at 16.

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

343. See *Green v. Secretary of State for Justice* [2013] EWHC (Admin) 3491 (Eng.)



when their legal gender does not match the gender they wish to express on a daily basis.

*e. The Pathologization of Intersex Individuals.* Public recognition of individuals who are intersex<sup>344</sup> is still greatly lacking in most European countries.<sup>345</sup> 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.<sup>346</sup> 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” or a “psycho-social emergency.”<sup>347</sup> Their “condition” is seen as requiring immediate medical intervention through surgical, hormonal, other medical and sometimes psychological means without any attention given to the wishes of the individual affected.<sup>348</sup>

As of 2015, 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.<sup>349</sup> 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.<sup>350</sup> The lack of self-determination given to intersex individuals is revealing of 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).<sup>351</sup>

Also noteworthy is the absence of recognizing the existence of intersex individuals in European school curricula.<sup>352</sup> Consequently, the vulnerability of children who are intersex to be isolated, bullied, and discriminated against are

344. 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, that 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.

345. 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-Europe, Intersex People].

346. *See id.*

347. JV Ladee-Levy, *Ambiguous Genitalia as a Psychosocial Emergency*, Z KINDERCHIR 178–81 (June 1984); *see also Children Born Intersex Are at Risk in Most European Countries. Here’s Why*, ILGA-EUR. (May 20, 2022), <https://perma.cc/JH6T-M6FZ>.

348. *See* FRA 2015 Update, *supra* note 271, at 69.

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

350. *Id.*

351. 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-Europe, Intersex People, *supra* note 345, at 20.

352. *See Overview of Youth Discrimination in the European Union*, *supra* note 314.

compounded.<sup>353</sup> With the exception of Malta<sup>354</sup> and Iceland, school systems lack policies that protect and support intersex students.<sup>355</sup>

## 5. The Middle East

The regulation of sexual orientation in the Middle East varies considerably, though there are some common themes.<sup>356</sup> 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 actually rooted in European colonization.<sup>357</sup> In Gaza, for example, the criminalization of same-sex relations continues to be based on the British Mandate Criminal Code from 1936.<sup>358</sup>

As of 2022, 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.<sup>359</sup> 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.<sup>360</sup> 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.<sup>361</sup>

*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 and the penalties for such acts if caught; this disparity spans both religion and region.<sup>362</sup> In Bahrain, Israel, Palestine (West Bank), and Jordan,

353. *See id.*

354. 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. Respect for All Framework, *Trans, Gender Variant and Intersex Students in Schools: Policy*, MINISTRY OF EDUC. & EMP. 24 (June 2015).

355. ILGA-Europe, *Intersex People*, *supra* note 345, at 11 n.5.

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

357. *See* STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 25 (“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.”).

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

359. 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>.

360. *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>.

361. *See* Whitaker, *supra* note 359.

362. *See infra* Section III.A.5.i.

same-sex sexual acts are legal.<sup>363</sup> Same-sex relations have been legal in Bahrain since 1976 and in Israel since 1988, with Jordan legalizing such conduct decades before.<sup>364</sup> Israel and Jordan have decriminalized same-sex relations,<sup>365</sup> though this does not necessarily mean that same-sex couples are viewed as equals or largely accepted by civil society within those countries.<sup>366</sup> 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.”<sup>367</sup>

*b. Marriage.* No country in the Middle East permits same-sex marriage as of 2022, including Israel.<sup>368</sup> 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.<sup>369</sup> 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.<sup>370</sup>

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.<sup>371</sup> 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.<sup>372</sup>

*c. Sources of Law.* In the majority of countries in the Middle East, same-sex sexual acts are illegal.<sup>373</sup> The major differences among countries in which same-

363. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 101–03. Same-sex affection may also be prosecuted under the public decency laws. *Bahrain: Freedom in the World 2022*, FREEDOM HOUSE (Feb. 23 2022, 7:34 PM), <https://perma.cc/F7UX-2FDT>. It should be noted that 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>.

364. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 101–02.

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

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

367. 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 38, at 137; *Bahrain: Freedom in the World 2022*, *supra* note 363.

368. The Israeli Government does recognize same-sex marriages performed abroad, however. See Gross, *supra* note 366.

369. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 298, 311; see also Gross, *supra* note 366.

370. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 327–28.

371. See *id.* at 37.

372. See, *e.g.*, PENAL CODE art. 394 (Iraq) (criminalizing any sexual relations outside of marriage).

373. Same-sex relations are illegal in several countries including Iran, Kuwait, Lebanon, Oman, Qatar, Saudi Arabia, Syria, United Arab Emirates, and Yemen. STATE-SPONSORED HOMOPHOBIA, *supra*

sex relations are illegal are the legal rationales for its criminalization.<sup>374</sup> Some countries like Oman have a penal code that specifically criminalizes and penalizes sexual acts between members of the same sex.<sup>375</sup> For example, the Oman penal code criminalizes the “disgracing crime” of “any erotic act[s] with a person of the same sex.”<sup>376</sup>

In Middle Eastern countries, however, the law finds its roots in Sharia law and the Qur’an.<sup>377</sup> For example, Saudi Arabia has no codified penal law, and instead applies only Islamic Sharia law.<sup>378</sup> 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.<sup>379</sup> 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.”<sup>380</sup> Even countries like Lebanon and Jordan, along with 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.”<sup>381</sup> Thus, there are many laws in the Middle East 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.<sup>382</sup>

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.<sup>383</sup> 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.<sup>384</sup> In contrast,

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note 38, at 129–39, 327–28. Though not explicitly illegal in Iraq, the disarray of the State and the rise of Da’esh warrant its inclusion in the ILGA’s State-Sponsored Homophobia Report as a country in which same-sex relations are illegal. *Id.* at 131.

374. See generally STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 129–39. 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*, HUM. RTS. WATCH (July 15, 2013, 3:03 PM), <https://perma.cc/76LR-Y9Z6>.

375. See *e.g.*, PENAL CODE art. 33, 223 (Oman).

376. *Id.*

377. See *infra* Section III.A.5.iii.

378. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 135.

379. *Id.* at 38.

380. 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 2022*, *supra* note 363.

381. See, *e.g.*, STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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).

382. See *e.g.*, STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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.*

383. *Id.* at 35–37.

384. *Id.* 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.<sup>385</sup>

*d. Punishment.* States in the Middle East that criminalize same-sex relations also differ significantly in the forms of punishment that are enforced.<sup>386</sup> The most severe punishment for sexual acts with a person of the same sex is the death penalty.<sup>387</sup> However, even amongst countries that prescribe the death penalty, the means of execution varies in terms of brutality.<sup>388</sup> In Iran, Article 110 of the penal code countries only that same-sex relations 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.<sup>389</sup> 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 in prison.<sup>390</sup>

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.<sup>391</sup> 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.<sup>392</sup> 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.<sup>393</sup> Since 1979, Iran has sentenced over four thousand people to death for engaging in same-sex relationships.<sup>394</sup> Penal codes may also impose a harsher punishment

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385. *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. 210 (Iran).

386. *See infra* Section III.A.5.iv.

387. 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 38, 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)).

388. *See infra* notes 393, 394.

389. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 46–50, 69–74.

390. Cviklova, *supra* note 6, at 53; STATE-SPONSORED HOMOPHOBIA, *supra* note 38, 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 38, at 138.

391. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 48, 139.

392. *Id.* at 139.

393. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 47–48 (citing ISLAMIC PENAL CODE 2013, arts. 136, 233, 234 nn.1–2, 236, 238 (Iran)); Cviklova, *supra* note 6, at 53.

394. Cviklova, *supra* note 6, at 53.

based on the marital status and religion of the parties engaging in the conduct.<sup>395</sup> For example, in Iran, married men are sentenced to death, while unmarried men subjected to one-hundred lashes.<sup>396</sup> Non-Muslims who engage in same-sex sexual acts with Muslim men are also subject to the death penalty.<sup>397</sup>

It is important to note that in some Middle Eastern countries, punishment is not reserved only for instances where actual sexual relations took place.<sup>398</sup> In Saudi Arabia, for example, punishment for acts merely perceived as homosexual in any way are criminalized.<sup>399</sup> 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.<sup>400</sup>

*e. Discriminatory Practices Targeting the LGBTI Community.* In many countries where same-sex sexual relations are illegal, many citizens act as if the LGBTI community is non-existent; but hostility and discrimination is common even in countries where same sex-sexual relations are legal, such as Bahrain.<sup>401</sup> Even some Middle Eastern countries that do not criminalize same-sex sexual activities still severely limit freedom of speech and expression.<sup>402</sup> Countries like Jordan and Lebanon that have more progressive attitudes towards the LGBTI community curtail the ability of LGB people to freely express themselves.<sup>403</sup> In 2016, a protest in Lebanon that spoke out against laws targeting the LGBTI community was considered “rare.”<sup>404</sup> 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.”<sup>405</sup> This Qatari law, along with similar

395. *Id.*; see, e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 47, 65–66.

396. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 47 (citing ISLAMIC PENAL CODE 2013, art. 234 n.2 (Iran)).

397. Cviklova, *supra* note 6, at 53; STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 47 (citing ISLAMIC PENAL CODE 2013, art. 234 n.1 (Iran)).

398. See e.g., STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 129–39.

399. *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”).

400. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 131 (citing ISLAMIC PENAL CODE 2013, art. 237 (Iran)).

401. Bahrain: *Freedom in the World 2022*, *supra* note 363. 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>.

402. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 153–58.

403. *Id.* at 155.

404. *LGBT Activists Stage Rare Lebanon Sit-In to Protest Law*, AL ARIBYA (May 16, 2016, 12:00 AM), <https://perma.cc/8YUP-4CJV> [hereinafter *Lebanese Sit-In*].

405. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 157 (citing PENAL CODE art. 296 (Qatar)).

ones in other countries like Saudi Arabia and Iran, can be construed broadly, criminalizing any act that could possibly “lead” to “immorality.”<sup>406</sup>

Countries and territories including Israel, the West Bank, and Jordan have equal ages of consent for same-sex and different-sex relationships.<sup>407</sup> 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.<sup>408</sup> Israel is also the only Middle Eastern country that permits joint adoption and surrogacy by same-sex couples.<sup>409</sup>

Aside from the limited ability to express oneself in public, some countries actively discourage and punish gatherings of LGBTI persons even in private.<sup>410</sup> 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.<sup>411</sup> The State also arrested a doctor for flying a rainbow flag, though he was unaware that the flag was a symbol for the LGBTI community.<sup>412</sup> In Lebanon, the police have raided nightclubs that members of the LGBTI community commonly visit.<sup>413</sup> Governments may also block access to websites targeted at the LGBTI community.<sup>414</sup>

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.<sup>415</sup> In Iran, government hospitals have denied treatment to individuals based on the belief that they were homosexual.<sup>416</sup> Even in Jordan, a country where same-sex relationships are legal, discrimination in areas like housing, access to public services, and employment

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406. *Id.* at 154, 157.

407. See §§ 346–47, PENAL LAW (Amendment No. 22), 5748–1987/88, LSI 42 57 (Isr.), <https://perma.cc/398D-KCYY> (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 38, at 103 (stating the West Bank aligns with the Jordanian Penal Code).

408. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 204, 225, 327–28.

409. *Id.* at 311; Jeffrey Heller, *Israel lifts restrictions on same-sex surrogacy*, REUTERS (Jan. 4, 2022, 5:01 AM), <https://perma.cc/XMH5-YWT4>.

410. See *infra* notes 416–17.

411. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 136–36.

412. *Id.* 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 359. Prior to this, the government was allegedly unaware that the rainbow was also an “emblem of the homosexuals.” *Id.*

413. *Lebanese Sit-In*, *supra* note 404.

414. See e.g., 2021 *Country Reports on Human Rights Practices: Oman*, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. <https://perma.cc/5FFU-522T> (last visited Mar. 5, 2023).

415. See *supra* notes 416–17.

416. Ali Hamedani, *The Gay People Pushed to Change Their Gender*, BBC (Nov. 5, 2015), <https://perma.cc/TE8Z-BRLU>.

are common.<sup>417</sup> Jordanian tourist police have also arrested LGBTI individuals based on their appearance.<sup>418</sup>

*f. Regulation of Gender Identity.* Many traditionally conservative Middle Eastern countries prefer that transgender persons in the country change their gender, as to avoid homosexuality in a relationship.<sup>419</sup> 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 once the person has undergone surgery.<sup>420</sup> The State even sets aside government money to assist in gender reassignment, which the State and medical professionals treat as a psychological disorder.<sup>421</sup>

However, in other countries it is illegal to change one's gender, either with or without surgery.<sup>422</sup> For example, Kuwait and Saudi Arabia forbid legal changes to one's gender.<sup>423</sup> Further, any form of cross-dressing or "imitating" the opposite gender can be punished by arrest and imprisonment.<sup>424</sup> 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.<sup>425</sup>

## B. LEGAL DEVELOPMENTS TOWARDS LGBTI EQUALITY

### 1. Africa

Despite many world leaders' harsh criticism of African nations' failures to protect sexual and gender minorities,<sup>426</sup> African countries demonstrate a mix of continued criminalization efforts and moves toward decriminalization and even protection for LGBTI individuals.<sup>427</sup> The most explicit protections for LGBTI individuals among African countries are found in South Africa.<sup>428</sup> LGBTI

417. U.S. Dep't of State, Jordan 2021 H.R. REP. (2021).

418. *Id.*

419. Hamedani, *supra* note 416.

420. *Id.*

421. Rochelle Terman, *Trans[ition] in Iran*, WORLD POL'Y J. (2014).

422. *See* Whitaker, *supra* note 359.

423. *Id.*

424. *Id.*

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

426. *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).

427. 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), <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.") [hereinafter S. Afr. Const.].

428. 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



individuals who live in countries that have neither discriminatory nor protective laws may still face challenges due to lack of resources<sup>429</sup> or lack of State-enforced protection or recourse for discrimination.<sup>430</sup> 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 protections in the law are available and may both help and hurt LGBTI individuals in these nations.<sup>431</sup>

Several African countries have pending commitments to compare their laws to international obligations and address or remove criminalization statutes still in effect.<sup>432</sup> Other African countries simply deny that they have laws criminalizing

AGAINST BLACK LESBIANS AND TRANSGENDER MEN IN SOUTH AFRICA (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.* (describing instances of police violence against LGBTI individuals).

429. 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 2022*, *supra* note 129.

430. Although in Côte d'Ivoire some same-sex sexual activity is not criminalized, LGBT individuals still face violence, for instance. *See Côte d'Ivoire 2021 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (Apr. 12, 2022), <https://perma.cc/P3CR-KU7M>. Côte d'Ivoire rejected two recommendations from other State parties in its most recent UPR related to implementing further protections for LGBTI individuals against violence. *Id.*

431. *Compare Ethiopian Government Cancels Anti-Gay Rally*, *supra* note 88 with Ludovica Iaccino, *Nigeria Anti-Gay Laws: US Puts Pressure on President Buhari to Allow Same-Sex Unions*, INT'L BUS. TIMES (July 15, 2015, 5:34 PM), <https://perma.cc/EK5T-P3F7> (showing stronger pushback from country's leaders in response to international pressure to eliminate the law against same-sex sexual activity).

432. *See UPR Sexual Rights Database*, *supra* note 56 (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 two 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 five recommendations in 2021 pertaining to curbing discrimination and violence against LGBTI persons, including in the workplace and by the police forces. *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 twelve recommendations to decriminalize same-sex activity, nine about measures to combat discrimination and violence, and one encouraging the end of forced anal examinations. *Id.* Tunisia, in 2017, accepted one recommendation to stop forced anal examinations and another to protect LGBTIQI persons from discrimination, stigmatization, 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),

homosexuality or that they enforce laws against LGBTI individuals.<sup>433</sup> However, even if the law changes, public opinion and the violence resulting from stigma are not guaranteed to change.<sup>434</sup> 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, and LGBTI individuals may have misconceptions about what activity can subject them to prosecution.<sup>435</sup> For a lasting impact, more international and local human rights organizations are seeking the ability to register and operate in countries without harassment.<sup>436</sup>

*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.<sup>437</sup> However, even though public opinion in most African countries profoundly disfavors LGBTI individuals,<sup>438</sup> three African countries have repealed laws criminalizing homosexuality since 2020: Gabon (2020), Angola (2021), and Botswana (2022).<sup>439</sup> Some countries are also quietly moving toward decriminalizing same-sex sexual activity or instituting protections in the law for LGBTI individuals, including six countries

Kenya (2020), Liberia (2020), Malawi (2020), Namibia (2021), Senegal (2018), South Sudan (2022), Tanzania (2021), Togo (2022), Uganda (2022), Zambia (2017), and Zimbabwe (2022). *Id.*

433. *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 Morocco 2021 Human Rights Report* 42, U.S. DEP’T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (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 38, at 120 (“Moroccan authorities are known to intimidate LGBTI activists by contacting their families and asking them questions that may end up ‘outing’ them.”).

434. *See, e.g.,* Philip P. Rodenbough, *On Being LGBT in West Africa: A Virtual Student Foreign Service Project and Independent Report Exploring Regional Sexual Orientation and Gender Identity*, RIGHTS VIEWS (July 2014), <https://perma.cc/RV8Y-48MP> (describing instances of open and widespread discrimination against LGBTI individuals in Cabo Verde, where same-sex sexual activity is legal and which is a vocal advocate for decriminalization of same-sex sexual activity in other African countries).

435. *See* Ryan Thoreson & Sam Cook, *Nowhere to Turn: Blackmail and Extortion of LGBT People in Sub-Saharan Africa 9-10* (2011) (citing throughout examples of police blackmail against LGBT individuals, including an example of police blackmail of a gay man in Zimbabwe); *see also* Rodenbough, *supra* note 434, at 18 (describing a gay couple who were forcibly evicted by neighbors in Burkina Faso, where same-sex sexual activity is not criminalized, and lack of police or State intervention to provide any redress).

436. *See, e.g.,* GHOSHAL & TABENGWA, *THE ISSUE IS VIOLENCE*, *supra* note 86, at 10–11 (citing two cases within a year brought by two different NGOs seeking to register and conduct affairs openly in Kenya, which has a notoriously negative climate for sexual and gender minorities).

437. *See* Iaccino, *supra* note 431.

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

439. *Id.*

that accepted recommendations from their most recent United Nations Universal Periodic Review (UPR) cycle<sup>440</sup> or otherwise indicated an openness to reforming their laws during the UPR process.<sup>441</sup> Zimbabwe decriminalized HIV transmission in March 2022,<sup>442</sup> while it still criminalizes same-sex sexual activity;<sup>443</sup> decriminalizing HIV-positive status eliminates an additional mode of criminalization that might affect LGBTI individuals in these nations.<sup>444</sup>

Even in African countries that criminalize same-sex activity and prosecute on the basis of perceived sexual orientation, lawmakers have signaled areas in which they would be open to instituting legal protections<sup>445</sup> or building public support to enact such protections in law.<sup>446</sup> For example, Mauritius, which criminalizes all same-sex sexual activity,<sup>447</sup> has instituted protections in its employment non-discrimination statutes in the past ten years.<sup>448</sup> Many countries received recommendations from a UPR report to decriminalize or institute other protections for LGBTI individuals but failed to respond.<sup>449</sup> Other countries have accepted recommendations; in 2022, Zimbabwe accepted one recommendation to strengthen efforts against violence motivated by sexual orientation and gender identity and

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440. Cameroon accepted a recommendation to investigate police violence against LGBTI or LGBTI-perceived individuals. *Id.* at 61. Liberia accepted three recommendations related to the issue of decriminalization and protecting LGBTI individuals from discrimination by law. *Id.* at 72. Malawi and Swaziland accepted two recommendations to prevent violence against LGBTI individuals and to provide effective access to health care. *Id.* at 74, 85. Uganda accepted three recommendations to improve protections against violence for LGBTI individuals. *Id.* at 90. Zambia accepted one recommendation to investigate attacks against LGBTI individuals. *Id.* at 92.

441. *See id.*, at 57–93, for a discussion of each African State’s recent UPR reports. Botswana indicated that it would undertake an educational awareness campaign on issues including sexual orientation. *Id.* at 59. Burundi indicated it would raise the issue with its parliament in 2015. *Id.* at 60. Mauritania indicated that it would accept help in the country to resolve issues of intolerance. *Id.* at 75. Tunisia indicated that it would consider a national dialogue on LGBTI rights. *Id.* at 88.

442. 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>.

443. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 125.

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

445. *See, e.g.*, Mauritius Equal Opportunities Act 42 of 2008, <https://perma.cc/3EYL-E7X5> (providing for equal opportunities in employment).

446. *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”).

447. *See Reid*, *supra* note 438.

448. Mauritius Equal Opportunities Act, *supra* note 445, at § 1.3.

449. 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 56 (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”).

one recommendation to protect intersex minors' bodily integrity and stop non-consensual surgeries.<sup>450</sup>

Finally, several large initiatives to criminalize perceived or actual participation in same-sex sexual activity have been abandoned or failed to pass.<sup>451</sup> Ethiopia introduced a law similar to Uganda's Anti-Homosexuality Act, but it ultimately never came to fruition.<sup>452</sup> Ethiopia also considered legislation in 2014 that would make same-sex sexual activity a non-pardonable offense, and the bill was ultimately abandoned.<sup>453</sup> The Republic of Chad considered making same-sex sexual activity a punishable offense in 2014, but the provisions did not pass.<sup>454</sup> 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.<sup>455</sup>

States that have decriminalized same-sex sexual activity may still lack protections and effective ways to prevent violence against LGBTI individuals.<sup>456</sup> Angola, Cabo Verde, Guinea Bissau, and Mozambique have enacted laws that directly or indirectly prohibit same-sex marriage.<sup>457</sup> Many African countries also report both major and minor instances of violence and discrimination against LGBTI individuals,<sup>458</sup> including South Africa, which includes protections against discrimination in multiple pieces of legislation and in its constitution.<sup>459</sup>

*b. Recent Protections.* As of 2000, South Africa is the only African country with multiple explicitly granted rights and protections for LGBTI individuals in their legal framework.<sup>460</sup> These rights includes protections against discrimination in employment and generally based on sexual orientation, gender identity, and

450. *Id.*

451. *See, e.g., World Report 2015: Ethiopia*, HUM. RTS. WATCH, <https://perma.cc/HKR8-UTF7> (last modified Feb. 16, 2016, 3:58 AM).

452. *Id.*

453. DUTCH COUNCIL FOR REFUGEES, *supra* note 61, at 59.

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

455. *See* Global Commission on HIV and the Law, *supra* note 101, at 18.

456. *See* NATH, *supra* note 428.

457. *See* CÓDIGO DA FAMÍLIA [FAMILY CODE] art. 20 (Angl.) (defining marriage as between a man and a woman); 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).

458. *See generally* Rodenbough, *supra* note 434.

459. *See* S. Afr. Const., *supra* note 427; Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 § 8 (S. Afr.) [hereinafter Promotion of Equality Act]; NATH, *supra* note 428.

460. Labour Relations Act 66 of 1995 § 187(f) (S. Afr.).

intersex status.<sup>461</sup> South Africa also has statutes that explicitly recognize same-sex marriage,<sup>462</sup> adoption rights for non-heterosexual couples,<sup>463</sup> and policies addressing crimes such as rape and sexual assault were rewritten to be gender-neutral.<sup>464</sup> Courts have consistently held that laws limiting protections or rights to heterosexual individuals violate the provisions against discrimination in the Constitution and by statute.<sup>465</sup>

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.<sup>466</sup> Fewer countries are enacting laws that discriminate against individuals with HIV, and they are instead enacting laws that protect individuals with HIV from discrimination.<sup>467</sup> 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.<sup>468</sup>

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.<sup>469</sup> 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.<sup>470</sup> 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.<sup>471</sup> Similarly, fifteen individuals who were arrested shortly following the passage of a new criminalization statute in The Gambia were acquitted and

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461. Promotion of Equality Act, *supra* note 459.

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

463. *See, e.g.,* Du Toit & Another v. Minister of Welfare & Population Dev. & Others 2002 40/01 (CC) (S. Afr.), <https://perma.cc/YA62-89CR>.

464. *See generally* Criminal Law (Sexual Offences and Related Matters) Amendment Act 37 of 2007 (S. Afr.); *see also* NATH, *supra* note 428, at 17.

465. *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).

466. *See* STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 218.

467. *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).

468. *See generally* *Nigeria Anti-Gay Laws*, *supra* note 467.

469. *See, e.g.,* *Eric Gitari v. NGO Coordination Bd.*, *infra* note 491.

470. *See id.*

471. Colin Stewart, *Cheers and Praise for Victory in Nigerian Court*, 76 CRIMES (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).

released after spending several months in prison.<sup>472</sup> 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.<sup>473</sup> A report on cases pursued by Kenyan officials found that all cases brought under criminal laws between 2007 and 2011 were dismissed because the government failed to present enough evidence for effective prosecution.<sup>474</sup>

Courts also have addressed violations of constitutionally protected rights without addressing the sexual orientation or gender identity of the individual affected.<sup>475</sup> 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.<sup>476</sup> 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.<sup>477</sup> A Kenyan court recently awarded compensation 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").<sup>478</sup> 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.<sup>479</sup>

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.<sup>480</sup> For instance, in 2016, a court in Botswana held the government's refusal to register an LGBTI

472. *Id.*

473. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 150; see also *People v. Kasonkomona* (2015) HPA 53/2014 (Zambia).

474. See *Oloka-Onyango*, *supra* note 49, at 7.

475. See *id.* at 8–9.

476. *Id.* (citing Miscellaneous Cause No. 2 of 2006 UGHC (22 November 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.

477. See *Zimbabwe*, HUM. DIGNITY TRUST, <https://perma.cc/E6QX-33NB> (last updated Jan. 25, 2023, 11:02 AM). But see *Zimbabwe 2021 Human Rights Report 48–49 (2021)*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. <https://perma.cc/P7SC-SLW4> (reporting NGOs say that LGBTIQI+ 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).

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

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

480. *Thuto Rammoge v. Att'y Gen. of Botswana*, H.C.C. MAHGB-ooo175-13 (Nov. 14, 2014).

organization to operate within the country unconstitutional, based on the protected right to freedom of expression.<sup>481</sup> 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.<sup>482</sup> 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.<sup>483</sup> 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.<sup>484</sup>

Despite the victories in court for LGBTI activists and organizations, courts do not uniformly protect the rights of LGBTI individuals.<sup>485</sup> 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.<sup>486</sup> In 2015, a Cameroon court upheld the conviction of 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."<sup>487</sup> 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

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

482. *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 49, at 23 (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> (last visited Nov. 1, 2022). 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 49, at 28–29. 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.*

483. *Id.* However, a recent appeal of a conviction under the HIV criminalization statute in Zimbabwe that challenged the constitutionality of the HIV criminalization statute for the same reasons was ultimately dismissed, with the court holding that the law did not infringe on citizens' constitutional rights. *See* Paidamoyo Chipunza, *Zimbabwe: Activists Call for HIV Criminalisation Law to Be Scrapped as It Reversed Public Health Gains in National HIV Response*, HIV JUST. NETWORK, <https://perma.cc/JA9Z-JCX9> (last visited Nov. 1, 2022); *ConCourt Rules on Willful HIV Infections*, ZIMBABWE DAILY (June 18, 2016, 10:49 PM), <https://perma.cc/EE4D-66EQ>.

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

485. *Compare* Stewart, *supra* note 471 with Clár Ní Chonghaile, *infra* note 487.

486. GHOSHAL, DIGNITY DEBASED, *supra* note 114, at 3–4, 31.

487. 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>.

meeting of the organization.<sup>488</sup> The court declined to protect the group's right to freedom of assembly, stating: "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."<sup>489</sup> It is possible that the Ugandan court was influenced by public opinion leading up to the passage of the Anti-Homosexuality Act in 2014.<sup>490</sup>

*c. Legal Recognition of Gender Change.* Only South Africa legally recognizes an individual's right to change their gender or sex on State-issued identification documents.<sup>491</sup> In other African countries, an individual's ability to change their gender or sex on identity documents may be addressed at common law, but it is not given legal recognition in statutory form.<sup>492</sup> For example, a Kenyan court held that a transgender woman was legally entitled to have her gender change recognized, but did not extend this ruling beyond the case at hand or otherwise change the law.<sup>493</sup> The court later refused to compel the government to set medical guidelines for recognition of "Gender Identity Disorder,"<sup>494</sup> which was a

488. See Oloka-Onyango, *supra* note 49, at 17.

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

490. See Oloka-Onyango, *supra* note 49, at 17; see also AENGUS CARROLL, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF SEXUAL ORIENTATION LAWS 91 (MAY 2016), <https://perma.cc/TL5C-R7RL> (citing 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).

491. Alteration of Sex Description and Sex Status Act 49 of 2003 (S. Afr.), <https://perma.cc/B566-9FAE>. However, it may be difficult to access effective medical care. See Ziphezhinhle Msimango, *Born in the Wrong Body: The Fight for Transgender Surgery in SA*, SUNDAY TIMES (Oct. 18, 2018), <https://perma.cc/Y7VA-FLGM>.

492. A review of scholarly literature and analysis yields no indication of other countries with established processes for change of gender or sex on identity documents. See Ghoshal & Knight, *supra* note 7.

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

494. Katy Migiro, *Kenya's Transgender Warrior: From Suicide Bid to Celebrity*, YAHOO NEWS, <https://perma.cc/KF8V-9Z33> (last visited Nov. 1, 2022). The World Professional Association for Transgender Health, in its most recent Standards of Care recommendation, notes that the term "Gender Identity Disorder" (now called "Gender Dysphoria") refers to "distress or discomfort that may be experienced because a person's gender identity differs from that which is physically and/or socially attributed to their sex assigned at birth." E. Coleman, A. E. Radix, W. P. Bouman, G. R. Brown, A. L. C. de Vries, M. B. Deutsch, R. Ettner, L. Fraser, M. Goodman, J. Green, A. B. Hancock, T. W. Johnson, D. H. Karasic, G. A. Knudson, S. F. Leibowitz, H. F. L. Meyer-Bahlburg, S. J. Monstrey, J. Motmans, L. Nahata, T. O. Nieder, S. L. Reisner, C. Richards, L. S. Schechter, V. Tangpricha, A. C. Tishelman, M. A. A. Van Trotsenburg, S. Winter, K. Ducheny, N. J. Adams, T. M. Adrián, L. R. Allen, D. Azul, H. Bagga, K. Başar, D. S. Bathory, J. J. Belinky, D. R. Berg, J. U. Berli, R. O. BluebondLangner, M.-B. Bouman, M. L. Bowers, P. J. Brassard, J. Byrne, L. Capitán, C. J. Cargill, J. M. Carswell, S. C. Chang, G. Chelvakumar, T. Corneil, K. B. Dalke, G. De Cuypere, E. de Vries, M. Den Heijer, A. H. Devor, C. Dhejne, A. D'Marco, E. K. Edmiston, L. Edwards-Leeper, R. Ehrbar, D. Ehrensaft, J. Eisfeld, E. Elaut, L. Erickson-Schroth, J. L. Feldman, A. D. Fisher, M. M. Garcia, L. Gijs, S. E. Green, B. P. Hall, T. L. D. Hardy, M. S. Irwig, L. A. Jacobs, A. C. Janssen, K. Johnson, D. T. Klink, B. P. C. Kreukels,



required prerequisite to obtain a legally recognized gender change.<sup>495</sup>

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.<sup>496</sup>

*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.<sup>497</sup> 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).<sup>498</sup> 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.<sup>499</sup> Although the mandate was ultimately not included in the bill, the debate highlights lawmakers' ignorance of issues affecting trans and intersex individuals.<sup>500</sup>

There are, however, signs of progress in various instances in which issues that affect intersex people have been recognized.<sup>501</sup> 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.<sup>502</sup> 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.<sup>503</sup> South Africa included "intersex" under the definition of "sex" in its antidiscrimination statute enacted in 2005.<sup>504</sup> In 2016, A Kenyan lawmaker presented Parliament with a law recognizing a third gender to help remove some of the stigma that people

L. E. Kuper, E. J. Kvach, M. A. Malouf, R. Massey, T. Mazur, C. McLachlan, S. D. Morrison, S. W. Mosser, P. M. Neira, U. Nygren, J. M. Oates, J. Obedin-Maliver, G. Pagkalos, J. Patton, N. Phanuphak, K. Rachlin, T. Reed, G. N. Rider, J. Ristori, S. Robbins-Cherry, S. A. Roberts, K. A. Rodriguez-Wallberg, S. M. Rosenthal, K. Sabir, J. D. Safer, A. I. Scheim, L. J. Seal, T. J. Sehoole, K. Spencer, C. St. Amand, T. D. Steensma, J. F. Strang, G. B. Taylor, K. Tilleman, G. G. T'Sjoen, L. N. Vala, N. M. Van Mello, J. F. Veale, J. A. Vencill, B. Vincent, L. M. Wesp, M. A. West, & J. Arcelus, *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1, S252 (Sept. 2022), <https://perma.cc/E8MQ-8A44>.

495. See Migiro, *supra* note 494.

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

497. A review of literature produced by human rights organizations, including the International Lesbian, Gay, Bisexual, Transgender, and Intersex Association, Human Rights Watch, and UN publications, indicates no mention of development in the laws of African countries other than South Africa regarding the treatment of individuals who are intersex. UN Human Rights Council, United Nations High Commissioner for Human Rights, Annual Report: Discrimination and violence against individuals based on their sexual orientation and gender identity, 19 A/HRC/29/23 (May 4, 2015).

498. *Id.* at 6.

499. See Oloka-Onyango, *supra* note 49, at 28.

500. *See id.*

501. *See, e.g.,* Baby A & The Cradle v. Att'y Gen. (2013) Pet. 266 K.L.R. 66-67 paras. at 17–18 (Kenya), <https://perma.cc/IB3M-BWB3> (last visited Feb. 7, 2023).

502. *Id.*

503. *See* Oloka-Onyango, *supra* note 49, at 30–31.

504. Promotion of Equality Act, *supra* note 459.

who are transgender or intersex face.<sup>505</sup> The proposed law would also provide funding for public awareness and medical expenses for intersex individuals.<sup>506</sup>

## 2. The Americas

Despite discrimination against the LGBTI community, legal advances and protections for the LGBTI community are being made in various areas.<sup>507</sup> For example, same-sex marriage and unions are becoming increasingly legal and most countries have provisions for employment discrimination protection.<sup>508</sup> Protections for non-normative gender identity and openness in military service, however, are less pervasive.<sup>509</sup>

*a. Recognition of Unions.* Recognition of same-sex marriage and unions has come through a mixture of court and legislative action in different countries.<sup>510</sup> Canada, Mexico and the U.S. recognize same-sex marriage.<sup>511</sup> 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.<sup>512</sup>

In South America, same-sex marriage is legal in Argentina, Brazil, Chile, Colombia, Costa Rica, and Uruguay.<sup>513</sup> Argentina was the first Latin American country to legalize same-sex unions—it passed a Civil Union Law in December 2007, giving same-sex unions similar rights to those of heterosexual marriages.<sup>514</sup> However, the law was restrictive because it required couples to be together for at least five years.<sup>515</sup> Then in 2013, Uruguay became the second country in Latin America to legislatively legalize same-sex marriage.<sup>516</sup> In Brazil and Colombia, rights for same-sex couples came through court rulings, in 2011 and 2009, respectively.<sup>517</sup> Chile legalized same sex marriage through legislation in 2021, while the Costa Rican Supreme Court ruled for marriage equality in 2020.<sup>518</sup>

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505. *Kenyan MP Pushes for Law to Recognise Intersex People*, BBC NEWS, <https://perma.cc/3D94-AAMF> (last visited Feb. 7, 2023).

506. *Id.*

507. *See infra* notes 520, 536.

508. *See infra* notes 520, 524, 529.

509. *See infra* notes 558, 564, 561 and accompanying text.

510. *See* Glickhouse & Keller, *supra* note 183.

511. *See Recognition Map*, *supra* note 164.

512. Glickhouse & Keller, *supra* note 183; Eulich, *supra* note 168; Stephen Smith, *Canada Legalizes Gay Marriage*, CBS NEWS, <https://perma.cc/E4EC-8FQY> (last visited Feb. 7, 2023).

513. *Marriage Equality Across the World Map*, HUM. RTS. CAMPAIGN, <https://perma.cc/43QB-2RD7> (last visited Mar. 7, 2023).

514. Glickhouse & Keller, *supra* note 183.

515. *Id.*

516. *Id.* *See also* *Uruguay Congress Approves Gay Marriage Bill*, BBC, <https://perma.cc/Y2J7-UUSJ> (last visited Feb. 7, 2023).

517. Glickhouse & Keller, *supra* note 183.

518. *Marriage Equality Across the World Map*, *supra* note 513.

*b. Protection from Employment Discrimination.* Many countries protect LGBTI citizens from workplace discrimination.<sup>519</sup> The U.S. and Costa Rica have statutory or other provisions specifying sexual orientation as a basis for nondiscrimination.<sup>520</sup> Although Costa Rica has limited protections, a law was passed in 1998 that prohibited discrimination against people with HIV/AIDS.<sup>521</sup> In 2015, Costa Rican Vice President Ana Helena Chacón announced an executive order prohibiting public institutions and workers from discriminating on the basis of sexual orientation or gender identity.<sup>522</sup>

Other countries, including Bolivia, Canada, Ecuador, and Mexico, have constitutionally-based prohibitions on discrimination based on sexual orientation.<sup>523</sup> Canada also has statutory provisions protecting individuals against discrimination based on sexual orientation.<sup>524</sup> Many of the laws seem to focus primarily on sexual orientation; Bolivia and Mexico City, Mexico, specifically protect transgender individuals from discrimination as well.<sup>525</sup> Other countries prohibit discrimination in employment but may not specifically identify sexual orientation as a protected category.<sup>526</sup>

*c. Hate Crimes.* Among the countries that protect individuals against hate crimes, levels of protection vary.<sup>527</sup> Some protect from hate crimes based on sexual orientation, while others also punish individuals for an incitement to hatred based on sexual orientation.<sup>528</sup> Others, at a minimum, have a national human rights institution that focuses on sexual orientation in its human rights work.<sup>529</sup>

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519. *Protection Map*, *supra* note 164. Countries that do protect LGBTI citizens from workplace discrimination include Argentina, Bolivia, Brazil, Canada, Colombia, Costa Rica, Ecuador, Guatemala, Haiti, Mexico, Nicaragua, U.S., Uruguay, and Venezuela. *Id.*

520. *Protection Map*, *supra* note 164.

521. Ley No. 7771 Ley General del VIH/SIDA, La Gaceta, Diario Oficial [L.G.], 20 May 1998 (Costa Rica).

522. Zach Dyer, *Costa Rica to Punish Public Workers for LGBT Discrimination*, TICO TIMES, <https://perma.cc/7SSS-CLAF> (last visited Feb. 7, 2023).

523. *Protection Map*, *supra* note 164; *Same-Sex Marriage Is Legal in Ecuador, but Will All Ecuadorians Accept It?*, WPR, <https://perma.cc/ZB58-DXS8> (last visited Jan. 22 2023).

524. *Id.*

525. In Bolivia, the constitution and statutes prohibit discrimination based on sexual orientation and gender identity. Bolivia 2021, *supra* note 185. Mexican law prohibits discrimination against LGBTI individuals, but only Mexico City provides for protections based on gender identity. Mexico 2021, *supra* note 185.

526. *Protection Map*, *supra* note 164 (countries with general non-discrimination laws include: Colombia, Guatemala, Nicaragua, Venezuela, Ecuador, Brazil, Argentina, Chile, and Haiti).

527. *See id.*

528. *See Protection Map*, *supra* note 164. Countries that prohibit incitement to hatred based on sexual orientation include Bolivia, Mexico, Canada, U.S., Uruguay, and Colombia. *Id.* Countries that consider hate crimes based on sexual orientation an aggravating circumstance include Argentina, Brazil, Canada, Ecuador, Mexico, Nicaragua, U.S., and Uruguay. *Id.*

529. *See id.*

Other countries have more advanced hate crime protections.<sup>530</sup> Uruguay, for example, prohibits prejudice based on sexual orientation and identity.<sup>531</sup> Uruguay also established a commission to examine discriminatory practices and recommend new legislation to protect LGBTI individuals.<sup>532</sup> Similarly, in Canada, the criminal code sanctions and protects against hate, bias, and prejudice based on sexual orientation.<sup>533</sup> Certain Canadian territories also include additional protections based on gender identity and gender expression.<sup>534</sup>

*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 one of the world's most 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.<sup>535</sup> Moreover, Cuba has sponsored sex reassignment surgery free of charge since 2008.<sup>536</sup> 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.<sup>537</sup> 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.<sup>538</sup> Since 2007,

530. *Id.*

531. *Id.*; *Effort to Roll Back Transgender Rights Fails in Uruguay*, VOICE OF AM., <https://perma.cc/DN2Z-WV34> (last visited Jan. 22, 2023).

532. *See id.*

533. *Canada 2015 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (2015); *Rights of LGBTI persons*, GOV'T OF CAN., <https://perma.cc/FK6E-Q3LE> (last modified May 16, 2022).

534. *Id.*

535. Argentina 2021, *supra* note 185; *New law in Argentina could change lives in the transgender community*, WORLD ECON. F., <https://perma.cc/655J-BRYL> (last visited Jan. 22, 2023); *Transgender people in Argentina and Colombia fight for equal rights*, GOV'T OF THE NETH., <https://perma.cc/4U8M-SZRB> (last visited Jan. 22, 2023).

536. Glickhouse & Keller, *supra* note 183.

537. *Compare Canada 2015 Human Rights Report, supra* note 533 *with Costa Rica 2015 Human Rights Report*, U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. & LAB. (2015). 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. 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. In Costa Rica, an individual can change gender on documents through an administrative law judge's decision and later registration in the Civil Registry Office. *Id.*

538. *Bolivia's first transgender news anchor puts LGBTQ issues front and center*, NBC NEWS (July 8, 2020, 8:59 AM), <https://perma.cc/GC94-X2CS>; *Bolivia's transgender community pays high price for affirming sexual identity*, LA PRENSA LATINA, <https://perma.cc/6JFP-WTSC> (last visited Jan. 22, 2023).

only seven persons in Bolivia have reportedly been able to complete the change.<sup>539</sup>

*e. Military.* Few countries allow for LGBTI members to serve openly in the military.<sup>540</sup> Those in Latin America and North America that do allow LGBTI persons to serve in the military include Argentina, Cuba, Chile, Colombia, Canada, Ecuador, El Salvador, Mexico, Paraguay, Peru, Uruguay, and the U.S.<sup>541</sup> Canada, which also provides protection against gender-based discrimination, has allowed transgender individuals to serve in the military since 1992.<sup>542</sup> Similarly, in 2009, Peru's Constitutional Court ruled that LGB Peruvians can serve in the police and the armed forces.<sup>543</sup> In contrast, LGBTI service members in Mexico have reportedly been discharged under laws concerning proper conduct and morality.<sup>544</sup>

### 3. Asia and the Pacific

Asia is a diverse region with varying degrees of protection for LGBTI individuals across different countries.<sup>545</sup> The region is currently experiencing a greater push to accept LGBTI people into the society.<sup>546</sup> 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.<sup>547</sup>

*a. LGBTI Recognition and Protection.* Thailand not only emphasizes that all citizens have equal rights but also offers constitutional protection against discrimination of individuals based on gender.<sup>548</sup> The 2007 Thai Constitution emphasizes that every citizen must be protected against discrimination, “especially by the State itself.”<sup>549</sup> In New Zealand, same-sex sexual activity was decriminalized in 1986, and in 1994 “post-operative transsexuals” were allowed to marry as their new sexual orientation; less than 10 years later, New Zealand legalized same-sex

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539. See *Bolivia's transgender community pays high price for affirming sexual identity*, *supra* note 538.

540. Glickhouse & Keller, *supra* note 183; Corrales, *supra* note 162, at 31.

541. Glickhouse & Keller, *supra* note 183; Corrales, *supra* note 162 at 31; Katie Miller & Andrew Cray, *The Battles that Remain: Military Service and LGBT Equality*, CTR. FOR AM. PROGRESS, <https://perma.cc/LS7E-RJGF> (last visited Feb. 7, 2023).

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

543. Glickhouse & Keller, *supra* note 183; Sentencia del Tribunal Constitucional (2004) ¶ 87, <https://perma.cc/4AUN-L2LE>.

544. Glickhouse & Keller, *supra* note 183.

545. See *infra* section III.B.3.i.

546. See *Leave No One Behind*, *supra* note 195, at 4.

547. *Id.*

548. See Thailand Country Report, *supra* note 253, at 21; 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>.

549. *Id.*

marriage.<sup>550</sup> 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.”<sup>551</sup>

Asia has made progress regarding the advancement of LGBTI rights, notably transgender rights.<sup>552</sup> Courts in Hong Kong and Nepal have ruled in support of the recognition of LGBTI individuals.<sup>553</sup> In 2005, the Hong Kong Special Administrative Region (SAR) Court ruled that homosexual men possess equal rights and also protection from discrimination.<sup>554</sup> The Hong Kong Legislative Council decided to bring same-sex partners who live together under the protection of its domestic violence laws, widening the scope of legal protection for same-sex couples.<sup>555</sup> The government in Nepal has been ordered by the Supreme Court in a landmark ruling to recognize transgender individuals as citizens under law; transgender individuals were soon permitted to identify themselves as a “third gender” at voter registration, which is seen by some as no small feat.<sup>556</sup> Similarly, South Korea’s Supreme Court has held that “transsexuals have the right to be recognized for their current sex.”<sup>557</sup> Nevertheless, not many legal reforms have been taking place in the region.<sup>558</sup>

Traditionally, the laws of Mongolia have not explicitly discriminated against LGBTI individuals nor provided them protection; however, some progress towards legal recognition was seen in its laws.<sup>559</sup> In 2009, an amendment was made to Article 20(1) of the Civil Registration Law allowing the registration of sex changes on identity documents when accompanied by medical certification.<sup>560</sup> The Democratic People’s Republic of Korea has officially stated that

550. *Timeline: Gay Rights in New Zealand*, NZ HERALD (Apr. 17, 2013, 6:25 PM), <https://perma.cc/T2SV-FKWC>.

551. AUSTL. HUM. RTS. COMM’N, *FACE THE FACTS: LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX PEOPLE 2* (2014), <https://perma.cc/UD98-4FBX>; *Marriage equality in Australia*, AUSTL. GOV’T ATT’Y-GEN.’S DEP’T, <https://perma.cc/5PR5-4KL7> (last modified Aug. 31, 2021).

552. *See infra* notes 574–83.

553. Regional Dialogue, *supra* note 198, 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.*, THE DIPLOMAT (Feb. 10, 2021), <https://perma.cc/XR6S-B7EE>.

554. *Leave No One Behind*, *supra* note 195, at 6.

555. Holning Lau, *Grounding Conversations on Sexuality and Asian Law*, 44 UC DAVIS L. REV. 773, 779 (2011).

556. *See* Regional Dialogue, *supra* note 198, at 2; *see also* Holly Young, *Trans Rights: Meet the Face of Nepal’s Progressive ‘Third Gender’ Movement*, THE GUARDIAN (Feb. 12, 2016, 2:00 AM), <https://perma.cc/M23A-DPS6>.

557. Lau, *supra* note 555, at 774; *see also* Supreme Court [S. Ct.], 2004 Seu 42, June 22, 2006 (S. Kor.) (In re Change of Name and Correction of Family Register), <https://perma.cc/CGM6-9VAG> (last visited Feb. 7, 2023).

558. *See* Regional Dialogue, *supra* note 198, at 2.

559. *See* UNDP & USAID, *Being LGBT in Asia: Mongolia Country Report 6* (2014); Aubrey Menard & Khaliun Bayartsogt, *Charges in Mongolia LGBT attack hint at changing attitudes*, ALJAZEERA (Oct. 19, 2019), <https://perma.cc/UCG8-D83Q>.

560. *See id.*

“many individuals are born with homosexuality as a genetic trait” and that they are to be “treated with due respect.”<sup>561</sup>

*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.<sup>562</sup> New Zealand legalized same-sex unions in 2013—the first in the region.<sup>563</sup> Australia legalized same sex marriage in 2017.<sup>564</sup>

In Japan, Tokyo’s Shibuya Ward issued an ordinance in 2015 that recognizes same-sex marriage; however, there appears to be little chance for a nation-wide legalization in the near future.<sup>565</sup> 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 Korea.<sup>566</sup> 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.<sup>567</sup> Despite the generated attention, as of 2022, same-sex partnerships still do not have legislative or judicial recognition in South Korea.<sup>568</sup> However, in February 2023, the Seoul High Court ruled the National Health Insurance Service owed spousal coverage to a same-sex couple.<sup>569</sup> 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.<sup>570</sup> And, in the last several years, LGBTI-friendly NGOs, restaurants, shops, and magazines have continued to pop up around the country.<sup>571</sup> 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.<sup>572</sup> Taiwan legalized same-sex marriage in 2019, which made it the first

561. Richard Ammon, *Living in Silence: Gay North Korea*, GLOBALGAYZ (Dec. 23, 2011), <https://perma.cc/M6F7-K4FF>.

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

563. 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>.

564. See *Marriage equality in Australia*, *supra* note 551.

565. *Japan court says ban on same-sex marriage is constitutional*, NPR (June 20, 2022), <https://perma.cc/49BE-WYL3>.

566. 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>.

567. *Id.*

568. *Id.*

569. Joel Guinto & Damin Jung, *South Korea court recognises same-sex couple rights for first time*, BBC NEWS (Feb. 21, 2023), <https://perma.cc/R7MH-RR96>.

570. Cambodia Country Report, *supra* note 215, at 8.

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

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

country in Asia to do so, and in 2022, it started recognizing transnational same-sex marriages with non-Taiwanese partners.<sup>573</sup>

*c. The Role of Technology.* Amidst social pressure against open LGBTI conduct, media and technology became crucial in enabling the Asian LGBTI community to connect with others and organize the LGBTI rights movement.<sup>574</sup> Internet sites are often used to openly discuss sexuality-related topics.<sup>575</sup> In Pakistan, for example, there are smartphone applications that inform people of the nearest LGB person, provided that the person has created a profile in the app.<sup>576</sup> Meanwhile, more mainstream dating apps for meeting other LGBTI people, such as Grindr and Tinder, were banned in 2020 by the Pakistan Telecommunications Authority.<sup>577</sup> Other media, such as the television, also play an important part by fostering positive public discourse.<sup>578</sup> One example of this can be seen with a television show named ‘Love Patrol’ that left the viewers in the Pacific Islands with a better understanding of LGBTI individuals and helped create a positive public opinion towards LGBTI people.<sup>579</sup> For populations of Asia with access to technology, the technology provides the mobility and privacy necessary for organizing strategic LGBTI movements.<sup>580</sup>

#### 4. Europe

There have been some significant triumphs across Europe involving the recognition of transgender/intersex rights over the last few years,<sup>581</sup> and as of January 25, 2023, several European countries are debating additional important protections for transgender individuals.<sup>582</sup>

*a. Recognition of the Human Rights of Transgender People.* While many legal challenges continue to confront transgender individuals, several recent developments deserve note here.<sup>583</sup> The Council of Europe’s Commissioner for Human Rights declared that imposing burdensome requirements upon individuals

573. Thompson Chu, *Taiwan recognizes transnational same-sex marriage*, NIKKEI ASIA (Jan. 22, 2023), <https://perma.cc/C98X-3A53>.

574. China Country Report, *supra* note 203, at 12.

575. *Id.*

576. Mobeen Azhar, *Gay Pakistan: Where Sex Is Available and Relationships Are Difficult*, BBC (Aug. 27, 2013), <https://perma.cc/2E2C-AFCY>.

577. See Gibran Naiyyar Peshimam, *Dating app Grindr ‘disappointed’ by Pakistan block*, REUTERS (Sept. 3, 2020), <https://perma.cc/JP39-YKCB>.

578. Regional Dialogue, *supra* note 198, at 2.

579. *See id.*

580. *See Leave No One Behind*, *supra* note 195, at 10.

581. *The State of LGBT Human Rights Worldwide*, AMNESTY INT’L (May 21, 2015), <https://perma.cc/AKU2-WADZ>.

582. *See Enrique Anarte, FEATURE-Europe moves towards trans self-ID despite controversy*, REUTERS (Jan. 25, 2023), <https://perma.cc/V2H3-6YWH>.

583. IGLA-Europe, Annual Review 2023, *supra* note 266.



seeking legal recognition of their preferred gender disregards their human rights.<sup>584</sup> Advocacy work on behalf of children who are gender non-conforming has been especially effective, and in a public statement before the European Parliament, the Commissioner stated:

Trans and intersex children encounter specific obstacles to self-determination. Trans adolescents can find it difficult to access trans-specific health and support services [. . .] before they reach the age of majority. The legal recognition of trans and intersex children's sex or gender remains a huge hurdle in most countries. Children are rights-holders and they must be listened to in decision-making that concerns them. Sex or gender assigning treatment should be based on fully informed consent.<sup>585</sup>

The statement precipitated actions taken by several countries—Denmark, Malta, Ireland, and Sweden—to minimize or simplify the procedural barriers that challenge the ability of minors who are transgender to obtain legal gender recognition.<sup>586</sup> For example, Ireland's Gender Recognition Act was introduced in July 2015 and allows individuals over 18 to self-declare their gender identity without having to produce affirming medical testimony.<sup>587</sup>

Several countries have also eliminated requirements that a married person seeking gender reassignment must first obtain a divorce.<sup>588</sup> In the UK, for instance, the 2014 Marriage (Same Sex Couples) Act disposed of the requirement that a married transgender individual annul their marriage prior to receiving full legal recognition of their preferred gender.<sup>589</sup> Scotland, Denmark, and Malta have made even greater strides toward adopting legislation that removes forced divorce or marriage annulment as a precondition for transgender individuals to have their gender legally recognized.<sup>590</sup>

*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.<sup>591</sup> One of the most significant was the passage of Malta's Gender Identity, Gender Expression and Sex Characteristics Act in 2015.<sup>592</sup> The Act requires doctors to obtain an intersex

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584. An Issue Paper published by the Council Commissioner stated that “from a human rights and health care perspective, no mental disorder needs to be diagnosed in order to give access to treatment for a condition in need of medical care.” FRA 2015 Update, *supra* note 271, at 16.

585. *Id.* at 19.

586. *Id.*

587. ILGA-Europe, Annual Review 2016, *supra* note 263, at 89.

588. FRA 2015 Update, *supra* note 271, at 21.

589. *Id.* at 22.

590. *Id.*

591. IGLA-Europe, Annual Review 2023, *supra* note 266, at 9.

592. *Id.* at 174.

individual's consent prior to performing any modifying procedures,<sup>593</sup> thus establishing a "new benchmark in Europe" for affirming the right of self-determination.<sup>594</sup> The Act is also a departure from traditional EU birth registration legislation, which obliges 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.<sup>595</sup> Developments were also seen in Greece, which bolstered its anti-discrimination protections for intersex persons in December 2015.<sup>596</sup> Similarly, Finland amended its Gender Equality Act to prohibit discrimination based on "gender features of the body."<sup>597</sup> In France, "a court in Tours recognized an intersex person as gender neutral, the first time a French court has recognized an individual as having a gender other than male or female."<sup>598</sup>

Public officials in various European countries have also recognized the importance of increasing public exposure to the rights of intersex persons.<sup>599</sup> In May 2015, the EU Fundamental Rights Agency and the Council of Europe Human Rights Commissioner issued recommendations strongly emphasizing the human rights of individuals who are intersex, helping place "intersex issues firmly at the heart of the European agenda."<sup>600</sup>

## 5. The Middle East

Some of the most recent progress made in the recognition of same-sex relationships in the Middle East is seen in Lebanon.<sup>601</sup> 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.<sup>602</sup> 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.<sup>603</sup> Further, in 2013, the Lebanese Psychiatric Society published a release stating that the organization

593. *Id.*

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

595. FRA 2015 Update, *supra* note 271, 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.*

596. ILGA-Europe, Annual Review 2016, *supra* note 263, at 12.

597. *Id.*

598. *Id.*

599. *Id.*

600. *Id.*

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

602. Legislative Decree 340 of 1 Mar. 1943 (Penal Code) (Leb.), art. 534, available at <https://perma.cc/XK7P-U7G9>; *Lebanon Court*, *supra* note 601 (discussing a case in which nine LGBT people were acquitted of the crime of "unnatural offenses").

603. *Lebanon Sit-In*, *supra* note 408; cf. *Lebanon: Unlawful Crackdown on LGBTI Gatherings*, HUM. RTS. WATCH (July 4, 2022, 12:01 AM), <https://perma.cc/928H-63FW>.

recognized that homosexuality is not a mental disorder, and that homosexuality is not a disease that needs to be treated.<sup>604</sup> Following the original release, the Society amended the statement in 2015 demanding the abolishment of Article 534 of the Penal Code.<sup>605</sup>

Although there have been positive developments in Lebanon 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.<sup>606</sup> 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.<sup>607</sup> 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 as far as to create fake dating profiles on same-sex dating sites in order to “out” people suspected as being LGBTI.<sup>608</sup> 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 2000–2014, permitted joint adoption in 2018, and allowed surrogacy in 2022.<sup>609</sup>

There is a wide range of viewpoints about the LGBTI community around the Middle East, ranging from acceptance to discrimination and punishment.<sup>610</sup> Though 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.<sup>611</sup>

### 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,<sup>612</sup> and have thus agreed to international treaties that have been interpreted to prevent discrimination on the basis of sexual

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

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

606. See Cathrin Schaer, *LGBTQ communities face threats in Middle East*, DW (July 16, 2022), <https://perma.cc/5XSS-BUAW>.

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

608. *Id.*

609. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 204, 225, 298, 311, 327–28.

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

611. *Id.*

612. See *United Nations Regional Groups of Member States*, U.N., <https://perma.cc/TMH9-VWTC> (last visited Mar. 21, 2023).

orientation and gender identity.<sup>613</sup> Moreover, all African countries are members of the African Union<sup>614</sup> 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.<sup>615</sup>

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.<sup>616</sup> The International Covenant on Civil and Political Rights (ICCPR) provides that each signatory is obligated to ensure all citizens have their rights recognized without regard to sex, which includes sexual orientation.<sup>617</sup> Countries that criminalize LGB sexual orientations appear to be in violation of this provision.<sup>618</sup> The ICCPR also provides the right to freedom of expression, association, and assembly.<sup>619</sup> While countries that prevent organizations that serve LGBTI individuals from operating within their borders may be in effect violating this provision, countries like Uganda that purposefully shut down gatherings of LGBTI individuals are violating the ICCPR beyond doubt.<sup>620</sup>

613. See e.g., *Toonen*, *supra* note 27 (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).

614. See *Member States of the AU*, AFR. UNION, <https://perma.cc/8HAJ-PD9A> (last visited Nov. 2, 2022).

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

616. 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 114, 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).

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

618. See *id.* at art. 2.

619. See *id.* at art. 19, 21–22.

620. 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>.

Other international treaties indicate further instances where the laws of some African countries may contravene their UN obligations.<sup>621</sup> The practice of conducting anal examinations, for example, is likely a violation of the Convention Against Torture.<sup>622</sup> Furthermore, nonconsensual cosmetic surgery performed on intersex infants may violate the Convention on the Rights of the Child.<sup>623</sup> 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.<sup>624</sup> 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,<sup>625</sup> 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.<sup>626</sup>

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 Human and Peoples' Rights.<sup>627</sup> The African Charter, ratified by all members of the African Union except for Morocco,<sup>628</sup> requires member-states to report on the state of human rights and freedoms within their borders according to the guidelines in the charter.<sup>629</sup> Although the African Charter does not expressly mention sexual orientation or gender identity as categories to be protected against discrimination.<sup>630</sup> 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

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621. See GHOSHAL, DIGNITY DEBASED, *supra* note 114, at 59.

622. 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).

623. Greenberg, *supra* note 616, at 93.

624. See generally *General Recommendation No. 28*, *supra* note 616.

625. See *UPR Sexual Rights Database*, *supra* note 56 (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").

626. 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).

627. See *Ratification Table: African Charter on Human and Peoples' Rights*, *supra* note 615.

628. *Id.*

629. 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.

630. *Id.*

on sexual orientation.<sup>631</sup> 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.”<sup>632</sup> Resolution 275 condemns State-sanctioned violence against LGBTI individuals and the failure of States to protect individuals because of sexual orientation and gender identity.<sup>633</sup> 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.<sup>634</sup> 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.<sup>635</sup>

## 2. Americas

Many American nations have consented to various international human rights obligations, which consider LGBTI issues to be human rights concerns.<sup>636</sup> These obligations come in the form of regional and UN treaties.<sup>637</sup> The Inter-American Court of Human Rights also plays a role in defining and upholding international human rights obligations.<sup>638</sup> The decisions of the court are binding.<sup>639</sup> In conjunction with the American Convention on Human Rights, the court seeks to ensure domestic law is consistent with the convention’s requirements.<sup>640</sup> 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

631. 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 article 2 of the charter is to “ensure equality of treatment for individuals irrespective of . . . sexual orientation.”).

632. 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>.

633. *Id.*

634. *Id.*

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

636. 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 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*].

637. Saner, *supra* note 636; *Convention Against Discrimination*, *supra* note 636.

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

639. *Id.* at 7.

640. *Id.* at 6.

“unique family” was a “situation of risk” for them.<sup>641</sup> This decision effectively stated that sexual orientation and gender identity are protected under international human rights law.<sup>642</sup>

Despite many countries signing onto human rights treaties, many are in violation of those obligations.<sup>643</sup> Laws prohibiting same-sex unions, criminalizing LGBTI identity, and allowing discrimination against LGBTI individuals, for example, all violate various international treaties.<sup>644</sup> The interpretation that countries that discriminate based on LGBTI identity violate international law is supported by a 2016 Inter-American Court of Human Rights ruling.<sup>645</sup> The court ruled that the Colombian State discriminated against a gay man by not allowing him to receive the pension of his deceased partner of ten years.<sup>646</sup> Note that the Court’s rulings are only binding upon consenting countries.<sup>647</sup>

### 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.<sup>648</sup> The ICCPR declares the “fundamental rights guaranteed to all individuals regardless of race, color, sex, language, religion, opinion, nation, property, birth or other

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

642. *Id.*

643. Saner, *supra* note 636. For example, laws criminalizing homosexuality, or discriminating against the LGBT community would be in violation of those treaties.

644. See Convention Against Discrimination, *supra* note 636; *About LGBTI People and Human Rights*, U.N. OFF. OF THE HIGH COMM’R ON HUM. RTS., <https://perma.cc/3WZD-CY2N> (last visited Jan. 16, 2023). 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 LGBT people. 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 Chapter 1, Article 1. *Id.*

645. *Duque v. Colombia*, Case 123-05, Inter-Am. Comm’n H.R., Report No. 150/11 (2011), <https://perma.cc/7LSH-76X9>.

646. *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>.

647. *Inter-American Human Rights System*, INT’L JUST. RES. CTR., <https://perma.cc/HA2P-L6MR> (last visited Mar. 5, 2023). 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.*

648. 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>.

status.”<sup>649</sup> Because Singapore has not signed the ICCPR, Section 377A of the Singapore Penal Code punishing “acts of gross indecency” with imprisonment remained protected against the pressure from external legal obligations, but the provision was recently repealed due to increased acceptance of LGBT people within the country.<sup>650</sup> Four countries—Maldives, Sri Lanka, Turkmenistan, and Uzbekistan—have ratified the ICCPR and accepted the obligations,<sup>651</sup> but continue to criminalize or condemn homosexual activity within their borders.<sup>652</sup> 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.<sup>653</sup> These conflicting domestic laws are but some of the ongoing violations of ICCPR in Asia, as demonstrated by the previous section on legal obstacles against LGBTI individuals.<sup>654</sup>

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.”<sup>655</sup> Within Asia, the Asia Pacific Forum of National Human Rights Institutions (APF)<sup>656</sup> 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.<sup>657</sup> 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

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649. Suzanne Trimel & Grace Poore, *UN Urges End to Discrimination Against LGBT Individuals in Japan*, OUTRIGHT ACTION INT’L (July 25, 2014), <https://perma.cc/9SVA-GA2D>.

650. Tessa Wong, *377A: Singapore to end ban on gay sex*, BBC NEWS (Aug. 22, 2022), <https://perma.cc/ASM3-XU95>.

651. *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <https://perma.cc/3B3J-HYTK> (last visited Jan. 17, 2023) (select “International Covenant on Civil and Political Rights” from the “Treaty” drop down menu to view countries that have ratified).

652. Paula Gerber, *Countries Where Homosexuality Is Still a Crime—Asia*, COUNTRIES THAT STILL CRIMINALISE HOMOSEXUALITY, <https://perma.cc/PVW6-QAXY> (last visited Jan. 17, 2023).

653. Trimel & Poore, *supra* note 649.

654. *See supra* Section III.A.3; *see also* Leave No One Behind, *supra* note 195.

655. 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 and Christie M. Gardiner eds., 2018).

656. 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> (last visited Jan. 18, 2023); Poore, *supra* note 648, at 1 n.2.

657. Poore, *supra* note 648, at 3.



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.”<sup>658</sup> Other monitoring bodies such as CEDAW, ICCPR, and the International Covenant on Economic, Social and Cultural Rights experience similar complaints as human rights violations towards LGBTI individuals continue to grow.<sup>659</sup>

In light of the shortcomings of various international treaties, the Yogyakarta Principles<sup>660</sup> provide a firm basis for LGBTI advocacy in Asia.<sup>661</sup> The Principles have appeared in a number of important court decisions regarding LGBTI rights, including those of India, Nepal, and the Philippines.<sup>662</sup> 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 rulemaking.<sup>663</sup> In addition, Asia as a region does not currently possess its own human rights treaties like the Americas, Africa and Europe do.<sup>664</sup> However, the Asia Pacific Forum continues to utilize the Yogyakarta Principles as a basis for monitoring the domestic law of member countries.<sup>665</sup>

#### 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.”<sup>666</sup> However, despite these international obligations to implement the recommendations, countries often fail to make any domestic reforms to their legislation.<sup>667</sup> As the authors of the International Gay, Lesbian, Bisexual, Trans, and Intersex Association noted, “[t]here is no guarantee that a recommendation accepted will

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

659. See Poore, *supra* note 648, at 4.

660. See *supra* Section II.A; see also YOGYAKARTA PRINCIPLES, *supra* note 1; YOGYAKARTA PRINCIPLES PLUS 10, *supra* note 1.

661. See Poore, *supra* note 648, at 4.

662. Paula L. Eitelbrick & Alia Trabucco Zerán, *The Impact of the Yogyakarta Principles on International Human Rights Law Development: A Study of November 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.).

663. Eitelbrick & Zerán, *supra* note 662, at 10, 44.

664. *Id.* at 44.

665. See *id.* at 12.

666. *Basic facts about the UPR*, U.N. HUM. RTS. COUNCIL, <https://perma.cc/MBN4-42NN> (last visited Mar. 10, 2023).

667. Eponine Howarth, *The United Nations Universal Periodic Review: an effective tool for the international protection of human rights?*, LONDON SCH. ECON. L. REV. BLOG (Dec. 18, 2021), <https://perma.cc/SF7P-F2WQ>.

actually be implemented,” and “[s]ometimes national developments mean that an accepted recommendation is not implemented . . . .”<sup>668</sup> For example, Poland has still declined to implement any of the ten recommendations it accepted or partially accepted in 2017 regarding its problems of hate speech and hate crime.<sup>669</sup>

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 do not necessarily correlate with an increased sense of safety, acceptance, and equal opportunity for LGBTI individuals.<sup>670</sup> Victims of homophobic and transphobic violence still have no legal recourse in a number of European countries where no legislation exists that forbids hate speech targeting an individual’s sexual orientation and/or gender identity.<sup>671</sup>

## 5. The Middle East

Many Middle Eastern countries have been “passionately opposed to the application of international human rights principles to LGBTI people.”<sup>672</sup> Popular belief in the region is that this should not be a valid area of concern when it comes to addressing human rights abuses.<sup>673</sup> Middle Eastern countries have vehemently opposed international efforts to discuss and implement human rights protections for the LGBT community.<sup>674</sup> The Yogyakarta Principles include the rights to privacy, a life free from discrimination, basic human rights, freedom from torture, and the freedom of expression.<sup>675</sup> 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

668. CARROLL, *supra* note 490, at 22.

669. Compare UPR Sexual Rights Database, *supra* note 56 (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-Europe, Annual Review 2023, *supra* note 266, at 114 (describing incidents of bias-motivated speech in Poland), and STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 329 (noting Poland’s lack of laws prohibiting actions “incit[ing] hatred, violence or discrimination based on sexual orientation”).

670. See IGLA-Europe, Annual Review 2023, *supra* note 266, at 85–86, 128–30.

671. See STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 328–29.

672. Jayesh Needham, Note, *After the Arab Spring: A New Opportunity for LGBT Human Rights Advocacy?*, 20 DUKE GENDER L. & POL. 288, 307 (2013).

673. *Id.*

674. *Id.* at 307–08. Countries that have voted against UN Resolutions regarding the LGBT community, including, Kuwait, Saudi Arabia, UAE, Bahrain, Jordan, and Qatar. *Id.* 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. *Id.*

675. 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).

perpetrate acts of violence, depriving victims of basic human rights in contravention of the Yogyakarta Principles.<sup>676</sup> Countries that still punish same-sex sexual acts with the death penalty, like Iran and Saudi Arabia, violate the basic right to life protected by both the Yogyakarta Principles and the Universal Declaration of Human Rights.<sup>677</sup> Furthermore, although the Human Rights Commission held in the 1994 *Toonen* decision that all States were required to protect citizens from discrimination on the basis of sexual orientation,<sup>678</sup> many parts of the Middle East still fail to protect the LGBTI community.<sup>679</sup>

The Yogyakarta Principles explicitly state that no person should be denied asylum or refugee status based on sexual orientation and/or gender identity.<sup>680</sup> Even in countries that are tolerant of the LGBTI community, the ability to seek asylum for persecution based on gender identity or sexual orientation is non-existent.<sup>681</sup>

#### IV. CONCLUSION

The rights and recognition of LGBTI individuals in both international and foreign domestic law across the world is far from uniform.<sup>682</sup> This Article reveals 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 foreign domestic law that conflict with international standards and are potentially detrimental to LGBTI individuals living in those countries.<sup>683</sup> Domestically, many nations go beyond the protections suggested in international law to provide positive rights to LGBTI individuals, such as non-discrimination provisions and

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676. See discussion *supra* Section III.5.A. 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.

677. YOGYAKARTA PRINCIPLES, *supra* note 1, at 12; Universal Declaration of Human Rights, *supra* note 13.

678. See *Toonen v. Australia*, *supra* note 27.

679. STATE-SPONSORED HOMOPHOBIA, *supra* note 38, at 129–39; see, e.g., See Whitaker, *supra* note 359.

680. 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).

681. See, e.g., Yiftach Millo, *Identity and Integration in Israel and Kenya*, 42 FORCED MIGRATION REV. 52 (2013).

682. Compare *supra* Section II with ILGA-Europe, Annual Review 2022, *supra* note 261.

683. See, e.g., *supra* notes 437, 438, 634.

the legal recognition of relationships, name and gender change, and non-binary sex.<sup>684</sup> Nevertheless, many nations have responded to greater visibility of LGBTI individuals and issues with punishment and criminalization.<sup>685</sup> International and local organizations continue to work to heighten the legal standard of protection of LGBTI rights as fundamental human rights across borders.<sup>686</sup> The next thirty years will likely bring more attention to the different legal issues faced by LGBTI individuals across the world.

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684. See *Protection Map*, *supra* note 164.

685. See, e.g., discussion *supra* part III.A.1.ii.

686. See, e.g., *Egypt: 117 NGOs Slam HIV-Based Arrests and Trials*, *supra* note 90.