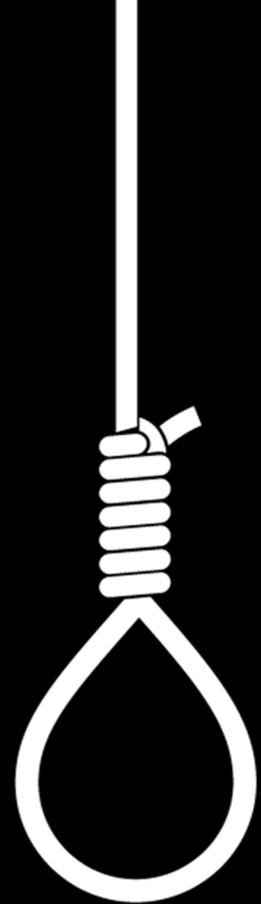


Briefing Note

The Death Penalty and its Arbitrary Use to Punish LGBTIQ Persons



20th World Day Against the Death Penalty

Introduction

While working towards the complete abolition of the death penalty worldwide, it is crucial to raise awareness on the discrimination that individuals face in countries that criminalise same-sex sexual conduct and the consequences such discrimination can have on a death sentence. Discrimination based on sexual orientation and gender identity often coupled with other elements of identity, such as race, ethnicity, religion and political beliefs, can expose individuals to intersecting forms of structural injustice and a denial of access to justice. Such discrimination and bias can also lead to critical mitigating factors not being considered during arrest and trial, such as the experiences of sexual and gender-based violence and custodial torture.

Death penalty and its arbitrary use to punish LGBTIQ persons

As of today, nearly 70 countries around the world still criminalize consensual same-sex sexual conduct. Furthermore, 11 countries – Afghanistan, Brunei Darussalam, Iran, Mauritania, Nigeria, Pakistan, Qatar, Saudi Arabia, Somalia, the United Arab Emirates and Yemen – of which 8 are in Asia, retain the death penalty as a possible punishment for same-sex sexual conduct. The use of criminal sanctions, including capital punishment against lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ) individuals is rampant in Asia, especially against those from disadvantaged socio-economic backgrounds and/or belonging to racial, ethnic or religious minority groups. Moreover, limited access to legal aid and legal representation, as well as bias within the criminal justice system, has a detrimental impact on LGBTIQ people's ability to be guaranteed a fair trial.

The death penalty has been imposed to punish LGBTIQ persons in Asia, with Iran being the most prolific in terms of carrying out executions. In early 2022, reports indicated that two gay men were executed on charges of 'sodomy' after they spent several years on the death row. Further, in August 2022 two women belonging to the LGBTIQ community were arrested by the Revolutionary Court of Urumieh, in the West Azerbaijan Province of Iran, and were sentenced to death under the charges of "corruption on earth" and "trafficking." Experts have expressed their concern about the arrests being based on their involvement in LGBTIQ rights activism and non-normative gender expression. Reports have pointed out that the vague provision of 'corruption on Earth' while not containing any explicit reference to sexual orientation, gender identity and expression, or sex characteristics, has been used to arrest LGBTIQ individuals.

International human rights law and standards

International human rights law is clear that, even those few States that have not yet abolished capital punishment, may only impose death sentences, let alone carry out executions, except for “the most serious crimes, and then only in the most exceptional cases and under the strictest limits” and “in a non-arbitrary manner.” The Human Rights Committee in its General Comment 36 has explained, among other things, that the term “the most serious crimes” must be read restrictively and appertain only to crimes of extreme gravity involving intentional killing. Further, in 2017, the UN Human Rights Council passed a resolution condemning the imposition of the death penalty for consensual same-sex sexual conduct. The resolution urged member States that continue to retain the death penalty to ensure that it is not “applied arbitrarily or in a discriminatory manner.”

Several UN Treaty Bodies and a number of Special Procedures of the UN Human Rights Council have recognized that the criminalization of same-sex conduct violates the rights to privacy, liberty and security of the person, including the right not to be subjected to arbitrary arrest and detention and have repeatedly urged States to repeal laws criminalizing homosexuality. Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment. Laws and regulations that directly or indirectly criminalize consensual same-sex sexual orientation provide State actors with the means to perpetrate human rights violations on account of their real or imputed sexual orientation and/or gender identity with impunity. Further, the UN Working Group on Arbitrary Detention has noted that detaining someone under laws criminalizing consensual same-sex sexual activity, including vague and less well defined offences, breaches international law.

In 2016, the Report of the Special Rapporteur on torture took note of the unique experiences of LGBTI persons and noted that victims of violence “face significant hurdles in accessing justice and reparations, including absence of or shortcomings in domestic legal frameworks to hold perpetrators accountable, and practical obstacles such as the significant expense involved in accessing court.” The UN Human Rights Committee has recommended that states must ensure “LGBT persons have access to justice, and that all allegations of attacks and threats against individuals targeted because of their sexual orientation or gender identity are thoroughly investigated. In its General Recommendation on Access to Justice in 2015, the CEDAW Committee noted that “discrimination against women is compounded by intersecting factors”, one of which was “being lesbian, bisexual, transgender women or intersex persons. These intersecting factors make it more difficult for women from those groups to gain access to justice.”

Conclusion

The use of the death penalty is not consistent with the right to life and the right to live free from torture or cruel, inhuman, or degrading treatment or punishment. All countries that continue to retain the death penalty for consensual same-sex sexual conduct must abolish the death penalty and introduce a moratorium on its use, as a necessary first step towards abolition. Further, authorities must ensure that all necessary safeguards are in place to ensure access to legal representation, fair trials and judicial transparency for those currently facing the death penalty in connection with their real or perceived sexual orientation and/or gender identity. Lastly, laws criminalizing consensual same-sex sexual conduct must be repealed including vague and broadly defined provisions that can be misused against individuals based on their real or purported SOGIESC.

Recommendations

- Abolish the death penalty; establish a moratorium on all executions and commute all death sentences
- Remove the mandatory death penalty for all crimes, including for offences relating to same-sex sexual acts and other vague provisions that criminalise persons of diverse gender expressions
- Bring national legislations in line with international law and standards by removing legal provisions that allow for the use of the death penalty for offences that do not meet the threshold of the “most serious crimes”
- Repeal all discriminatory laws that punish same-sex sexual relationships and non-normative gender expression.
- Ensure that all persons facing the death penalty – especially including those from disadvantaged or marginalized backgrounds – are provided access to effective legal assistance,
- Ensure judicial transparency by publishing full and detailed information, disaggregated by gender identity and sexual orientation, among other factors.

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ILGA Asia is the Asian Region of the International Lesbian, Gay, Bisexual, Trans, and Intersex Association, representing more than 190 member organisations across East Asia, South Asia, Southeast Asia, and West Asia. Our vision is a world where Asia is a safe place for all, where all can live in freedom and equality, be properly informed in the nature of sexual orientation and gender identity & expression and sex characteristic (SOGIESC) rights, have access to justice, and diversity is respected; regardless of their age, race, ethnicity, nationality, belief, language, class, caste, health and other statuses.