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The ICJ calls on South Asian States to end criminalization of LGBTI identities

South Asian States must repeal laws that discriminate against LGBTI persons, and must respect, protect and fulfill the full range of their human rights, the ICJ said today on International Day Against Homophobia and Transphobia (IDAHO-T).

These rights include the right to equality before the law and equal protection of the law for all without discrimination, to which LGBTI persons are entitled due to their inherent dignity as human beings.

Across South Asia, discriminatory laws have enabled socially constructed gender and sexual norms to foster and perpetuate intimidation, harassment, threats of violence and violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, due to animosity, hostility and hatred motivated in whole or in part by their actual or perceived sexual orientation, gender identity, gender expression and/or intersex status.

Under international law, including the International Bill of Rights, that is the Universal Declaration of Human Rights and the two Covenants – the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights – discrimination on the grounds of sexual orientation and/or gender identity is prohibited.

In this context, the Office of the UN High Commissioner of the Human Rights has underscored five core international human rights law obligations for States: (1) protecting individuals from homophobic and trans-phobic violence; (2) preventing torture and cruel, inhuman, and degrading treatment of LGBTI persons; (3) decriminalizing homosexuality; (4) prohibiting discrimination based on sexual orientation and gender identity; and (5) respecting the freedom of expression, association and peaceful assembly of LGBTI persons.

Under international human rights law, the principle of non-discrimination includes the right to determine one's sexuality, sexual orientation, and gender identity and gender expression.

Contrary to their international human rights law obligations in this respect, States' policing of gender and sexuality has created a pattern of stigma, harassment and violence.

For example, consensual same-sex sexual relations remain criminalized in seven out of eight countries in South Asia - Afghanistan, Bangladesh, Bhutan, India, Maldives, Pakistan, and Sri Lanka – based on colonial era laws, such as S. 377 of the Penal Codes of Pakistan, India, Maldives and Bangladesh, and similar legal provisions in Sri Lanka and Bhutan, that criminalize “carnal intercourse against the order of nature”.

While the enforcement of these laws rarely lead to actual criminal convictions and sentences of imprisonment, their mere continued existence creates an ominous and ongoing threat against and criminalizes entire sectors of the populations in these countries.

This, in turn, gives rise to a climate that encourages and is ripe for extortion, harassment and blackmail of LGBTI persons, by the police, as well as non-State actors, including the general public and even their own families.

In India, in 2014, the Supreme Court recognized the right of transgender persons to self-identify their gender as male, female or as third gender. However, the Transgender Persons Bill, 2016, if enacted in its current form, would deny the right of self-identification to transgender persons.

In another welcome move, on August 24 2017, the Indian Supreme Court affirmed the right to privacy as a fundamental right, and stated that one’s sexual orientation and gender identity are core aspects of an individual’s right to privacy.

Recently, the Court has also decided that it would hear petitions challenging the constitutional validity of S. 377 of the Indian Penal Code on the basis that this provision infringes the petitioners’ rights to sexuality, sexual autonomy, life, privacy, dignity and equality, along with other fundamental rights recognized by the Indian Constitution.

In Pakistan, in 2009, the Supreme Court directed the Government to recognize the human rights of transgender persons.

Subsequent Supreme Court orders further directed the Government to provide free medical and educational facilities, microcredit schemes and job quotas to transgender people in every Government department.

However, the Supreme Court’s orders have remained largely unimplemented. On 8 May 2018, the Pakistan Parliament has enacted a law to protect and promote the rights of transgender people.

While this law is a landmark achievement, it falls short of international standards in this area, including the Yogyakarta Principles on the application of international human rights law in relation to sexual orientation and gender identity.

In Nepal, in 2007, the Supreme Court in a landmark judgment directed the Government to ensure that people of diverse gender identities and sexual orientations enjoyed their fundamental rights without discrimination.

Further, the 2015 Constitution contains provisions for the protection, empowerment and advancement of gender and “sexual minorities”.

A recently tabled bill proposes to criminalize unnecessary medical interventions, and provides some, though incomplete, protections to intersex children.

While there have been some progressive developments, discrimination, violence and other human rights abuses against LGBTI people – both at the hands of State and non-State actors – remain rampant in South Asia.

Hence, on IDAHO-T, the ICJ renews its call on all South Asian Governments to repeal discriminatory laws against LGBTI persons, including laws that criminalize consensual same-sex sexual relations.

In addition, the organization urges all South Asian Governments to enable transgender persons’ right to self-identification of their gender, and to enact legislation that establishes prior, free, full, informed, genuine and consistent consent for any medically unnecessary interventions on intersex persons.

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Read also

ICJ Practitioners’ Guide No. 4: [Sexual Orientation, Gender Identity and International Human Rights Law](#), which provides legal practitioners, activists and policy-makers with detailed and practical references on international standards on sexual orientation, gender identity, gender expression, and sexual characteristics.

ICJ [Comparative Law Casebook: Sexual Orientation, Gender Identity, and Justice](#), which provides legal practitioners, activists and policy-makers with a compilation of legal cases on sexual orientation, gender identity, gender expression and sex characteristics.

ICJ India 2017 Report: [“Unnatural Offences” Obstacles to Justice in India Based on Sexual Orientation and Gender Identity](#), which provides a legal analysis of the discrimination and abuse faced by the LGBTI community in India based on over 100 interviews with LGBTI persons.