

# Comments on Article 154 of the Draft Criminal Code of Uzbekistan



## Background

On 22 February 2021, the Prosecutor General's Office published a draft of Uzbekistan's new Criminal Code.<sup>1</sup> The introduction of this legislation presents a clear opportunity to finally decriminalise same-sex conduct between men in Uzbekistan, in line with international human rights standards and Uzbekistan's own Constitution. Regrettably, the draft Criminal Code retains Article 120 of the existing Criminal Code, although moved to Article 154 and worryingly included in a new Chapter V, entitled 'Crimes against family, children and morality'. The wording of the provision is unchanged:

*Besoqolbozlik (Homosexual Intercourse)*

*Besoqolbozlik, that is, voluntary sexual intercourse of two male individuals – shall be punished with imprisonment up to three years.*

To retain Article 120 in any form is contrary to Uzbekistan's constitutional protections, to international human rights standards and to Article 1 of the Draft Criminal Code itself, which states that the Code is "*grounded on the Constitution and universally recognised principles of international law*". This is a missed opportunity for Uzbekistan to bring their laws into conformity with international human rights standards by decriminalising same-sex sexual activity.

This submission sets out brief details of the clear global and regional trend towards the decriminalisation of consensual same-sex sexual activity. It then sets out the human rights breached by the existence of these laws. Finally, it discusses some of the further effects of criminalisation on LGBT people. This submission focuses primarily on the human rights compliance of the Article 154 and does not purport to consider any other aspects of the draft Code.

This submission is made by the Human Dignity Trust and ILGA-Europe, following a letter they co-signed on 7 March 2021 with other human rights organisations.<sup>2</sup>

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<sup>1</sup> Draft of the Criminal Code of the Republic of Uzbekistan, available at: <https://regulation.gov.uz/ru/d/29646>

<sup>2</sup> Available at: <https://www.ilga-europe.org/resources/news/latest-news/joint-statement-unique-opportunity-uzbekistan-decriminalise-same-sex#Russian>

## A global trend to decriminalise same-sex sexual activity

Since 1991, 50 jurisdictions across the world have decriminalised same-sex sexual activity. Many of those instances are the result of the development of new legislation in a post-Soviet era. The Soviet law had criminalised same-sex sexual activity, but in their new criminal law regimes of the 1990s, former Soviet states all chose *not* to criminalise same-sex sexual activity, save for two, of which Uzbekistan was one.

In its communication with the UN Committee Against Torture, Uzbekistan's government claimed that criminalisation of same-sex conduct between men reflects traditions and religion of Uzbekistan.<sup>3</sup> This ignores the universality of human rights and specifically the statement of the United Nations Special Rapporteur on Freedom of Religion or Belief that religious beliefs cannot be used to justify LGBT rights violations nor be invoked as legitimate 'justification' for violence or discrimination against LGBT people, and that the right to freedom of religion protects individuals and not religions as such.<sup>4</sup> It is therefore of particular note that several neighbouring states have decriminalised homosexuality: Azerbaijan repealed Article 121 of the Soviet Criminal Code<sup>5</sup> as part of the adoption of a new Criminal Code in 2000; Kazakhstan, which transposed Article 121 into Article 104 of its Soviet-era Criminal Code, repealed its Article 104 in 1997 when adopting the new Kazak Criminal Code; Kyrgyzstan legalised homosexuality in 1998; Tajikistan similarly removed Article 121 when it adopted its first Tajik Criminal Code. All of these countries are members of the Organization of Islamic Cooperation and have majority Muslim populations. It is worthy of note too that other Muslim majority jurisdictions which have decriminalised same-sex sexual activity in this period are Albania in 1995, Bosnia and Herzegovina in 2001 and Northern Cyprus in 2014.

In the past decade alone, in consideration of their own constitutions and international human rights obligations, at least thirteen jurisdictions across five continents have removed old laws which criminalised same-sex sexual activity: Lesotho, Sao Tome and Principe, Northern Cyprus, Palau, Mozambique, Belize, Nauru, Seychelles, India, Trinidad and Tobago, Angola, Botswana and Bhutan.

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<sup>3</sup> UN Committee against Torture (CAT), List of issues in relation to the fifth periodic report of Uzbekistan. Replies of Uzbekistan to the list of issues, 20 September 2019, CAT/C/UZB/Q/5/Add.1

<sup>4</sup> UNOHCHR (2 March 2020), "States should not use religious beliefs to justify women and LGBT+ rights violations – UN expert", accessible at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25644&LangID=E>

<sup>5</sup> Soviet Article 121: *Sexual relations between men (pederasty) – shall be punishable by deprivation of freedom for a period not to exceed five years. Pederasty when committed with physical violence, a threat, or with respect to a minor, or when taking advantage of the dependent position of the injured party – shall be punishable by deprivation of freedom for a period not to exceed eight years.*

To miss this opportunity to repeal Article 120 now would mark complete disregard for human rights and leave Uzbekistan in a fast-shrinking minority of jurisdictions which criminalise same-sex sexual activity.

## The existence of Article 154 of the Criminal Code is unconstitutional and breaches the human rights of LGBT people

A body of domestic, regional and international case-law has found laws which criminalise same-sex sexual activity to breach rights to privacy, dignity, equality before the law, non-discrimination, and freedom of expression. These rights are protected under the Constitution of Uzbekistan<sup>6</sup> and under the international human rights treaties to which Uzbekistan is party, including the International Covenant on Civil and Political Rights. Laws which criminalise same-sex sexual activity have been found to be unconstitutional and/or contrary to international human rights standard and have been removed following considerations by courts and tribunals across the world, including the following.

A key decision was reached by the United Nations Human Rights Committee ('HRC') in *Toonen v Australia*,<sup>7</sup> in which state legislation in Tasmania which criminalised certain sexual conduct between consenting adult males in private was held to constitute a violation of the right to privacy under Article 17 of the ICCPR. In reaching its decision, the HRC took the view that the prohibition, under Article 2 of the ICCPR, of differential treatment on grounds of 'sex' properly included differential treatment on grounds of sexual orientation.

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<sup>6</sup> See, in particular:

Article 13: *Democracy in the Republic of Uzbekistan shall be based on the principles common to all mankind according to which the ultimate value is a human being, his life, freedom, honour dignity and other inalienable rights.*

Article 14: *The state shall function on the principles of social justice and legality in the interests of well-being of the people and society.*

Article 18: *All citizens of the Republic of Uzbekistan shall have equal rights and freedoms, and shall be equal before law without discrimination by sex, race nationality, language, religion, social origin, convictions, individual and social status. Any privileges may be granted solely by law and must conform to the principles of social justice.*

Article 19: *... Citizens' rights and freedoms, established by the Constitution and laws, shall be inalienable. No one shall have the right to deprive or limit them without a court.*

Article 26: *...No one may be subject to torture, violence, other cruel or humiliating human dignity treatment.*

Article 27: *Everyone shall be entitled to protection against encroachments on his honour, dignity, interference in his private life, inviolability of his home....*

Article 44: *The state shall safeguard the rights and freedoms of citizens proclaimed by the Constitution and laws.*

<sup>7</sup> *Toonen v Australia*, UN Doc. CCPR/C/50/D/488/1992 (1994).

The European Court of Human Rights in *Dudgeon v United Kingdom*,<sup>8</sup> found that legislation in Northern Ireland which criminalised certain sexual acts between consenting adult males was held to constitute a violation of the right to privacy under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The Supreme Court of the United States in *Lawrence v Texas*<sup>9</sup> found that state legislation in Texas criminalising same-sex sexual conduct between adults was struck down as a violation of the liberty afforded by the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution. In reaching this decision, the US Supreme Court was not swayed by the absence of sexual orientation from the US Constitution as an unlawful basis of discriminatory treatment.

The Supreme Court of India in *Navtej Singh Johar v Union of India*<sup>10</sup> found that the provision of the Penal Code criminalising same-sex sexual conduct between consenting adults was held to constitute a violation of the constitutional rights to equality, liberty, dignity, freedom of expression, freedom of association and privacy.

The South African Constitutional Court in *National Coalition for Gay and Lesbian Equality v Minister of Justice*<sup>11</sup> found that provisions prohibiting 'sodomy' were held to constitute violations of constitutional rights to privacy, dignity, equality and freedom from discrimination on the basis of sexual orientation

The Fijian High Court in *McCoskar v State*<sup>12</sup> found that the maintenance of laws criminalising same-sex sexual acts between consenting adults in private was held to violate the constitutional rights to privacy and equality.

The High Court of Botswana in *Motshidiemang v Attorney General*<sup>13</sup> struck down the provisions of the Penal Code criminalising same-sex sexual conduct as violating constitutional protections of liberty, privacy, dignity and non-discrimination.

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<sup>8</sup> *Dudgeon v United Kingdom* [1981] ECHR 5; (1981) 4 EHRR 149. The European Court of Human Rights came to similar conclusions in respect of other States' provisions criminalising same-sex sexual conduct in *Norris v Ireland* [1988] ECHR 22; (1991) 13 EHRR 186 and *Modinos v Cyprus* [1993] ECHR 19; (1993) 16 EHRR 485.

<sup>9</sup> *Lawrence v Texas* 539 US 558 (2003).

<sup>10</sup> *Navtej Singh Johar and ors v Union of India* WP (Cri) No. 76 of 2016.

<sup>11</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6.

<sup>12</sup> *McCoskar v State* [2005] FJHC 500.

<sup>13</sup> *Motshidiemang v Attorney General* [2019] MAHGB-000591-16.

The Supreme Court of Nepal in *Sunil Babu Pant and ors v Nepal Government and ors*<sup>14</sup> struck down provisions criminalising homosexuality as constituting unlawful discrimination.

The Supreme Court of Belize in *Orozco v Attorney General*<sup>15</sup> struck down the provision of the Criminal Code criminalising 'sodomy' on the basis that it violated the constitutional rights to privacy, dignity and equality.

Key to all these decisions is privacy.<sup>16</sup> The right to privacy is qualified and each of the cases above has considered the matter of the state's right to interfere in an individual's right to privacy. In each case the interference (that is legislating to criminalise same-sex sexual activity) was found to be to be arbitrary, or otherwise improper.

The qualified right to privacy is protected under Article 17(1) of the ICCPR:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

It is basis of the *Toonen* decision above, which was decided in 1994 prior to Uzbekistan's accession to the ICCPR in September 1995. Further, though, Uzbekistan's Constitution provides powerful 'protection against encroachments on...honour, dignity, and interference in...private life' and 'guarantee[s] inviolability of the home'.

The Government of Uzbekistan is urged to uphold the rights of LGBT people, including the right to privacy and to end the criminalisation of the same-sex sexual activity.

## Section 154 leads to further violations of the human rights of LGBT people

It is well established that the criminalisation of same-sex sexual activity itself does not only breach rights, but that criminalisation leads to further rights violations, not just for men who are criminalised under Article 120 (draft Article 154), but of the wider LGBT community. These include the rights to a fair trial, to liberty, to life and to be free from torture and inhuman and degrading treatment. These rights are guaranteed under the ICCPR, the Convention Against Torture and under the Constitution of Uzbekistan.

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<sup>14</sup> *Sunil Babu Pant and ors v Nepal Government and ors* [2007] 2 NJA LJ 261.

<sup>15</sup> *Orozco v Attorney General* [2016] No. 668 of 2010.

<sup>16</sup> It is clear that sexual life forms part of private life (see, for example, Dudgeon, at para 41) and that acts done in private / in the home must not be arbitrarily interfered with.

The Human Rights Council has expressed grave concern at acts of violence and discrimination committed against LGBT people because of their sexual orientation and/or gender identity.<sup>17</sup> The Independent Expert on protection from violence and discrimination based on sexual orientation and gender identity has made clear the link between criminalisation and violence against LGBT people.

The criminalization of consensual same-sex relations between adults of the same sex violates States' obligations under international law, including the obligation to protect privacy and to guarantee non-discrimination. Such violations occur even when the law is not enforced. As such, arrests and detentions on the basis of sexual orientation, gender identity or expression are to be considered arbitrary...Criminalization of same-sex relations also fuels stigma, legitimizes prejudice and exposes people to family and institutional violence and further human rights abuses such as hate crimes, death threats and torture. All such provisions should be repealed.<sup>18</sup>

This violence towards LGBT people was underscored in recommendations of the UN Committee Against Torture in November 2019:

'63. The Committee is concerned at reports that lesbian, gay, bisexual and transgender persons are subjected to: violence and torture while in detention; persecution by the police, including through entrapment schemes carried out using websites, threatening videos and extortion; and violence by private persons. The Committee is also concerned that the State party indicated that it has no cases open involving violence against lesbian, gay, bisexual or transgender persons. In addition, it is concerned about reports that the criminalization of same-sex sexual relations in article 120 of the criminal procedure code renders lesbian, gay, bisexual and transgender persons particularly vulnerable to violence by both law enforcement officials and private persons. This is because lesbian, gay, bisexual and transgender persons are reluctant to contact the authorities to seek protection from violence for fear of being arrested (arts. 2, 12–14 and 16).

64. The State party should undertake prompt, effective and impartial investigations of all allegations of torture and ill-treatment perpetrated against lesbian, gay, bisexual or transgender persons by or with the consent or acquiescence of public officials. The State party also should take measures to prevent violence and discrimination against lesbian, gay, bisexual or transgender persons on the basis of their sexual orientation and gender identity, including by **repealing article 120 of the criminal code** and ensuring that its

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<sup>17</sup> A/HRC/RES/17/19 (2011), A/HRC/RES/27/32 (2014), A/HRC/RES/32/2 (2016)

<sup>18</sup> A/72/172 (2017), para 32

complaints mechanisms are accessible to and capable of facilitating effective protection for lesbian, gay, bisexual or transgender persons who are victims of or at risk of violence.<sup>19</sup> [Emphasis added.]

Similar concerns were expressed by the UN Human Rights Committee in March 2020 in its report on Uzbekistan's implementation of the International Covenant on Civil and Political Rights<sup>20</sup> and among its recommendations was the repeal of article 120 of the Criminal Code.<sup>21</sup>

There have also been numerous accounts of hate crimes against members of Uzbekistan's LGBT community, reported in English-language media. These include acts of discrimination and mistreatment by the state, such as the detention and intrusive physical examination of two gay men suspected of engaging in same sex sexual activity in their apartment in Tashkent in 2017<sup>22</sup>, and reports of widespread blackmail and extortion of LGBT people by law enforcement officers<sup>23</sup>. It is also reported that violence against LGBT people is widespread and that members of the public who subject LGBT people to hate-motivated violence and murder are met with police indifference,<sup>24</sup> including in the 2019 murder of a young gay man who was murdered in his apartment shortly after he came out as gay in an Instagram post<sup>25</sup>.

It is also the case that criminalising same-sex sexual activity has negative consequences for of public health. UNAIDS estimates that 50,000 people in Uzbekistan are living with HIV, and there has been an increase of people with HIV since 2004<sup>26</sup>. The Indian Supreme Court found in *Navtej Singh Johar v Union of India* that<sup>27</sup>:

**Laws that criminalize same-sex intercourse create social barriers to accessing healthcare and curb the effective prevention and treatment of HIV/AIDS.** Criminal laws are the strongest expression of the State's power to punish certain acts and behaviour, and it is therefore incumbent upon the State to ensure full protection for all persons, including the specific needs of sexual minorities. [Emphasis added.]

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<sup>19</sup> Committee Against Torture, [Concluding observations \(2020\) CAT/C/UZB/CO/5](#), paras. 63-64

<sup>20</sup> Human Rights Committee, [Concluding Observations \(2020\)](#), CCPR/C/UZB/5, para. 10.

<sup>21</sup> *Ibid.*, para. 11(d).

<sup>22</sup> Eurasianet (4 Dec 2017). "Uzbekistan: Gay Couple Arrested for Engaging in Illegal Relations." Available at: <https://eurasianet.org/uzbekistan-gay-couple-arrested-for-engaging-in-illegal-relations>.

<sup>23</sup> IWPR (17 Feb 2020). "Uzbekistan: LGBT Rights Neglected. State oppression is combined with indifference from local human rights groups." Available at: <https://iwpr.net/global-voices/uzbekistan-lgbt-rights-neglected>

<sup>24</sup> Bacchi, Umberto. "Gay man's murder raises questions over Uzbek human rights reforms". Reuters, 2019. Available at: <https://www.reuters.com/article/us-uzbekistan-lgbt-rights-analysis/gay-mans-murder-raises-questions-over-uzbek-human-rights-reforms-idUSKBN1WC1Z4>.

<sup>25</sup> See footnote 28.

<sup>26</sup> <https://www.unaids.org/en/regionscountries/countries/uzbekistan>.

<sup>27</sup> Page 362, para 83.

## Conclusions

The Government of Uzbekistan is urged in the strongest terms not to include Article 154 in its new Criminal Code and to repeal Article 120 as it is in the current Criminal Code. In doing so, Uzbekistan will be acting in accordance with its Constitutional and international human rights obligations. It will specifically respect its commitment to the promotion and protection of human rights and the adoption of a range of legislative, institutional and administrative measures to fulfil its international obligations in the field of human rights, and pledged to protect, promote and support universal human rights and fundamental freedoms for all made to the United Nations General Assembly<sup>28</sup> and, as an EU GSP+ beneficiary, in accordance with Article 13 of the GSP Regulation<sup>29</sup>.

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<sup>28</sup> Annex to the letter dated 30 September 2019 from the Permanent Representative of Uzbekistan to the United Nations addressed to the President of the General Assembly. Candidature of Uzbekistan to the Human Rights Council, 2021– 2023. Available at: <https://undocs.org/en/A/74/477>

<sup>29</sup> Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008. Available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32012R0978>.