

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 7 | Issue 3

2024

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LGBTQ+ people in Afghanistan: An Analysis in the Context of Application of Sharia Law

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ABSTRACT

This article is an analysis of the post-Taliban era issues faced by LGBTQ+ people in Afghanistan. Sharia law is not in favor of accepting the sexual life of LGBTQ+ people. There are different approaches towards the LGBTQ+ community in different jurisdictions where Sharia is considered as the basis of law. Some countries like Afghanistan, Iran, and Saudi Arabia provide the death penalty, while others don't. A stricter interpretation of the Sharia law, which is the idea and agenda of the Taliban group, which is running the government now in Afghanistan, makes the plight of LGBTQ+ people more pathetic. The article gives a glimpse of the report submitted by the International Lesbian, Gay, Bisexual, Trans, and Intersex Association regarding the threats faced by and torturing experienced by LGBTQ+ people in Afghanistan. The exacerbation of the conditions happens through the already prevailing child marriage in Afghanistan. The chances of coming out through which an LGBTQ+ person reveals a non-heteronormative identity are suppressed through an act of child marriage. The article tries to applaud the efforts taken by countries like the Republic of Canada and the United Kingdom to provide settlement options for LGBTQ+ refugees from Afghanistan. The article suggests the international cooperation of nations and human rights agencies to mitigate the horrific plight of Afghanistan's LGBTQ+ community.

Keywords: LGBTQ+ people, Sharia law, Taliban.

I. INTRODUCTION

The LGBTQ+ community has been experiencing centuries-long discrimination and violence all over the world. Countries around the globe, led by democratic laws and progressive constitutions, as well as monarchic constitutions and despotic laws, have been unsympathetic towards gender and sexual minorities. India, still a country known to be progressive and democratic, had approved the legality of the existence of transgender people and acknowledged the right to the sexual life of non-heteronormative people only in the last decade. The number

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of countries with sodomy laws and rigorous punishments is around 80². The death penalty, imprisonment, and whipping could be the possible punishments existing in many such jurisdictions. Nigeria, Cameroon, Uganda, Mexico, Saudi Arabia, and Afghanistan are specific examples of countries with sodomy laws. President Vladimir Putin's Russia is known for suppression of LGBTQ rights, 'citing traditional family values' as the government's agenda.³ Recently, the Russian Supreme Court banned LGBTQ activism as extremism⁴. Countries like Saudi Arabia and Afghanistan have been known for imposition of Sharia law, which considers LGBTQ+ people as sinners.

Afghanistan is a country now ruled by a regime led by the Taliban, which is considered to be a hard-line extremist group by many countries. Taliban group had its emergence after the withdrawal of Soviet troops from Afghanistan⁵. The movement aimed at the establishment and enforcement of their version of Sharia law or Islamic law once they reached power.⁶ The capture of Afghanistan's capital, Kabul, by the Taliban happened in 1996, which gave them the first access to power for nearly five years. The strict interpretation of Sharia law was the signature deed of that regime. Post the September 11 terror attack, the accusations of the Taliban's involvement in the attack prompted American troops to launch an attack against Afghanistan. This resulted in the collapse of the Taliban regime.

The two-decade-long American invasion of Afghanistan had seen the Taliban kept away from the power circle. That long break came to an end in 2021, which had seen the withdrawal of American troops from Afghanistan. Afghanistan came completely under the control and power of the Taliban. The people who were reluctant to face the strict interpretation of Sharia law tried to flee away before Kabul fell entirely under the Taliban. When US Air Force Jets were taken off, apparent attempts of stowaways were reported, which reported a few deaths as well. The refugees from Afghanistan got admitted to the USA in 2023 hit the highest number in the last twenty years.⁷

² Amnesty International, 7 Discriminatory (or Deadly) Countries for LGBTQ+ People <https://www.amnestyusa.org/updates/7-discriminatory-or-deadly-countries-for-lgbt-people/>

³ Aljazeera, Russian Court Bans LGBTQ+ Movement as 'Extremist', <https://www.aljazeera.com/news/2023/11/30/russian-court-bans-lgbtq-movement-as-extremist> 30, November 2023

⁴ Aljazeera, Russian Court Bans LGBTQ+ Movement as 'Extremist', <https://www.aljazeera.com/news/2023/11/30/russian-court-bans-lgbtq-movement-as-extremist>, 12th August 2022

⁵ Aljazeera, Russian Court Bans LGBTQ+ Movement as 'Extremist', Who Are The Taliban? <https://www.bbc.com/news/world-south-asia-11451718>, 12th August 2022

⁶ Aljazeera, Russian Court Bans LGBTQ+ Movement as 'Extremist', Who Are The Taliban?, <https://www.bbc.com/news/world-south-asia-11451718>, 12th August 2022

⁷ Akmal Dawl, Afghan Special Migration to US Hits Record High, <https://www.voanews.com/a/afghan-special-migration-to-us-hits-record-high/7486128.html>, February 13, 2024

II. SHARIA AND LGBTQ+

Series of principles which got interpreted and debated by legal scholars⁸ bringing forth an ‘Islamic’ way of doing things⁹ in order to enable an individual to lead a life in line with the vision of God is known as Sharia. Based mainly on the Quran and the Prophet's sayings, works of scholars, judgments by courts, and customs have also contributed to the enlargement of the scope of Sharia law.¹⁰ Even though the Quran or the Prophet's sayings do not explicitly deal with same-sex relationships, interpretations of certain scholars who refer to the story of Lot and Sodom and Gomorrah opine that sodomy is a punishable act¹¹. Majority of Islamic jurists argue that this act should be equated to Zina (extramarital sexual intercourse between man and woman)¹². Hanafi school argues that since sodomy does not result in offspring, equating that with zina was not necessary.

There are many countries where the legal system finds its source or basis from sharia laws. Iran, Saudi Arabia, the United Arab Emirates, Yemen, Nigeria, Somalia, Mauritania, Qatar, Pakistan, and Afghanistan are the countries where the death penalty is a punishment for consensual homosexual relations.¹³ The countries that deal with LGBTQ+ people on the basis of Sharia laws have different approaches toward the community.¹⁴ There are certain countries led by Sharia law but avoid the death penalty even though the consensual same-sex act is criminalized. In 2019, Brunei came up with a law punishing homosexuality with stoning, but later, due to international outcry, a moratorium was imposed on the said law¹⁵. Muslim jurisprudence was also influenced by the colonial codes, which resulted in severe punishments for same-sex relations¹⁶. It was, to an extent, tolerated or treated with an inclusive approach during pre-

⁸ Religion and Public Life, Harvard Divinity School, Shari'a, <https://rpl.hds.harvard.edu/faq/sharia>

⁹ United States Commission on International Religious Freedom, Factsheet, Shari'a And LGBTI Persons, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf>, March 2021

¹⁰ United States Commission on International Religious Freedom, Factsheet, Shari'a And LGBTI Persons, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf>, March 2021

¹¹ United States Commission on International Religious Freedom, Factsheet, Shari'a And LGBTI Persons, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf>, March 2021

¹² Eleni Polymenopoulou, Same Sex Narratives and LGBTI Activism in Muslim World, <https://gjia.georgetown.edu/2020/05/18/same-sex-narratives-and-lgbti-activism-in-muslim-world/>, May 18, 2020

¹³ Criminalization of Consensual Same-Sex Sexual Acts, ILGAWORLD database, <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>

¹⁴ United States Commission on International Religious Freedom, Factsheet, Shari'a And LGBTI Persons, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf>, March 2021

¹⁵ Aljazeera, Brunei Halts Plan to Punish Gay Sex with Death by Stoning <https://www.aljazeera.com/news/2019/5/5/brunei-halts-plan-to-punish-gay-sex-with-death-by-stoning>

¹⁶ Eleni Polymenopoulou, Same Sex Narratives and LGBTI Activism in Muslim World, <https://gjia.georgetown.edu/2020/05/18/same-sex-narratives-and-lgbti-activism-in-muslim-world/>, May 18, 2020

colonial days.¹⁷.

III. LGBTQ+ PEOPLE IN AFGHANISTAN

The criminalization of LGBTQ activities could be divided into the pre-Taliban era and the post-Taliban era (after 2021).

(A) Pre-Taliban era

Even before the takeover of power by the Taliban in 2021, homosexuality was a criminal offense in Afghanistan. The main difference in the Penal Code after February 2018 was the explicit criminalization of homosexuality, which was absent in the code earlier. Pederasty (a sexual act between an adult and a boy) was punishable with long imprisonment earlier.¹⁸ The illegality of sodomy was confirmed through section 646 of the Penal Code, 2017¹⁹.

This act was defined as "the penetration of a male sexual organ into a female or a male anus, regardless of the depth of penetration", which was punishable with two years imprisonment.²⁰ The commitment of "Mosahege" was punishable up to one year under Section 645²¹ It is the sexual act of lesbianism that lacks penetration. Male-to-male sexual act without penetration is called 'Tafkhiz', which was punishable by a year imprisonment under section 649²². Section 650 criminalized "ghavadi" (incitement of two or more people to commit adultery or sodomy by introducing them to each other or finding them a place to do so)²³.

The unfortunate scenario is even the United Nations had approved these laws, citing that the new penal code is in line with the international humanitarian principles of the United Nations.²⁴.

(B) Post-Taliban era

The report by ILGA says that the gravity of the application of law in Afghanistan after the Taliban became the de facto government lacks clarity. A senior official of the Taliban had said that a council of Islamic scholars would frame the new legal framework and Islamic law would

¹⁷ Eleni Polymenopoulou, Same Sex Narratives and LGBTI Activism in Muslim World, <https://gjia.georgetown.edu/2020/05/18/same-sex-narratives-and-lgbti-activism-in-muslim-world/>, May 18, 2020

¹⁸ Criminalization of Consensual Same-Sex Sexual Acts, ILGAWORLD database <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>

¹⁹ Country Profile, Afghanistan, <https://www.humandignitytrust.org/country-profile/afghanistan/>

²⁰ Criminalization of Consensual Same-Sex Sexual Acts, ILGAWORLD database <https://database.ilga.org/criminalisation-consensual-same-sex-sexual-acts>

²¹ Country Profile, Afghanistan, <https://www.humandignitytrust.org/country-profile/afghanistan/>

²² Country Profile, Afghanistan, <https://www.humandignitytrust.org/country-profile/afghanistan/>

²³ United States Commission on International Religious Freedom, Factsheet, Shari'a And LGBTI Persons, <https://www.uscirf.gov/sites/default/files/2021-03/2021%20Factsheet%20-%20Sharia%20and%20LGBTI.pdf>, March 2021

²⁴ UN News, Global Perspective Human Stories, Afghanistan: UN mission welcomes new penal code, urges measures to protect women from violence, <https://news.un.org/en/story/2018/02/1003271>

be applied over democratic principles while explaining the plans for the new government.²⁵. Same-sex relations, adultery, and immorality are reportedly strictly prohibited through regulations provided by the Ministry of Vice and Virtue manual.²⁶. Human Rights Watch has reported serious violations of LGBTQ+ rights in Afghanistan in a post-Taliban era, which was found through a survey. Violence, death threats, and gang rape are the major findings of the survey.

SOGI has been found to be grounds for penalizing with imprisonment, public flogging, and death penalty, which are evidenced through documents²⁷. ILGA World's report "Our Identities under Arrest" compiles numerous cases of arrests and executions carried out by the Taliban²⁸.

Standing behind an about-to-fall wall or stoning are the two punishments for homosexuality promised by a Taliban judge, as reported by the media²⁹. Taliban's Ministry of Vice and Virtue published a manual in 2020 stating same-sex relations shall be prohibited by religious leaders and the allegations which are stronger should be adjudged by the district manager under the ministry.³⁰. These rules are abusive and harsher than the early announced policies of Taliban leaders.

(C) Glimpses of the ILGA report

ILGA World, an association working for the human rights protection of the LGBTQ+ community, had, on 30th March 2022, submitted a report on 'Peace, security and sexual orientation and gender identity in Afghanistan' to the 'UN Independent Expert on Protection against Violence and Discrimination based on sexual orientation and gender identity'³¹. This article also intends to look into this report.

²⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

²⁶ Human Rights Watch, Even If You Go to the Skies, We Will Find You, <https://www.hrw.org/report/2022/01/26/even-if-you-go-to-the-skies-we-will-find-you/lgbt-people-afghanistan-after-taliban-takeover>, January 26, 2022

²⁷ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

²⁸ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

²⁹ Ronzheimer. Paul. 13 September 2021. This Taliban judge orders stoning, hanging, hands chopped off. https://www.bild.de/politik/international/bild-international/this-taliban-judge-orders-stoning-hanging-hands-chopped-of-77067554.bild.html###wt_ref=https%3A%2F%2Fwww.google.com%2F&wt_t=1648380232422

³⁰ Human Rights Watch, Afghanistan: Taliban 'Vice' Handbook Abusive, <https://www.hrw.org/news/2021/10/29/afghanistan-taliban-vice-handbook-abusive>

³¹ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action

In 2022 the United Nations launched an appeal for funding for Afghanistan, which was the largest single-country aid ever, as the highest growth of poverty issues and humanitarian crises were getting reported from that country.³² Hunger risk is higher for already ostracised communities like LGBTQ+ people, who could face threats even in a queue for food³³

It is reasonable to presume that transgender people are more vulnerable to ostracisation and violent discrimination due to the gender expression they have compared to other members of the LGBTQ+ community. This makes transnational mobility a near impossibility for them. Refugee migration outside Afghanistan is a difficult task for every individual.³⁴ Along with transgender people, LGBTQ women also face discrimination of equal gravity, which makes it difficult to get through passport, and visa procedures.³⁵ Fear of getting spotted by officials while officially engaging and lack of knowledge due to deprivation of education are certain factors denying access to the option of migration for some LGBTQ+ people.³⁶

Since many people have migrated to countries criminalizing non-heteronormativity like Iran, Pakistan, and Turkey, the migration itself couldn't be a solution for the challenges they are facing, in addition to the lack of experience and expertise of UNHCR staff working with gender minorities.³⁷

Reported deaths of LGBTQ activists, even though they couldn't be verified, show light on the threats of violence and potential danger that LGBTQ+ people are facing under the Taliban

International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

³² UN News, Afghanistan: UN Launches Largest Single Country Aid Appeal Ever, <https://news.un.org/en/story/2022/01/1109492>

³³ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

³⁴ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

³⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

³⁶ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

³⁷ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

regime.³⁸ The reported death cases are substantiated with evidence of sexual assault and relatives' testimonies pointing towards association with LGBTQ+ as a reason for the death.³⁹ Even though violence like whipping and lashing got reported in the post-Taliban era, extreme violence like the murder of LGBTQ+ people for the reason of their SOGI hasn't yet been reported, which may be due to the media restrictions and a sense of fear in the minds of people. Violence against gay men and transgender women at places like detention centers and checkpoints has been reported. Victims of rape include gay men as well. The threat of disclosing the SOGI of LGBTQ+ persons amounting to extortion has been reported.

Like any other conservative society in the world, LGBTQ+ people in Afghanistan are forced to marry and have sex with a person not in line with their SOGI. Many child marriages are also reported, which had been a common anti-social practice in the pre-Taliban era. Complying with heteronormative norms has increased after the Taliban's return.

Hiding from the Taliban, fear of getting spotted in public places, fear of getting reported by other people to Taliban officials, etc have exacerbated the miserable life of LGBTQ+ people as some of them are even denied access to food, health, education, and employment.

(D) The plight of female LGBTQ members

When women are subjected to mahram rules like the mandatory accompaniment of a male relative to go out, an LGBTQ+ woman who may be getting ostracized inside her house would have nearly no access to outside life. This is in addition to the clothing restrictions and denials of work and employment. Girls, who are more susceptible to chances of child marriage, are trapped in a situation in which they cannot come out when they identify their LGBTQ+ identity.

IV. POSSIBLE SOLUTIONS

The only possible hope the LGBTQ+ community in Afghanistan has is the support of the international community. Globally, UNHCR-registered refugees in Afghanistan amount to 2.6 million.

The commitment to non-refoulement bestowed upon nations through the Convention Relating to the Status of Refugees, 1951, has created an obligation upon countries not to send them back to

³⁸ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

³⁹ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

their countries where they experienced prosecution. LGBTQ+-related sensitization training should be given to all the officials dealing with asylum seekers to ensure them safe and equal treatment, where international agencies can contribute a lot. The at-risk populations, including LGBTQ+ people, should be given priority in all types of resettlement processes. The commitment of the United Kingdom reflected through the Afghan Citizens Resettlement Scheme (ACRS) is an example of this. The scheme aimed to resettle 20,000 Afghan people over the years while vulnerable includi groups which includes women, girls and gender minorities.⁴⁰The Republic of Canada has also come forward with several special programs welcoming Afghan refugees, including LGTBQ+ people.⁴¹

LGBTQ+ inclusive jurisdictions should make an extra effort to protect LGBTQ+ people in Afghanistan which international agencies could also facilitate. Ensuring safety while identifying the LGBTQ+ people who are living in secrecy should be ensured.⁴²

A UN Security Council-mandated assessment team that analyses the international approach to the Afghan crisis is requested by agencies like Human Rights Watch to prioritize rights, including LGBTQ+ rights.⁴³ Access to food is also a threatening issue, and reports are coming regarding the lack of funds for many Afghan humanitarian organizations.⁴⁴ Countries, UN agencies, and NGOs have to design schemes to bridge this gap. Along with it, schemes addressing the lack of access to shelter for LGBTQ+ people should also be designed.⁴⁵

V. CONCLUSION

LGBTQ+ people have been experiencing traumatizing things in many countries where non-heteronormative lives are illegal and socially unacceptable. The commitment of the Taliban to a strict interpretation of Sharia laws makes the lives of LGBTQ+ people more exacerbated. Countries which are having legal frameworks to protect the rights of LGBTQ+ people should take initiatives to make the Taliban answerable to human rights commitments. At the same time,

⁴⁰ Afghan Citizens Resettlement Scheme, <https://www.gov.uk/guidance/afghan-citizens-resettlement-scheme>

⁴¹ Aljazeera, Where Does the World Stand on Afghan Refugees?, <https://www.aljazeera.com/news/2021/8/18/which-countries-will-take-in-afghan-refugees-and-how-many>.

⁴² International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

⁴³ Human Rights Watch, Afghanistan: UN Assessment Should Prioritize Rights, <https://www.hrw.org/news/2023/07/26/afghanistan-un-assessment-should-prioritize-rights>

⁴⁴ Human Rights Watch, Afghanistan: UN Assessment Should Prioritize Rights, <https://www.hrw.org/news/2023/07/26/afghanistan-un-assessment-should-prioritize-rights>

⁴⁵ International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA World) and OutRight Action International, Report on peace, security, sexual orientation and gender identity in Afghanistan, <https://www.ohchr.org/sites/default/files/documents/issues/sexualorientation/cfi-report-ga77/ngos/2022-11-10/ILGA%20World-Outright-Action-International.pdf>

countries like the United Kingdom are coming forward with laudable schemes for protecting at-risk populations, including LGBTQ+ people, that are not an inclusive solution for the protection of sexual minorities in Afghanistan. More commitments from nations, many more special programs, and many more interventions and monitoring from international human rights agencies are needed on this issue.
