

# In the shadows

Systemic injustice based on sexual orientation and gender identity/expression in Myanmar



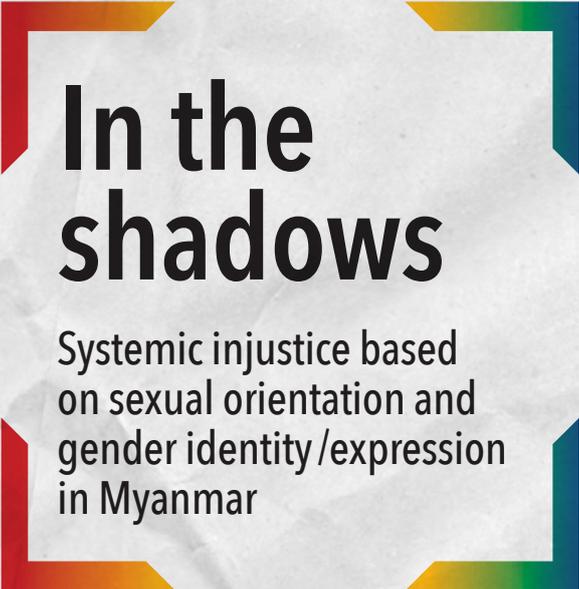


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# Preface



It is my great honor to introduce this very important report on the situation of LGBTIQ people in Myanmar.

Like any human society, there have always been LGBTIQ people in Myanmar. From the time of ancient civilizations, dynasties of kings, colonialism, and in the modern era, LGBTIQ people have always lived here. However, their lives and roles in society were limited, and their contributions as well as their rights were not well-recognized, because of discriminatory cultural and social perspectives. Although LGBTIQ persons served important roles in Myanmar's national and cultural history, it is not acknowledged. For instance, they are not mentioned in a single page in textbooks in Myanmar. In the view of history, it is if they are invisible and voiceless.

Moreover, Myanmar's criminal laws and justice system make LGBTIQ more marginalized and vulnerable, particularly Penal Code Article 377. This is a provision inherited from British colonial rule, and it continues to criminalize consensual same-sex sexual conduct. Although this Act is not strictly enforced, law enforcement officers have been using this to

intimidate, harass, and arrest LGBTIQ people on other charges. Many of the LGBTIQ members are subject to all forms of mistreatment by criminal laws and are not protected by the justice system in Myanmar.

However, the LGBTIQ movement in Myanmar has progressed significantly in recent years. There have been strong efforts to advocate for legal reform and carry out public campaign for non-discrimination. LGBTIQ activists today are never silent.



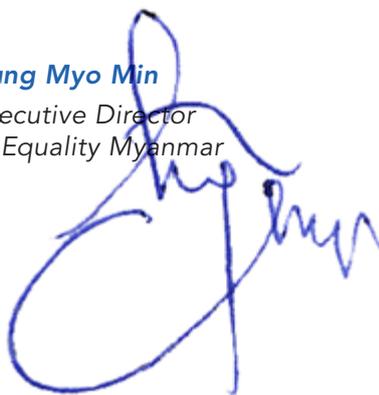
We stand up and we always call for equality and justice. LGBTIQ activists are working together like never before to create more space in society, to build a world that is more respectful and tolerant of diversity. They prove that they are part of society, not the problem of society. Nonetheless, there is still a long fight ahead over ending the discrimination based on sexual orientation and gender identity. We need both legal protection and widespread acceptance by society.

This report highlights not only the situation of LGBTIQ people in Myanmar but also makes important recommendations for how to make a better world for them and all people. Without a doubt, this report makes an important contribution in documenting the challenges people face both in their daily life and in the legal environment. The stories in this report highlight the suffering, intimidation, and threats faced by LGBTIQ in Myanmar today. These injustices must be stopped, and we all have a moral imperative to be part of the solution. As fellow human beings, LGBTIQ people are entitled to enjoy fair and equal legal protection and access to justice. They are not the rightful subjects of discrimination.

I strongly believe that recommendations for protection and policy changes mentioned in the report should be well recognized and implemented by the duty-holders with urgency. Action is needed by both LGBTIQ and non-LGBTIQ alike to make the government listen.

***Let's work for equality for all!***

**Aung Myo Min**  
Executive Director  
of Equality Myanmar



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# Part One

## Introduction

### Summary

Like many other transgender women in Myanmar, Alinkar and her friends work as makeup artists. In November 2016 during the cool season, they were traveling by motorbike to a client, to do make up for a night-time Buddhist ritual, when they were stopped at a police checkpoint. Alinkar recounted her experience:

*“The police asked us where we were going, but before we could answer, they were hitting us. They forced us to kneel with our hands behind our heads. They falsely accused us of dealing drugs and mocked us for being transgender. An officer derisively asked whether my friends and I are men or women. When we said that we are transgender, the police kicked us brutally. A police officer asked me if parts of my body were fake. When I said my body is real, the officer kicked me again and demanded oral sex.”*

When Alinkar refused, she was subjected to further abuse. The women were released only after their make up client arrived to help them. Due to their well-founded fear of retaliation, Alinkar and her friends never complained to the authorities about this incident. Memories of this traumatic evening still haunt Alinkar. She noted, “to this day, I feel scared.”<sup>1</sup>

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<sup>1</sup> Interview with Respondent No. 11, 26 September 2018; interview with Respondent No. 11, 19 December 2018.

Alinkar's experience is not exceptional. During research interviews conducted for this report, dozens of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals spoke of how Myanmar's criminal laws, law enforcement officials, and the whole justice system fail them.<sup>2</sup> Additional accounts of mistreatment were conveyed to the research team through written submissions.

This report documents and analyses these injustices, and identifies certain patterns of human rights violations perpetrated against LGBTQ individuals in Myanmar. It also makes a number of recommendations aimed at law and public policy reforms necessary to address the plight of LGBTQ persons. Specifically, this report focuses on three aspects of Myanmar's criminal law and justice system that perpetuate stigmatization, discrimination, violence and abuse based on sexual orientation and gender identity/expression (SOGIE), as outlined below:

**First, Myanmar's criminal laws are outdated and fail to respect and protect human rights, including those enshrined in international human rights treaties binding on the country.**

In particular, Myanmar has maintained Section 377 of its Penal Code, a provision inherited from British colonial rule that criminalizes consensual same-sex sexual conduct. This provision reads as follows:

*377. Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for a term of twenty years, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

*Explanation. – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.*

This provision of the Myanmar Penal Code is almost identical to what was Section 377 of the 1860 Indian Penal Code.<sup>3</sup> Under colonial rule, Myanmar was administered

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<sup>2</sup> The research carried out for this report inquired into the experiences of a broad range of minorities for reason of on sexual orientation, gender identity, and sex characteristics. Despite concerted efforts, the research team was unable to secure interviews with intersex respondents. For this reason, this report uses the acronym "LGBTQ" instead of broader terms such as "LGBTQI." This report's focus on LGBTQ populations is not intended to suggest that intersex persons do not face human rights violations. For definitions of the terms "lesbian," "gay," "bisexual," "transgender," and "queer", used in this report and for additional information about identity categories in Myanmar, see Appendix A.

<sup>3</sup> Section 377, Indian Penal Code: Unnatural offences—Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation—Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section

as a province of British India and adopted the Indian Penal Code, among other colonial era legislation, into its system.

In 2018, the Indian Supreme Court delivered a ground-breaking judgment in *Navtej Singh Johar et al & Others v Union of India and others*,<sup>4</sup> which concerned the criminalization of consensual same-sex sexual conduct under Section 377 of the Penal Code.<sup>5</sup> The Supreme Court ruled that the section ran contrary to the Indian Constitution and went against India's international obligations. In its decision, the Indian Supreme Court underscored that Section 377 contravened the rights to privacy, equality, non-discrimination and dignity, which were enshrined in international human rights treaties binding on India. These include the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights. The Indian Supreme Court also noted that the Yogyakarta Principles on the Application of International Human Rights law in relation to Sexual Orientation and Gender Identity (hereinafter referred to as the Yogyakarta Principles) affirming the conclusion that criminalizing consensual same-sex sexual conduct violated fundamental rights.<sup>6</sup>

Meanwhile, in Myanmar, not only does Section 377 continue to affect individuals who are accused of violating it; but its mere retention in the Penal code is a powerful symbol that lends false legitimacy to prejudices against individuals based on their real or imputed sexual orientation or gender identity/expression.

Other criminal provisions also stigmatize, discriminate against, or are otherwise used to justify violence and abuse against, LGBTQ individuals. Certain colonial era laws in Myanmar, which provide for a wide ambit of police powers for the 'prevention and detection of crime',<sup>7</sup> known collectively among the LGBTQ community as the "Shadow Laws" or "Darkness Laws", are a primary example of criminal laws that breed mistreatment based in whole or in part on SOGIE grounds. These laws exist both at the union level and state level, as codified in Section 35 of the Police Act

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4 Citation

5 Supreme Court of India, *Navtej Singh Johr & others.v. Union of India*, (2018) 10 SCC 1 (Navtej Singh)

6 ICJ Briefing Paper on *Navtej Singh Johar et all v. Union of India and others*, available at: <https://www.icj.org/wp-content/uploads/2018/07/India-Briefing-Paper-Navtej-Advocacy-Analysis-2018-Eng.pdf> (Accessed on 21 January 2019)

7 Preamble of the Police Act 1945

1945,<sup>8</sup> and Section 30 of the Rangoon Police Act 1899.<sup>9</sup> Some of their provisions are vague and overbroad (e.g., failing to specify what counts as a ‘satisfactory account’ for ‘being found in a public place between sunset and sunrise’) and are therefore open to serious abuse.<sup>10</sup> Law enforcement agents too easily invoke these provisions to harass, arrest and even bring spurious charges against LGBTQ people. The fact that these laws are colloquially referred to as the “Darkness Laws” and the “Shadow Laws” reflects their arbitrary nature. These laws give law enforcement officers wide latitude to arrest LGBTQ persons during the evening and night-time hours. Indeed, many arrests are carried out with spurious and vague accusations such as “you are in the dark, you have an agenda to do something”<sup>11</sup>.

In addition, several other criminal provisions have been used to harass, intimidate and detain LGBTQ persons. They include the crime of “Public Nuisance”, under Section 268 of the Penal Code, and Section 320 of the Penal Code criminalizing the act of “emasculatation”.<sup>12</sup>

The present report focuses on the abovementioned Section 377 of the Penal Code and the “Darkness Law” found in Section 35 of the Police Act and Section 30 of the Rangoon Police Act.

**Second, this report focuses on law enforcement officers’ discriminatory attitudes and behaviours, which contribute to LGBTQ persons being targeted for and being meted out unjust and unfair treatment within the criminal justice system.**

While conducting research for this report, many allegations detailing law enforcement officers’ misconduct toward LGBTQ persons were received. Misconduct at the hands of officers of the Myanmar Police Force (MPF) and General

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8 Section 35 of the Rangoon Police Act 1945 states: “(a). Any person found armed with any dangerous or offensive instrument whatsoever, who is unable to give a satisfactory account of his reasons for being so armed; (b) any reputed thief found between sunset and sunrise remaining or loitering in any bazaar, street, road, yard, thoroughfare or other place, who is unable to give a satisfactory account of himself; (c) any person found between sunset and sunrise having his face covered or otherwise disguised, who is unable to give a satisfactory account of himself; (d) any person found within the precincts of any dwelling-house or other building whatsoever, or in any back-drainage space, or on board any vessel, without being able satisfactorily to account for his presence therein [...] may be taken into custody by any police-officer without a warrant, and shall be punishable on conviction with imprisonment for a term which may extend to three months.”

9 Section 30 of the Rangoon Police Act 1899 states: “(b) any reputed thief found between sunset and sunrise lying or loitering in any bazaar, street, road, yard, thoroughfare or other place, who shall not give a satisfactory account of himself; (c) any person found between sunset and sunrise having his face covered or otherwise disguised and who is unable to give a satisfactory account of himself; (d) any person found within the precincts of any dwelling-house or other building whatsoever, or in any back-drainage space, or on board any vessel, without being able satisfactorily to account for his presence therein [...] may be taken into custody by any police-officer without a warrant, and shall be liable to imprisonment which may extend to three months.”

10 Please refer to note 9 for the wording of the Rangoon Police Act

11 Interview with Respondent No. 67, 14 November 2018

12 Refer to annex containing Myanmar laws

Administration Department (GAD)<sup>13</sup> range from false accusations and arbitrary arrests to verbal and physical abuse. Furthermore, the police's misconduct toward LGBTQ communities legitimizes the perception that LGBTQ persons are a source of criminality and social ills.<sup>14</sup> In addition to violating the human rights of LGBTQ persons and causing them harm, continued misconduct generates a general mistrust on the part of LGBTQ individuals towards the police and law enforcement agencies. This fear of the police and the GAD gives rise to a reluctance among LGBTQ individuals to seek assistance from authorities when they are themselves victims of crimes. It dissuades victims of human rights violations from seeking justice and, therefore, it hampers the overall exercise and enjoyment of human rights by LGBTQ people.

An intersectional analysis<sup>15</sup> suggests that prejudices against LGBTQ people intersect with discrimination against women. In this context, this report's findings substantiate previous studies showing that discrimination and violence against transgender women is particularly severe.<sup>16</sup> In addition, a lesbian community leader explained that lesbians can usually avoid police discrimination; however, to do so, they must conceal their sexual orientation when interacting with the police.<sup>17</sup> This pressure to conceal one's identity undermines lesbians' ability to live openly, with dignity, as their authentic selves.<sup>18</sup>

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13 As it was previously one of four departments of the Ministry of Home Affairs, the MPF has limited institutional independence, as its command structure ultimately comes under authority of the Tatmadaw Commander-in-Chief. The General Administration Department (GAD), effectively wields controls over all the administrative functions of subnational governance throughout Myanmar. Until late 2018 the GAD was a department of the Ministry of Home Affairs, whose Minister is constitutionally appointed by the military, meaning its command structure ultimately came under authority of the Commander-in-Chief of. From January 2019, the GAD was transferred from Home Affairs to the Ministry of the Union Government Office, a newly created ministry coming under the purview of the elected quasi-civilian government. Its tasks entail responsibilities ranging from tax collection to various registration and certification processes. GAD officers sometimes perform a law enforcement role. For background reading on the GAD, see Kyi Pyar Chit Saw & Matthew Arnold, *Administering the State in Myanmar: An Overview of the General Administration Department*, October 2014 (MDRI-CESD & The Asia Foundation, Subnational Governance in Myanmar Discussion Paper Series, Paper No. 6). See also: "GAD chief appointed deputy govt office minister," *The Myanmar Times*, 3 January 2019.

14 Interview with respondent No. 11, 26 September 2018, Interview respondent No. 60, 14 November 2018

15 See *Women's Access to Justice for Gender-Based Violence, A Practitioner's Guide* by the International Commission of Jurists, defines the term 'intersectionality' as a "term developed in international human rights discourse to express the fact that individuals may be subjected to discrimination or treated unequally in a variety of, or compounded, ways according to various facets of their identity. These multiple forms need to be taken into account in order to design methods of implementing rights obligations", p. 26. Some of these characteristics include: 'ethnicity/race', indigenous or minority status, colour, socio-economic status and/or caste. "Practitioners Guide 12: Women's Access to Justice for Gender-Based Violence"

16 E.g., Lynette J. Chua & David Gilbert, "State Violence, Human-rights Violations and the Case of *Apwint* in Myanmar," *Gender, Violence and the State in Asia*, p. 170 (Routledge, 2016).

17 Interview with Respondent No. 17, 26 September 2018.

18 Anecdotal evidence from the ICJ's research suggests that social class also plays a significant role in LGBTQ individuals' experiences within Myanmar's criminal justice system. Wealth, educational attainment, and political connectedness appear to mitigate one's risk of experiencing SOGIE-based discrimination. See, for example, the case of Moe Thida discussed on p. 32. Further research, however, is necessary to better understand the relationship between socioeconomic status and LGBTQ experiences within the criminal law and justice system.

**Third, this report focuses on discriminatory attitudes of judges and court staff as these attitudes create obstacles to access to justice and fair judicial proceedings for LGBTQ persons.** Many LGBTQ individuals reported that, in their experience, the attitude of judges and court staff toward them is profoundly affected by negative biases against, and stereotypical perceptions of, them. Deeply entrenched homophobia, transphobia and the harmful perpetuation of gender stereotypes pervade the court system. Prejudices manifest in various ways, ranging from judges' derogatory comments about homosexuality to their refusals to address transgender litigants using language that comport with the litigants' gender identity or expression. Lawyers too reported that judges discriminate against LGBTQ individuals.

For example, in one case, a gay man was not allowed to call a transwoman to stand as surety. The police informed him that he needed to call someone who was 'straight'. In May 2014, Myo Aung, a gay man, was arrested for selling alcohol. He called two of his friends – who happened to be a gay man and transgender person – for support. The police vetoed these two friends from standing as Myo Aung's surety because of their discriminatory attitudes towards LGBTQ persons.<sup>19</sup> This is clearly discriminatory and is against standard police procedures for providing surety and securing bail.

Similarly, when Jasmine, a restaurant owner and a transwoman, was arrested, she was not considered a 'credible' witness; the court stated it would not accept a transgender or a gay person providing witness testimony.<sup>20</sup>

The research conducted for this report established that discriminatory treatment of LGBTQ individuals ranged from judges rejecting witnesses on SOGIE grounds, to defendants facing difficulty contacting their family due to restrictions that court and prison staff applied selectively against them on SOGIE grounds.<sup>21</sup>

In addition to the specific challenges resulting from prejudice and discrimination on SOGIE grounds, LGBTQ individuals are also confronted by all the other obstacles to securing access to justice that ordinarily beset Myanmar's criminal justice system. Corruption detrimentally affecting one's right to a fair trial, for example, is a pervasive problem within Myanmar's criminal justice system generally, not only in cases concerning LGBTQ individuals.<sup>22</sup> However, as this report demonstrates, LGBTQ individuals face additional systemic challenges due to SOGIE-based prejudice and discrimination.

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19 Interview with respondent No. 23, 27 September 2018

20 Interview with respondent No. 26, 27 September 2018

21 Respondent No. 27, 26 September 2018; Respondent No. 7, 25 September 2018.

22 International Commission of Jurists Report: 'Right to Counsel: the Independence of Lawyers in Myanmar': <https://www.icj.org/myanmar-lawyers-still-face-restrictions-despite-increased-independence-2/>. See also: "ICJ, "Achieving Justice for Gross Human Rights Violations in Myanmar," January 2019, especially pages 32-35.

The human rights violations committed against LGBTQ people documented in this report directly contradict Myanmar's constitutional commitment to protect equality, liberty, privacy, and justice. Myanmar's laws, and the way in which they are enforced against LGBTQ people, also violate Myanmar's obligations under international human rights law. The state of Myanmar has the duty to respect, protect and fulfil the human rights of LGBTQ persons, including their rights to equality and non-discrimination; to liberty and security of person; to freedom from torture or other ill-treatment; and to privacy and family life. The authorities of Myanmar also have a duty to prevent and protect LGBTQ persons from stigma, discrimination, violence, intimidation, harassment and abuse meted out against them, and motivated, in whole or in part, by ignorance of, prejudice and hatred against their real or imputed sexual orientation, gender identity and expression.

There is also a striking tension between the situation in Myanmar and legal developments concerning the human rights of LGBTQ individuals around the world. For example, a growing number of countries have recently removed legal provisions criminalizing consensual same-sex sexual conduct; this evolution has taken place particularly in countries where such provisions were relics of colonial rule.<sup>23</sup> Conversely, in Myanmar, Section 377 remains in place.

## Overview of Recommendations

The following reforms are recommended to address the systemic injustices LGBTQ people face when they come into contact with Myanmar's criminal law and justice system.

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23 As Justice Malhotra of the Indian Supreme Court noted in its momentous 2018 decision in the case of *Navtej Singh Johar et al v. Union of India and others*, which held that section 377 of the Indian Penal Code was unconstitutional and in breach of India's obligations under international law, "The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights", *Navtej Singh Johar v. Union of India*, W. P. (Crl.) No. 76 of 2016 (India 2018) (Malhotra, J., concurring, para. 10). See <https://www.icj.org/india-supreme-court-decision-ending-criminalization-of-consensual-same-sex-relationships-is-a-momentous-step-forward-for-human-rights/>.

## To the Parliament of Myanmar<sup>24</sup>

- a. To repeal Section 377 of the Penal Code, the provision for ‘unnatural offences’.

An important and urgent reform to pursue is repealing Section 377 of the Penal Code, at least insofar as it criminalizes consensual same-sex sexual conduct.

Section 377 must be repealed or at the bare minimum amended to meet Myanmar’s international law obligations because it violates the non-discrimination principle, the right to equality before the law and equal protection of the law without discrimination, as well as the rights to liberty and security of person and to private life, among other rights, and contributes to the stigmatization of LGBTQ people. This lends false legitimacy to the anti-LGBT prejudice common throughout Myanmar’s criminal justice system.

- b. To enact anti-discrimination legislation in Myanmar.
- c. To become a party to nine core international human rights treaties.<sup>25</sup>
- d. To establish legal gender recognition for transgender persons.
- e. To reform vague and discriminatory laws.

Parliament should review and repeal or reform vaguely worded laws that invite discriminatory application, especially where such laws enable arrests to be made solely based on prejudice, discrimination, etc. on SOGIE grounds. Specifically, Section 35 of the Police Act 1945, Section 30 of the Rangoon Police Act 1899 (the so-called Shadow Laws) are legal provisions that should be amended or repealed as a matter of priority.

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<sup>24</sup> The Assembly of the Union is the bicameral Parliament in Myanmar that promulgates national-level legislation for the Union. It was established by the 2008 Constitution. Section 12 of the 2008 Constitution defines legislative power of the Union as shared amongst the national level Parliament (Pyidaungsu Hluttaw), Region and State Hluttaws. Section 12(b) defines the two houses of Parliament, one representing townships and populations, while the other house is represented from the States and Regions (divided into the House of Nationalities, the Amyotha Hluttaw and the House of Representatives, the Pyithu Hluttaw) . Section 96 of the 2008 Constitution provides for the powers of the Pyidaungsu Hluttaw to enact laws for the entire country or any part of the country, so long as it falls within the Schedule One of the Union Legislative List.

<sup>25</sup> Please refer to page 36, footnote 150

## To the Myanmar National Police and General Administrative Department

- a. To cease discriminatory arrests and detentions.

The Myanmar National Police (MPF) officers must stop arresting members of the LGBTQ communities on the mere suspicion of 'engaging in unnatural sex'. MPF officers must also cease applying laws selectively to target individuals for their assumed sexual orientation or gender identity/expression, especially with regard to Section 30 of the Rangoon Police Act and Section 35 of the Police Act.

- b. The police have a duty to promptly, thoroughly, independently and impartially investigate all crimes and human rights violations perpetrated against LGBTQ individuals. These investigations should be carried out with a view to identifying those responsible and bringing them to justice in proceedings that comply with international fair trial standards. This will include offences perpetrated by GAD officers.
- c. Crimes perpetrated by police, the military and other law enforcement agencies should be tried exclusively by civilian courts, especially gross violations of human rights. Civilian courts must be empowered by law to be able to conduct inquiries, prosecute and try members of the police force, the military and other law enforcement agencies, as a decisive step towards combating all forms of impunity.
- d. Undertake sensitivity training.
- e. The Government of Myanmar should provide mandatory training to MPF and GAD officers with a view to dismantling prejudicial attitudes and behaviours toward LGBTQ people.

## To the Judiciary, Lawyers and Other Actors in the Court System

- a. To proactively prevent discrimination.

The judiciary, lawyers and other actors in the court system should take an active role in preventing discrimination against LGBTQ persons involved in court proceedings.

- b. To issue writs to uphold constitutional rights and international human rights.

The Supreme Court should ensure that LGBTQ detainees can file writ petitions to the Court to challenge the legality of their arrest. The Court must independently and impartially hear these cases, and issue writs to uphold constitutional rights and international human rights. The Court's reasoned decisions in these cases should be made available through publicly accessible judgments.

- c. To ensure the security of LGBTQ individuals and to guarantee their right to a fair trial.

Ensure the right of LGBTQ individuals who are defendants in criminal proceedings to be tried in proceedings complying with international fair trial standards, including, in particular, the right to adequate legal advice and representation, the right to be brought before the court in a dignified manner free from discrimination and the right to a fair hearing. This must ensure that LGBTQ individuals who suffer human rights violations while in detention are able to seek accountability and reparation without fear of reprisal.

The members of the legal profession should provide LGBTQ defendants with adequate, fair and dignified legal representation.

The members of the legal profession must recognize that discrimination based on sexual orientation and gender identity or expression is baseless and unwarranted, and creates a barrier to justice for LGBTQ people. The members of the legal profession should provide LGBTQ defendants with adequate, fair and dignified legal representation and pro bono legal aid service, whenever necessary and possible, and without discrimination.

## To the Myanmar National Human Rights Commission (MNHRC)

- a. To ensure its policy, public statements, reports and investigations actively address violence and discrimination based on sexual orientation and gender identity.

The MNHRC must ensure that the human rights of lesbian, gay, bisexual, transgender and queer persons feature in its national strategy, policy and objectives with the view to addressing the stigmatization, discrimination, violence and other abuse LGBTQ persons face.

- b. To ensure transparent, timely and expedient availability of reports that are accessible by the public.

The MNHRC must make its investigations, especially its investigations in cases of LGBTQ persons publicly available, while ensuring their protection, the confidentiality of their complaint and the prioritization of their personal security.

- c. To create and implement a plan of action on discrimination and violence based on sexual orientation and gender identity/expression.

The MNHRC should conduct an inquiry with the objective of documenting human rights violations faced by LGBTQ persons in Myanmar. This should include recommendations aimed at providing better public awareness about such violations as well as greater protection and security for LGBTQ individuals. It is critical that such an inquiry includes adequate and detailed consultation with LGBTQ persons.

- d. To increase accessibility of the public to the MNHRC's complaint mechanisms, it is recommended that regional and state offices are created throughout Myanmar. This is to ensure that the Commission will be able to receive complaints and develop policies that are reflective of the country's diverse religious, ethnic groups, and LGBTQ people from all around Myanmar will be able to access these mechanisms with little difficulty.

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This report is dedicated to young librarian Ko Kyaw Zin Win who took his own life on 23 June 2019 in Yangon, and who was reportedly bullied by co-workers and forced to admit his sexual orientation. The Myanmar National Human Rights Commission (MNHRC) announced it would investigate the circumstances surrounding the case in August 2019. In a statement to the press, the MNHRC announced that he was “mentally weak”, and Commissioner Member Yu Lwin Aung told the media that “absolutely no evidence could be found he was bullied”.<sup>26</sup> At the time of publication, the MNHRC report is currently pending.

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<sup>26</sup> Equality Myanmar Website: Gay Yangon librarian who took his own life ‘mentally weak: inquiry, 14 August 2019 available at: <https://equalitymyanmar.org/gay-yangon-librarian-who-took-own-life-mentally-weak-inquiry/>

## Methodology

While earlier publications have documented a number of concerns about the treatment of LGBTQ people at the hands of the criminal law and justice system,<sup>27</sup> this report documents relatively recent cases of mistreatment, and analyses the legal framework that creates the conditions where such mistreatment can occur with impunity.

This report describes emblematic cases of recurring human rights violations against by LGBTQ persons in Myanmar. Because the report's underlying research was based on a snowball sample (see below), the findings in this report are not intended to represent the totality of LGBTQ experiences in Myanmar.

Field research for this report was conducted from September 2018 to March 2019. The research sample consisted of 70 respondents who participated in in-person interviews, either individually or in small focus groups. Some respondents participated in follow-up interviews either in person or by phone. Every person who was interviewed also completed a written survey about SOGIE-based discrimination in the context of the criminal law and justice system, as well as in other aspects of life. Additionally, two respondents completed the written survey even though they were not interviewed. All the interviews and written surveys were conducted in Burmese, with English-Burmese interpretation/translations provided to members of the research team who do not write or speak Burmese.

All respondents gave their informed consent to participate in this research. No participant was paid any remuneration. When participants needed to travel to attend an interview, travel expenses were reimbursed. To protect the respondents' security and privacy, this report refers to respondents using pseudonyms unless the specific respondent strongly preferred that the report use the respondent's real name. In addition, this report withholds other details (e.g., respondents' specific locations) to prevent respondents from being identified.

A snowball sampling process was used to identify the respondents, with research partners helping the research team to make initial contact with participants. The researchers identified participants who had concerns based on their first-hand experience with the criminal law and justice system. In addition, the research team identified participants who wished to share their experiences and insights about SOGIE-based discrimination even if they had not been subjected to mistreatment

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27 E.g., Colors Rainbow, *Facing 377: Discrimination and Human Rights Abuses Against Transgender, Gay, and Bisexual Men in Myanmar* (2015); Lynnette J. Chua & David Gilbert, "Sexual Orientation and Gender Identity Minorities in Transition: LGBT Rights and Activism in Myanmar," 37 *Human Rights Quarterly* 1 (2015).

first-hand. All the research respondents identified themselves in ways that shaped this report's terminology (i.e., LGBTQ, see Appendix A for definitions). The research team spoke with respondents from the Magway Region, Mandalay Region, Sagaing Region, Shan State, and Yangon Region.<sup>28</sup>

The field research for this report was supplemented by a desk review of the literature concerning SOGIE-based discrimination in Myanmar, including academic work, media reports and advocacy reports, as well as literature on international human rights and comparative law. The team carried out additional research to better understand Myanmar's laws, and to evaluate them against international and comparative human rights law.

The research team sought to obtain official information from government authorities concerning LGBTQ persons' grievances about Myanmar's criminal law and justice system. These efforts were, however, unavailing. Furthermore, upon meeting with the Myanmar National Human Rights Commission, Commissioners reported that they had received no complaints regarding discrimination on SOGIE grounds. There is also very limited official information available about criminal prosecutions for "SOGIE-related crimes".

Despite these challenges on access to official information and lack of data, the interviews and respondents' testimonies compiled for this report, illustrate a clear pattern of discriminatory treatment, mistreatment and injustice.<sup>29</sup>

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28 We interviewed 13 people from Yangon, 17 from Mandalay, 15 from Monywa (Sagaing region), 8 from Shwebo (Sagaing Region), 11 from Pakoukku (Magwe region), 6 from Aye Thayar and Taunggyi (Shan state)

29 To input information from UAGO, OSCU letters



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## Part Two

# Background and Context

From 1962 to 2011, Myanmar has seen a succession of military governments, and in 2011, executive power was transferred to a quasi-civilian government that promised to deliver significant economic and political reforms, together with a firm commitment to the 'rule of law'. After a landslide victory in the November 2015 elections, the National League for Democracy (NLD) formed a government in March 2016.

Historically, people in Myanmar have been consistently disenfranchised, experienced barriers in access to the courts, justice and effective remedies, including as a result of unfair and discriminatory laws.

Several provisions of Myanmar's national laws enable impunity for human rights violations, including by shielding security forces from public criminal prosecutions. Members of the military and police force enjoy impunity largely through the use of military courts or special police courts as mechanisms of investigation and prosecution concerning the conduct of the military and police personnel. Convictions are rare and penalties are relatively weak, often times not commensurate with the gravity of the acts in question.<sup>30</sup>

Myanmar's legal system is derived from the British common law system, certain standard elements of this system, such as the doctrine of ordinarily being bound by judicial precedents (i.e., to adhere to judicial decisions when cases are similar or substantially similar to those where a superior court/s' judicial precedent exist/s), have rarely been given effect since the 1962 military coup. Political and military influence over judges remains a major obstacle to the rule of law, with the executive branch, the military and security apparatus maintaining undue influence over the judiciary.

The 2008 Myanmar Constitution vests significant powers in the Myanmar National Police Force, the Tatmadaw. Article 20(b) confers upon the Tatmadaw the right to independently administer its own affairs without effective oversight from civilian executive authorities, the legislature or the judiciary. Articles 109(b) and 141(b)

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<sup>30</sup> International Commission of Jurists, Myanmar: Achieving Justice for Gross Human Rights Violations in Myanmar, Baseline Study, January 2018, Page 3

allocate to the Tatmadaw 25 percent of seats in each of the two houses of the national legislature.

The NLD-led Government is Myanmar's first democratically elected, civilian-led government since 1962. However, the many years of authoritarian military rule gradually weakened Myanmar's legal institutions, the perception of independence of the legal system and its adherence to the rule of law. Indeed, as a result of this, the current government has publicly committed itself to prioritize the establishment of the rule of law in Myanmar.

Myanmar continues to experience deficiencies in the rule of law and impunity for human rights violations carried out by security forces and the police to exist. The legal system is affected by widespread corruption, and the public generally has a deep mistrust of it. Corruption in the courts has created an environment where bribery, delays and obstructions are a systemic challenge.<sup>31</sup> Furthermore, as the legal profession rebuilds itself during the ongoing period of political transition, lawyers who represent clients in so-called 'political' cases have faced harassment, threats, and reprisals.

The plight of LGBTQ people facing Myanmar's criminal law and justice system is thus one dimension of Myanmar's larger challenges concerning the rule of law and human rights compliance. Yet, as this report will demonstrate, LGBTQ people face barriers to justice stemming from SOGIE-biased prejudices that extend beyond more general deficiencies across Myanmar's legal system.

Nevertheless, there are some early indications of potential progress on which Myanmar can build, for example, by implementing this report's recommendations with a view to enhancing the respect of the human rights of LGBTQ persons facing the criminal justice system and interacting with Myanmar's law enforcement officials. For example, this report calls for the repeal of Section 377 which is a concrete step that has previously been supported by the government.<sup>32</sup> This report also calls on Myanmar to become a party to core human rights treaties. Doing so would build on recent history, with Myanmar having ratified the International Covenant on Economic, Social and Cultural Rights in 2017 and enacting the new Child's Rights Law from 2019.

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31 Ibid, page 5

32 See Matthew McFetridge, "The Outlook for LGBT Rights in Myanmar," *The Diplomat*, 5 September 2014, <https://thediplomat.com/2014/09/the-outlook-for-lgbt-rights-in-myanmar>. During the second cycle of Myanmar's Universal Period Review at the United Nations, Australia called on Myanmar to "Repeal or revise the 'Protection of Race and Religion' laws and Section 377 of the 1861 Penal Code to ensure the rights of women, religious minorities and the lesbian, gay, bisexual, transgender and intersex community are protected". Myanmar took note of this recommendation but has so far not taken any steps to implement it.

# Part Three

## Discriminatory Criminal Laws

This chapter focuses on Myanmar’s criminal laws and the ways in which their enforcement discriminates against and violates the human rights of LGBTQ people. The mere existence of and the actual application of Section 377 of the Penal Code, which criminalizes “carnal intercourse against the order of nature” violates LGBTQ people’s human rights to: freedom from discrimination; equality before the law and equal protection of the law without discrimination; liberty and security of person; privacy; freedom of association; and freedom of expression, among others. Meanwhile, other legislative provisions grant the police a wide ambit of powers to detain, arrest, search and seize belongings from a person, and give them broad discretion to criminalize any activity that occurs after sunset. Granting this almost unfettered discretion opens up avenues for the police to discriminate against individuals based on their real or purported sexual orientation or gender identity or expression, resulting in the violation of LGBTQ people’s human rights.

### A. Section 377

#### Background on Section 377

Section 377 was introduced in 1861 during British Colonial rule in the territory which today is independent Myanmar.<sup>33</sup> Section 377 penalizes “carnal intercourse against the order of nature.”<sup>34</sup> Although the Penal Code does not clearly define “carnal intercourse”, Section 377 is generally understood – and perhaps more importantly enforced by law enforcement agencies, as a prohibition on consensual same-sex sexual relations.<sup>35</sup>

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33 For additional information on the British colonial legacy of criminalizing same-sex sexual intimacy, see Douglas E. Sanders, “377 and the Unnatural Afterlife of British Colonialism in Asia,” 4 *Asian Journal of Comparative Law* 1 (2009).

34 See Appendix B for the text of Section 377.

35 Chua & Gilbert (note 24), p. 16.

The prosecution must prove beyond reasonable doubt that:

- i. The accused had carnal intercourse with a man, woman or animal;
- ii. That such intercourse was against the order of nature;
- iii. That the accused did the act voluntarily;
- iv. That there was penetration.<sup>36</sup>

Three former British colonies have recently abolished – or otherwise done away with – prohibitions on consensual same-sex sexual conduct that they also had inherited from the British. In 2019, the High Court of Botswana struck down criminal law provisions criminalizing consensual same-sex relations, which were a legacy of British colonial rule.<sup>37</sup> Similarly, in 2018, the Supreme Court of India and the High Court of Trinidad & Tobago both invalidated their respective British colonial-era laws that criminalized consensual same-sex sexual relations.<sup>38</sup> In 2019, Angola decriminalized consensual same-sex sexual activity by repealing the relevant provision of its penal code, which was a legacy of Portuguese colonial rule.<sup>39</sup>

In Myanmar, however, Section 377 remains fully part of the criminal law, and continues to have a detrimental impact on the lives of LGBTQ individuals. To date, there has been no constitutional challenge filed against Section 377 before Myanmar's Constitutional Tribunal. UN Special Rapporteurs on the situation of human rights in Myanmar have recommended that section 377 be repealed because it violates the rights to privacy, equality and non-discrimination, among others.<sup>40</sup>

In Myanmar, official information on prosecutions and conviction rates—especially regarding the use of Section 377 to prosecute consensual, same-sex relationships—has been difficult to access.

One exception, however, has drawn public attention to Section 377. In both cases, the charges related to alleged non-consensual same-sex sexual activity, and the

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36 Ratanlal & Dhirajlal's "Law of Crimes", Volume 2, Bharat Law House, New Delhi, Page 1901

37 See, Botswana: ICJ welcomes High Court judgment striking down law criminalizing consensual same-sex sexual relations, <https://www.icj.org/botswana-icj-welcomes-high-court-judgment-striking-down-law-criminalizing-consensual-same-sex-sexual-relations/>, 13 June 2019.

38 *Navtej Singh Johar v. Union of India*, W. P. (Crl.) No. 76 of 2016 (India 2018) (reading down India's version Section 377); *Jason Jones v. Attorney General of Trinidad and Tobago*, Claim No. CV 2017-00720 (Trinidad & Tobago 2018) (declaring null and void Trinidad and Tobago's law criminalizing same-sex sexual conduct).

39 "UN Welcomes Angola's Repeal of Anti-gay Law, and Ban on Discrimination Based on Sexual Orientation," 25 January 2019, <https://news.un.org/en/story/2019/01/1031292>.

40 Report by the Special Rapporteur on the situation of human rights in Myanmar, 23 September 2013, UN Doc: A/68/397 paras 43 and 89(a). Report of the Special Rapporteur on the situation of human rights in Myanmar, 18 March 2016, UN Doc: A/HRC/31/71 annex page 27.

defendants have been stigmatized because of their sexual orientation and gender identity. Both cases sensationalized the sexual orientation of the defendants, shrouding same-sex sexual activity in taboo and stigma.<sup>41</sup>

The first case involves an alleged sexual assault by U Aung Myo Htut, a well-known LGBTQ Yangon-based human rights activist, of his restaurant employee. The accused was arrested in March 2018, charged in the South Okkalapa Township Court under Section 377 with allegedly committing ‘unnatural intercourse’, and was then denied bail.<sup>42</sup> Concern has been raised about the fact that his detention may be detrimental to his health.<sup>43</sup> His status as an HIV-positive gay man found its way to media headlines.<sup>44</sup> A transwoman, who is also an LGBTQ human rights defender from Yangon,<sup>45</sup> explained in an interview that media coverage of U Aung Myo Htut’s case had the effect of ‘discriminating against the LGBT people.’ She noted that many journalists lack experience reporting on and ‘making contact with the LGBT community’. In particular, she raised concern that the media had depicted the accused and used headlines referring to a ‘man with HIV’, reinforcing negative stereotypes of LGBTQ people as ‘HIV spreaders’.<sup>46</sup>

An acquaintance of U Aung Myo Htut, who is a human rights worker and a lawyer based in Yangon, also commented on the coverage of the case, stating, ‘I am concerned that the media coverage of Aung Myo Htut’s case has not respected the presumption of innocence. This has contributed to a belief among the general public that Aung Myo Htut is guilty. It is in that environment that his case is being heard.’ While she notes the LGBTQ community members in Myanmar have started creating their own films and presenting their own narratives about the LGBTQ community, in mainstream media ‘LGBTQ persons in Myanmar are presented . . . as figures of ridicule’.<sup>47</sup>

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41 Interview with Respondent No. 69, 28 May 2019.

42 ‘Two people have recently been charged under Section 377, a law advocates say was rarely enforced’, see: <https://equalitymyanmar.org/myanmar-is-arresting-people-for-being-gay-under-colonial-era-sodomy-law/>

43 Interview with Respondent No. 69, 28 May 2019

44 ‘Man files sexual abuse complaint against employer’, <https://www.irrawaddy.com/news/burma/man-files-sexual-abuse-complaint-employer.html>.

45 Interview with Respondent No. 69, 28 May 2019.

46 See ‘Gay man with HIV charged under Myanmar colonial era law’ <https://www.washingtonblade.com/2018/11/02/gay-man-with-hiv-charged-under-myanmar-sodomy-law/>, which mentions demands for fair media coverage of the case.

47 Interview with Respondent No. 70 11 June 2019.



### A. A tool of oppression, even without formal charges

Police officers have invoked Section 377 to enter LGBTQ people's homes; accuse them of 'unnatural sex';<sup>48</sup> take them into police custody;<sup>49</sup> and to subject them to abuse.<sup>50</sup> LGBTQ human rights defenders fear that arrests and charges based on Section 377 are on the rise.<sup>51</sup> One LGBTQ human rights defender in Mandalay told the research team that, by September of 2018, he had already heard about 17 arrests in 2018, which, by then, already exceeded the number of known arrests for the same period in previous years.<sup>52</sup> An LGBTQ rights organization based in Yangon has voiced similar concerns.<sup>53</sup>

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48 See Interview with Respondent No. 35, 27 September 2018.

49 See also Interview with Respondent No. 35, 27 September 2018; and Interview with Respondent No. 61, 14 November 2018.

50 Interview with Respondent No. 61, 14 November 2018.

51 Interview with Respondent No. 61, 14 November 2018.

52 Interview with Respondent No. 16, 26 September 2018.

53 Interview with Respondent No. 61, 14 November 2018.

Yet, the oppressive impact of Section 377 extends far beyond documented cases of arrest and charges. Law enforcement officers often threaten to press charges under Section 377 in order to extort money or coerce LGBTQ individuals into performing sexual acts. When the targets of these threats acquiesce, formal charges are not pursued. For example, a gay man named Htet Zaw spoke of how a male police officer threatened him with pressing charges under Section 377 in 2010. Htet Zaw had flirted with this man before realizing he was a police officer. Htet Zaw recounted how the officer had revealed that he was a member of the police by showing him his identification card. According to Htet Zaw, the police officer then abused his position and extorted money and non-consensual sexual acts from him. While the police officer did not explicitly refer to Section 377, he told Htet Zaw “I know you are gay and you have homosexual sex”, and suggested that Htet Zaw had better submit to his demands. As a result, Htet Zaw was both sexually assaulted and forced to pay his assailant, the police officer, the money he had demanded.<sup>54</sup>

“... I know you are gay and you have  
homosexual sex...”

Many respondents provided similar examples of how section 377 has been used to blackmail, threaten and extort money from LGBTQ persons. In Myanmar, Section 383 of the Penal Code criminalizes extortion,<sup>55</sup> and Section 503 makes criminal intimidation illegal.<sup>56</sup> However, MPF and GAD officers have been able to intimidate and blackmail individuals, including members of the LGBTQ community, with impunity.<sup>57</sup>

Section 377 also functions as a powerful tool that socially isolates LGBTQ people. It lends false legitimacy to harmful stereotypes depicting LGBTQ people as morally corrupt. Section 377 has given rise to widespread stigma prevalent across the country against LGBTQ individuals, and to a common perception of them as potential ‘criminals’<sup>58</sup> and sexual deviants.<sup>59</sup> As a result, generally speaking, the LGBTQ persons live segregated from mainstream society.

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54 Interview with Respondent No. 1, 24 September 2018.

55 Section 383 of the Penal Code: Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits “extortion.”

56 Section 503 of the Penal Code: Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

57 This has also been recorded by media: <https://frontiermyanmar.net/en/myanmars-lgbt-community-between-old-laws-and-enduring-stigma>, <https://frontiermyanmar.net/en/the-left-over-laws-myanmars-colonial-hangover>

58 Interview with Respondent No. 24, 27 September 2018.

59 Interview with Respondent No. 35, 27 September 2018.

As an LGBTQ human rights defender in Mandalay noted, he does not fear arrest based on Section 377 because he is a bisexual man who can pass as “straight”, but he is still affected by Section 377 because it legitimizes social stigma against LGBTQ people. He noted that, “it is important to amend the written law, such as Section 377, so that unwritten laws [in the form of social norms] will also change.”<sup>60</sup> Another respondent, a lesbian woman, noted that Section 377 is typically applied to gay men and transwomen. Thus, as a cisgender woman, she does not feel directly threatened by Section 377. Still, she believes that Section 377 sends the message that same-sex relationships are wrong and, as a result, Section 377 stigmatizes lesbian relationships as well.<sup>61</sup>

## B. Vague criminal laws and overly broad police powers

According to respondents for this report, as well as published sources,<sup>62</sup> law enforcement officials frequently violate the human rights of LGBTQ people through the prejudicial application of vague criminal provisions granting them overly broad powers.

The two key law enforcement agencies in this context, namely, the Myanmar Police Force (MPF) and the General Administration Department (GAD), were both previously under the purview of the Ministry of Home Affairs; however, the GAD has recently been moved under the authority of the Ministry of the Union Government Office.

The General Administration Department (GAD) plays a large role in Myanmar’s civil service, at the state/region and township levels. GAD is part of subnational governance, forming much of the civil service for state and regional governments while also providing administrative functions for districts and townships.<sup>63</sup> Previously, GAD was under the purview of the Ministry of Home Affairs, and it is usually the first point of contact for many people in villages and wards, through management of the Wards and Village Tract or Township offices. The Direct Administrator of GAD has significant formal and informal powers in terms of oversight and control of other government departments operating within the district and often regardless of their

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60 Id. The respondent also emphasized that the abolition of 377 should be accompanied by additional law reforms, such as the enactment of anti-discrimination protections, and laws to ensure that non-consensual same-sex sexual activity continues to be criminalized.

61 Interview with Respondent No. 17, 26 September 2018.

62 E.g., sources cited in note 24.

63 Kyi Pyar Chit Saw and Matthew Arnold, “Administering the State in Myanmar: An Overview of the General Administration Department”, October 2014, Myanmar Development Resource Centre and The Asia Foundation, Discussion Paper No. 6.

formal accountability line to civilian-led government. Interference with police and judicial affairs is also reportedly common.<sup>64</sup>

MPF and GAD officers often rely on archaic national level and state-level provisions providing a low threshold for authorities to exercise their powers of stop, search and arrest. Most prominent among these legal provisions are Section 30 of the Rangoon Police Act of 1899, which applies in Yangon, and Section 35 of Police Act of 1945, which applies everywhere else in Myanmar.<sup>65</sup> Because of their vague and overly broad nature, these two Sections provide the police with unbridled power. Neither of these provisions is necessary because other criminal provisions, which are more carefully defined, can be used by authorities to maintain law and order.

### 1. "Shadow" and "Darkness" Laws

Section 30 of the Rangoon Police Act and Section 35 of the police Act are both colloquially referred to as the "Shadow Laws" or "Darkness Laws."<sup>66</sup> These names, which are commonly used throughout the country, derive from the fact that under vaguely defined circumstances, the laws criminalize the act of being found outdoors during night-time. For brevity, this report will hereinafter refer to these laws as the "Shadow Laws." The text of the Shadow Laws are as follows.

Section 35 of the Police Act of 1945 states that:

- (a) *Any person found armed with any dangerous or offensive instrument whatsoever, who is unable to give a satisfactory account of his reasons for being so armed;*
- (b) *any reputed thief found between sunset and sunrise remaining or loitering in any bazaar, street, road, yard, thoroughfare or other place, who is unable to give a satisfactory account of himself;*
- (c) *any person found between sunset and sunrise having his face covered or otherwise disguised, who is unable to give a satisfactory account himself;*

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<sup>64</sup> International Commission of Jurists, Myanmar: Human Rights Law in Rakhine State, Questions & Answers- November 2017, page 28

<sup>65</sup> See Appendix B for the text of these criminal provisions.

<sup>66</sup> Some commentators use these terms to refer specifically to subsections (b)-(d) of the criminal provisions referenced above.

- (d) any person found within the precincts of any dwelling-house other building whatsoever, or in any back-drainage space, on board any vessel, without being able satisfactorily to account for his presence therein; and
- (e) any person having in his possession, without lawful excuse, any implement of housebreaking, may be taken into custody by any police-officer without a warrant, and shall be punishable on conviction with imprisonment for a term which may extend to three months.

Section 30 of the Rangoon Police Act 1899 states:

**Apprehension and punishment of reputed thieves and others.**

- 30. (a) Any person found armed with any dangerous or offensive instrument whatsoever, and who is unable to give a satisfactory account of his reasons for being so armed;
- (b) any reputed thief found between sunset and sunrise lying or loitering in any bazaar, street, road, yard, thoroughfare or other place, who shall not give a satisfactory account of himself;
- (c) any person found between sunset and sunrise having his face covered or otherwise disguised and who is unable to give a satisfactory account of himself;
- (d) any person found within the precincts of any dwelling-house or other building whatsoever, or in any back-drainage space, or on board any vessel, without being able satisfactorily to account for his presence therein; and
- (e) any person having in his possession, without lawful excuse, any implement of house-breaking,  
  
may be taken into custody by any police-officer without a warrant, and shall be liable to imprisonment which may extend to three months.

These laws, adopted in pre-independence times, provide MPF and GAD officers with a wide ambit of powers to arrest and detain suspects. These provisions' vague wording allows police officers to use the law to target virtually anybody they want. For example, Sections 30(a), (b), (c), (d) of the Rangoon Police Act and Sections 35(a), (b), (c), (d), (e) of the Police Act require persons to provide a satisfactory reason for being outdoors after sunset, but the laws do not define what constitutes a satisfactory

account. As a result, MPF and GAD have exercised wide discretion in determining what counts as a satisfactory account.

LGBTQ people have been particularly easy targets for arrest under the Shadow Laws. For example, transgender women often find work as hair and makeup stylists because it is one of the few occupations available to them. However, transgender women have been apprehended simply because the police have deemed the scissors<sup>67</sup> they carry for work a “dangerous or offensive instrument” under subsection (a) of the Shadow Laws. LGBTQ people are also stereotyped as criminals and sometimes presumed to be a “reputed thief” under subsection (b) without any evidence warranting such presumption. Meanwhile, transgender women have been accused of violating the Shadow Laws because their makeup is deemed to be a “disguise” according to subsection (c). Simply sitting outside one’s house can prompt the arrest of an LGBTQ person based on subsection (d).

Furthermore, the vague Shadow Laws are enforced arbitrarily against LGBTQ people, with the practical consequence of criminalizing what would be considered normal, everyday behaviour for cisgender heterosexual people, including the basic act of going to and from work. For example, Chu a transgender woman, was arrested in 2017 in the early morning while she was on her way to a wholesale market to purchase flowers for her retail business.<sup>68</sup> What happened to Sandar Thein, who was out at night in Yangon, is another example of police abuse under Shadow Laws. She recounted how upon finishing her work, she started walking home with friends; she then realized that police in an unmarked car were followed them. When the policemen started to photograph Sandar Thein and her friends, they asked why they were being photographed. Following this, the policemen placed her in their car, took her to the police station and later locked her up in a cell pursuant to Shadow Law.<sup>69</sup>

In yet another example, a transgender respondent named Shweyin was arrested while attending a cultural and religious festival one night in 2014. She told researchers that she was arrested for alleged theft, when a festival attendee accused Shweyin of stealing her earrings. However, it became clear that there was no evidence of theft, the police threatened to charge her with violating a “Shadow Law” based on no evidence other than the fact that she was a transwoman out at night. Shweyin was released after paying a so-called “fine”, which was essentially a bribe.<sup>70</sup>

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67 Interview No. 7, 25 September 2018

68 Interview Respondent No. 12, 26 September 2018; Interview Respondent No. 12, 19 December 2018.

69 Respondent No. 7, 25 September 2018.

70 Interview Respondent No. 42, 13 November 2018.



## San San

### Arrested for Cross-dressing in 2016

San San was found outdoors by police at around 7pm in June 2016.<sup>71</sup> She had been cross-dressing and sat on a bench with a group of young people in front of a hospital in a public area in Mandalay, at around 7 in the evening. She noticed a car that drove past and stopped in front of them.

Five police men in plainclothes emerged from the car and arrested San San. She asked the police why she was being arrested, and was merely informed that she was being detained under Section 377 and the Shadow Law. No further explanation was given. She recounted how she was held in police custody where police officers subjected her to repeated slapping, beatings, and verbal abuse.

**“When I arrived at the police station, they asked me what my name was, and I said ‘my name is San San’. Then, they slapped my face, and told me to say what my real name was, and I repeated my name was San San, and they continued slapping my face”,**

she recalled. San San then said they had asked her why she dressed as a woman, and why she had a wig. The policemen then made her remove her clothing and her wig.

Other respondents have also reported being arrested under Shadow Laws for strolling on a date as a gay couple<sup>72</sup> or visiting a park in the evening.<sup>73</sup> Indeed, the Shadow Laws have the effect of deterring LGBTQ people from going places after sunset and, therefore, impinge upon LGBT people’s right to freedom of movement, among other human rights.

The Shadow Laws are the most notorious among the vague laws used to harass, intimidate, and arbitrarily arrest LGBTQ people, but they are not the only ones.

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71 Interview with Respondent No. 61, 14 November 2018

72 Interview Respondent No. 5, 25 September 2018.

73 Transgender women reported that they were targeted by police while other individuals at the park were not. Interview Respondent No. 33, 27 September 2018; Interview Respondent No. 61, 14 November 2018.

Myanmar's nuisance and obscenity laws are also written so broadly that they can be used to the same effect against them.<sup>74</sup> The specific provisions of these laws, as well as those of the Shadow Laws, can be viewed in Appendix B.

## 2. "Hot areas" as danger zones

Testimonies indicate that arrests of LGBTQ persons under Shadow Laws often occur in so-called "hot areas", where visible members of the LGBTQ communities are known to frequent at night.<sup>75</sup> Policing of these hot areas can lead to multiple unwarranted arrests.

Interviewees have mentioned specific areas in Mandalay<sup>76</sup> and Aye Thar Yar, Shan State,<sup>77</sup> as favoured locations for socializing among LGBTQ persons. According to respondents, police target these areas to arrest LGBTQ persons. For example, Ei Khine, a transgender woman recounted her experience of being arrested on the U Bein bridge in Mandalay and being accused of being 'behind the shadow' "မှောင်ရပ်ရဲ့ နောက်တွယ်" (this is a phrase that was literally translated from Burmese, and this expression means they were found outdoors after sunset). That night, six other transgender persons were also arrested at the U Bein bridge. The police demanded them all to pay a bribe of 50,000 Myanmar Kyats (32 USD) and when Ei Khine failed to do so, she was placed in police custody.<sup>78</sup>

Myat Thiri, War and Min Da Tha shared their separate experiences of being arrested by the police at a specific "hot spot" called Aye Thar Yar Gate, in Shan State. War told her story of being transgender and crossing the Aye Thar Yar Gate, a route she uses when she travels to meet her clients as a makeup artist. On a particular occasion on which she was crossing the bridge, a policeman requested sexual favours from her, and when she refused, the police officer slapped her and told her 'you want a lesson from me!' She was then arrested and placed in a small cell. Police officers taunted her, teased her and told her she would be freed in exchange for sexual acts. She then was coerced into having sex with two policemen after several hours of being harassed.<sup>79</sup>

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74 Colors Rainbow (note 24), pp. 14-15.

75 Interview Respondent No. 63, 15 November 2018

76 Interview Respondent No. 14, 26 September 2018, No. 61, 62, 14 November

77 Interview Respondent No. 63-68, 15 November

78 Interview Respondent No. 14, 26 September 2018

79 Respondent No. 68, 15 November 2018





# Part Four

## Mistreatment by Law Enforcement Agents

### (The Myanmar Police Force and the General Administration Department)

Transparent investigations and prosecutions of acts involving human rights violations allegedly perpetrated by law enforcement agents rarely occur within Myanmar's criminal justice system, especially in relation to crimes perpetrated against LGBTQ persons. Rather, the reverse is commonplace, with investigations at times taken over by the special forces, ad hoc government committees and the Myanmar National Human Rights Commission. These investigations have occurred in lieu of the independent, impartial, independent, effective and fair investigations and prosecutions that are required according to Myanmar's criminal procedures and international human rights law and standards.

#### *Lenient penalties for serious crimes*

- › Legislation providing for police discipline, the 1995 Myanmar Police Force Maintenance of Discipline law (also see 1997 Law Amending the Myanmar Police Force Maintenance of Discipline Law), stipulates a wide range of offences committed by police will fall under the jurisdiction of Police Courts.
- › The offences under the law will include if police: carries out 'unnecessary imprisonment', 'strikes or otherwise ill-treats any prisoner, any person in custody or any person detained;', or 'demands or accepts cash or kind in a corrupt manner from any person he shall, on conviction by a Police Court be punished with imprisonment for a term which may extend to 3 years or such less punishment as it is mentioned in this Law'.
- › The offences are punishable with 'imprisonment for a term which may extend to 3 years or such less punishment or such less punishment as is mentioned in this Law'.
- › The Police Court will have exclusive jurisdiction over crimes stipulated by the law.

The failure to use the ordinary court system has effectively enabled the police to enjoy impunity for the perpetration of criminal offences, including acts involving the commission of human rights violations.<sup>80</sup> Indeed, respondents interviewed for this report expressed concern that police officers who commit acts against LGBTQ individuals that constitute criminal offences under the penal code, rarely if ever face disciplinary, let alone criminal sanctions.<sup>81</sup>

## A. Mistreatment by Law Enforcement Agents

This chapter documents complaints about human rights violations against LGBTQ persons committed by law enforcement officials. At present, no government initiatives exist to systematically collect complaints from LGBTQ people about complaints of misconduct at the hands of law enforcement officials of which they alleged to be victims. This information relevant to this chapter was collected, mainly, through research interviews and survey-based research. The chapter begins by outlining the various forms of mistreatment that respondents described having experienced at the hands of law enforcement officials. It goes on to discuss how such misconduct generates mistrust of law enforcement in general, and how this mistrust in turn creates a disincentive for LGBTQ individuals to file complaints when they themselves become victims of crime.

LGBTQ persons are not the only people in Myanmar who experience abuse and mistreatment at the hands of the MPF and GAD. Some forms of misconduct, such as demanding a bribe, are widespread, affecting the public at large. This chapter, however, discusses instances of misconduct that are directed specifically at LGBTQ people. It should be noted that, like LGBTQ individuals, other marginalized groups—such as ethnic and religious minorities—are negatively stereotyped and, as a result, are specifically targeted by law enforcement officers for abusive treatment. Various, perceived aspects of one’s identity, whether real or imputed—such as ethnicity, religion, class, and SOGIE status—may intersect in ways that increase the risk that an individual will face of mistreatment at the hands of law enforcement officers.

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80 International Commission of Jurists, Myanmar: Human Rights Law in Rakhine State, Questions & Answers- November 2017, page 15

81 For further discussion of the 1995 Police Maintenance of Discipline Law, see: ICJ, “Achieving Justice for Gross Human Rights Violations in Myanmar,” January 2018, pp.12; ICJ, “Questions and Answers on Human Rights Law in Rakhine State,” November 2017, pp. 14

## B. Mistreatment Takes Many Forms

Mistreatment of LGBTQ people by law enforcement officers may be described as falling into three main categories: (1) arbitrary accusations and detentions; (2) physical, sexual and verbal abuse; (3) forcible disavowal of sexual orientation and gender identity/expression; and (4) other cruel, inhuman or degrading treatment. This section elaborates on these four categories, and sets out a number of testimonies that illustrate the multiple forms of mistreatment that respondents reported.

### 1. Arbitrary accusations and detentions

Many respondents described being subjected to arbitrary accusations and detentions. In those instances, the police have accused respondents of violating the law even when they could point to no evidence of wrongdoing other than the victims being LGBTQ individuals. Yet, arresting and detaining someone based on their actual or perceived sexual orientation or gender identity/expression amounts to an arbitrary arrest and detention that violates international human rights standards.<sup>82</sup>

Respondents have been told that they violated a Shadow Law simply by being gay or transgender and outside at night. As one respondent explained, the police stereotype LGBTQ people as criminals: "A police officer told me that the crime rate is high because of transwomen and gays [and] LGBTQ people."<sup>83</sup>

Another respondent recounted that when she was arrested the police gave her no reason for it except to say that she should not be outside at night. When she asked the police why she had been arrested, they said: "Because you are a trans woman! Because you are gay!"<sup>84</sup> Other respondents reported comparable experiences of being arrested, or being threatened with arrest, for no reason other than being LGBTQ.<sup>85</sup>

Police officers also sometimes accuse people of violating Section 377, regardless of whether they have any evidence to support their accusations. For example, a respondent named Lin Lin reported that in June 2016, in a small district in the Sagaing region, police officers followed her home from a tea house to arrest her. According to Lin Lin, the police said, "we know you are transgender, so you need to

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<sup>82</sup> See notes 188-189 and accompanying text.

<sup>83</sup> Interview with Respondent No. 24, 27 September 2018.

<sup>84</sup> Interview with Respondent No. 38, 27 September 2018.

<sup>85</sup> E.g. Interview with Respondent No. 33, 27 September 2018; Interview with Respondent No. 40, 27 September 2018.

follow us.” After arriving at the police station, the police told Lin Lin she was under arrest under Section 377. Lin Lin explained that the police did not have any evidence of sexual activity. Instead, the arresting officer, displaying stereotypical and prejudicial views, stated: “all transwomen engage in anal sex and are bottoms [i.e., the ones who are penetrated during penetrative anal sex]”, and are therefore in violation of Section 377.<sup>86</sup> After arresting Lin Lin and other transgender women, a police officer slapped some of the transgender women and beat them in the head. He also threatened them by saying, “you are very active in sex, I will get all the inmates to have sex with you.” At that time, Lin Lin recognized an officer in the group who had previously raped her, and she said, “please arrest that police officer, sir, he has raped me before.” Eventually the police released the group of transgender women from custody. According to Lin Lin, the police did not follow up to investigate her rape accusation and provide redress.

The threat of arbitrary accusations and detention is not limited to the abuse of the Shadow Law and Section 377. For example, in one case, a community leader reported that a transgender woman found a mobile phone and handed it over at a police station.<sup>87</sup> However, the police accused her of stealing the phone. Other respondents also reported cases of false accusations of violating the law. Some respondents reported being arrested without ever being told what crimes the police suspected them of having committed. As illustrated by the testimony of Myat Thiri, in the text box below (p. 30), such arbitrary arrest can lead to arbitrary detention, ill-treatment and other abuse at the hands of law enforcement officers.

Representatives of LGBTQ organizations told researchers that arbitrary arrests tend to occur toward the end of each month. This has led them to suspect that LGBTQ people are easy targets for the police who carry out arrests to satisfy suspected monthly arrest quotas.

## 2. Physical, Sexual and Verbal abuse

Many respondents recounted being physically, sexually and/or verbally assaulted by law enforcement officers. Twenty respondents reported that they had been physically hurt by police officers and considered that the police had harmed them because they either knew or suspected that they were LGBTQ people. Physical assaults were

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<sup>86</sup> Interview with Respondent No. 35, 27 September 2018.

<sup>87</sup> Interview with Respondent No. 26, 27 September 2018.

committed in a variety of ways. For example, respondents reported being kicked,<sup>88</sup> slapped,<sup>89</sup> beaten with a stick,<sup>90</sup> tasered,<sup>91</sup> spat on<sup>92</sup> and burned with cigarettes.<sup>93</sup> Numerous respondents complained of being sexually assaulted, for example, by being groped<sup>94</sup> and even raped by police officers.<sup>95</sup> Respondents also complained about being threatened with sexual assault.<sup>96</sup> Forty respondents said that they had personally experienced verbal abuse from the police because the police either knew or suspected that they were LGBTQ individuals. The reported verbal abuse included name-calling,<sup>97</sup> being cursed at,<sup>98</sup> and denigrated as being criminal<sup>99</sup> or sexually deviant.<sup>100</sup>

Soe Soe Aung's testimony is illustrative of the physical and sexual abuse meted out by the police against people because of their real or perceived sexual orientation and gender identity.

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88 E.g., Interview with Respondent No. 11, 26 September 2019; Interview with Respondent No. 11, 19 December 2019; Interview with Respondent No. 14, 26 September 2018; Interview with Respondent No. 38, 27 September 2018; Interview with Respondent No. 47, 13 November 2018; Interview with Respondent No. 53, 13 November 2018.

89 E.g., Interview with Respondent No. 10, 25 September 2018; Interview with Respondent No. 11, 26 September 2019; Interview with Respondent No. 11, 19 December 2019; Interview with Respondent No. 40, 27 September 2018; Interview with Respondent No. 53, 13 November 2018; Interview with Respondent No. 66, 15 November 2018; Interview with Respondent No. 68, 15 November 2018.

90 E.g., Interview with Respondent No. 3, 24 September 2018; Interview with Respondent No. 5, 25 September 2018; Interview with Respondent No. 66, 15 November 2018.

91 Interview with Respondent No. 5, 25 September 2018.

92 Interview Respondent No. 53, 13 November 2018.

93 Interview Respondent No. 5, 25 September 2018.

94 E.g., Interview with Respondent No. 14, 26 September 2018; Interview with Respondent No. 66, 15 November 2018; Interview with Respondent No. 68, 15 November 2018.

95 E.g., Interview with Respondent No. 20, 27 September 2018; Interview with Respondent No. 35, 15 September 2018; Interview with Respondent No. 53, 13 November 2018; Interview with Respondent No. 68, 15 November 2018.

96 E.g., Respondent No. 47, 13 November 2018; Interview with Respondent No. 53, 13 November 2018; Interview with Respondent No. 61, 14 November 2018.

97 - 100 Interviews with various respondents

## Soe Soe Aung

*Sexually assaulted and beaten  
in 2011 & 2012*

Soe Soe Aung identifies as a transgender woman. One night in 2011, she was out with a few other transgender friends when two police officers arrived; her friends managed to flee, but Soe Soe Aung was left behind. The police ended up driving Soe Soe Aung to a toll gate. Then, according to Soe Soe Aung:

“They started slapping my face and kicking my stomach. They asked me if I am male or female, and I responded I was born as male, but I am female. They said, ‘if you have a dick, why are you dressing as a female?’ They slapped me again and I saw stars in my eyes. They were kicking me non-stop and it was so, so very painful. Again, I told them that I was born as a man, but I love to dress up as a female. One officer was so angry about my response that he put a knife to my throat. He then said I could go home if I gave the police officer and two gate-keepers massages and hand jobs. I did it, and then they allowed me to go home at around 3 in the morning. Afterwards, I felt so embarrassed and scared.”

In 2012, she had a run-in with the police again and, this time, they handcuffed her and raped her.<sup>101</sup>

Transgender respondents also reported being verbally abused, for instance, through derogatory questions about their gender and their bodies.<sup>102</sup> Forty respondents said that they had personally experienced verbal abuse from the police because the police either knew or suspected them of being LGBTQ. The reported verbal abuse included name-calling,<sup>103</sup> being cursed at,<sup>104</sup> and denigrated as being criminal<sup>105</sup> or sexually deviant.<sup>106</sup>

101 Interview with Respondent No. 53, 13 November 2018.

102 E.g., Interview with Respondent No. 11, 26 September 2019; Interview with Respondent No. 11, 19 December 2019.

103 E.g., Interview with Respondent No. 58, 14 November 2018; Interview with Respondent No. 64, 15 November 2018.

104 E.g., Respondent No. 47, 13 November 2018; Interview with Respondent No. 53, 13 November 2018.

105 Interview with Respondent No. 24, 27 September 2018.

106 Interview with Respondent No. 35, 27 September 2018.

### 3. Forcible disavowal of sexual orientation and gender identity/expression

There were also numerous complaints that law enforcement officers had forced transgender women to perform certain acts to make them disavow their gender identity/expression. For example, a transgender woman reported being forced to repeatedly shout out loud, “I am a male! I am a male!”<sup>107</sup> Transgender women also reported that the police had forced them to cut their hair<sup>108</sup> or held them in detention cells destined to hold male inmates,<sup>109</sup> as well as being made to change out of what police officers thought was women’s clothing into what they considered to be men’s wear, and ‘biologically appropriate’.<sup>110</sup>

Some transgender men also spoke about the pressure police officers put on them to behave according to rigid gender stereotypes. As one transgender man named Myint Thein explained: “At the police station, we refer to ourselves as ‘male,’ but the police keep calling us ‘daughter’ (သမီး) and ‘sister’ (ညီမ) [which is a customary way of addressing women in Myanmar], and they use the title ‘miss’. I do have my own experience with the police... I needed to tell them that I am female. We have to tell them we are female. That is how we protect ourselves, so that they will not touch us and they will leave us alone.”<sup>111</sup>

Transgender women and cisgender gay men reported being forced by the police to repudiate their self-identified gender identity/expression or their sexual orientation. However, more broadly, law enforcement bias also pressures other LGBTQ individuals to suppress their identities. For example, some respondents reported that due to prevalent cultural norms, law enforcement agents will treat cisgender women—including lesbians—and transgender men respectfully, as long as they conceal or deny being lesbians or transgender, respectively. Likewise, a bisexual man and gay men reported that they could avert being mistreated by “passing” as heterosexuals. The spectre of law enforcement mistreatment pressures people to suppress and/or conceal their LGBTQ identities. This, in turn, can strip individuals of their sense of self-worth and dignity.

107 Interview with Respondent No. 7, 25 September 2018.

108 E.g., Interview with Respondent No. 14, 26 September 2018; Interview with Respondent No. 19, 27 September 2018.

109 E.g., Interview with Respondent No. 9, 25 September 2018; Interview with Respondent No. 14, 26 September 2018; Respondent No. 61, 14 November 2018.

110 E.g., Interview with Respondent No. 60, 14 November 2018; Interview with Respondent No. 66, 15 November 2018.

111 Interview with Respondent No. 29, 27 September 2018.

#### 4. Other cruel, inhuman or degrading treatment

A number of respondents reported that law enforcement officers demanded that they perform humiliating tasks as a way of punishing or degrading them because of their sexual orientation or gender identity/expression. For example, one respondent, a gay man, was required to sing and dance on command;<sup>112</sup> at least two transgender women and one gay cross-dresser complaining that they were made to remove their clothing;<sup>113</sup> and at least three respondents were made to do frog jumps or squats by the police.<sup>114</sup> In addition, at least two transgender women were made to crawl around the police station on their knees;<sup>115</sup> and three transgender women respondents were made to do cleaning or perform other tasks at the police station under duress.<sup>116</sup> Two transgender women also said the police confiscated their personal property and, without justification, refused to return it.<sup>117</sup>

Numerous respondents—especially transgender women—reported a range of other mistreatment, such as the discriminatory withholding of basic provisions, which, in turn, the police would normally allow cisgender heterosexual inmates to have. For example, one transgender woman complained that the police had denied her food while they had served meals to other inmates who were cisgender.<sup>118</sup> Another four transgender women respondents said that they were not allowed to communicate with their families during their detention, even though cisgender inmates held alongside them were permitted to phone their relatives.<sup>119</sup> Another transgender woman respondent said she had been refused access to a toilet.<sup>120</sup> Finally, one cisgender male respondent who works with LGBTQ communities stated that he had witnessed police officers making transgender defendants walk to a court hearing, as an act of public shaming, whereas cisgender heterosexual defendants were transported by car.<sup>121</sup>

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112 Interview with Respondent No. 64, 15 November 2018.

113 E.g., Interview with Respondent No. 5, 25 September 2018; Interview with Respondent No. 14, 26 September 2018; Interview with Respondent No. 61, 14 November 2018.

114 E.g., Interview with Respondent No. 3, 24 September 2018; Interview with Respondent No. 66, 15 November 2018.

115 E.g., Interview with Respondent No. 9, 25 September 2018; Interview with Respondent No. 14, 26 September 2018.

116 E.g., Interview with Respondent No. 5, 25 September 2018; Interview with Respondent No. 7, 25 September 2018; Interview with Respondent No. 67, 15 November 2018.

117 E.g., Interview with Respondent No. 5, 25 September 2018; Interview with Respondent No. 68, 15 November 2018.

118 Interview with Respondent No. 7, 25 September 2018.

119 E.g., Interview with Respondent No. 7, 25 September 2018; Interview with Respondent No. 10, 25 September 2018; Interview with Respondent No. 40, 27 September 2018.

120 Interview with Respondent No. 58, 14 November 2018.

121 Interview with Respondent No. 1, 24 September 2018.

## Sandar Thien

### Humiliated and abused in 2017

Sandar Thien, a transgender woman who works in a beauty salon in Yangon was on her way back from a house call, one night in November 2017. She worked late at night providing hair care and treatment to her clients. That night, both Sandar Thien and a friend, who also identifies as a transgender woman, were arrested on their way home from work for allegedly violating a 'Shadow Law'. She recalled being stopped by a plain, unmarked car. Sandar Thien stated that the car was not a police car, however two men in the car identified themselves as police. According to her, the two policemen then proceeded to take photographs of her and her friend, and told them to get in the car with them. But neither at the time they were arrested nor later did the police ever mention the specific provision of the Police Act or the Rangoon Police Act they suspected Sandar Thien and her friend of having violated. She described her treatment:

**“The police forced us to clean their station and to shout out loud ‘I am a man’, but my voice is very soft and not strong as a man’s. Then the police told me I must shout as a man. It was very humiliating to shout this way in the public area of the station.”**

The same night, two cisgender men were also arrested. The police gave those men food, allowed them to contact their families, and ultimately released on bail. When Sandar Thien asked the police why she was not given any food, and was not allowed to contact her family, “the police replied, ‘because you are transgender!’”<sup>122</sup>

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122 Interview Respondent No. 7, 25 September 2018.

## Myat Thiri

*Arrested, detained and beaten in 2017*

In 2017, police arrested Myat Thiri when she was sitting outside at night with her friend at a popular hangout. Myat Thiri and her friend both identify as transgender women. According to Myat Thiri:

“ The police pulled my hair, slapped my face, and beat me with their rubber baton. I felt so embarrassed, and I was so very scared because I did nothing wrong. I asked what is my offence— why am I being arrested? They said I had no right to respond and no right to ask questions. They beat my leg again. I hurt so bad that I contemplated suicide. A large truck crossed the road and I wanted to throw myself under it to kill myself. Sadly, or luckily, one of the police officers grabbed my arms before I could do that, and then they beat me again. They then handcuffed me and put me in their car with my transgender friend. When we arrived at the police station, the police forced us to change our clothes into men’s shirts that were very dirty and smelly. Before they sent us to the cell, the police made us jump like frogs. While my friend was changing her clothes, the police touched her breast and butt, and asked if they were real. They also tried to touch my breasts. I said if you try to touch me, I will commit suicide. It was so embarrassing. I was forced to stay in a tiny police station cell for 15 days with my friend without knowing anything at all. We had no ability to communicate with our family members. On the fifteenth day, we were transferred to a holding area at the court. By coincidence, my friend saw her sister at the court. Her sister happens to be a lawyer and, thankfully, she successfully negotiated our release.”<sup>123</sup>

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123 Interview Respondent No. 66, 15 November 2018.

## Khin Maung Htun

*Arrested and humiliated in 2018*

Khin Maung Htun identifies as a cisgender gay man. In 2018, he happened to be using his phone outside at night. He did not realize that several young men had got into a fight not far from him. The police arrived to arrest the men who were fighting; among the police officers attending at the scene there was one officer who happened to know that Khin Maung Htun was gay because they had mutual acquaintances. According to Khin Maung Htun:

“...that officer pointed at me and said ‘he is gay, so arrest him too.’ They said I was arrested under the Shadow Law. When we arrived at the police station, the police made all of us kneel and they kicked us one by one, but I was also singled out for being gay. The police asked me in front of everyone why I am gay. I responded that ‘I am gay just because I am,’ and then the officer slapped me. All the other men were permitted to communicate with their family and make a bail payment (a payment of a personal bond at the police station),<sup>124</sup> but the police said I was not allowed to do the same because I am gay. It was not until much later that the police finally let me call my family.”<sup>125</sup>

### C. Mistreatment Breeds Mistrust

LGBTQ people have come to mistrust the police and GAD because of their biased, discriminatory and often violent behaviour towards them. As a result, LGBTQ people are often reluctant to file complaints with the police when they are victims of police misconduct. This reluctance extends also to their filing complaints with the police about human rights abuses at the hands of non-State actors of which LGBTQ individuals are often victims, partly or wholly, because of bias, animus, hostility and hatred against their real or imputed LGBTQ identity.

There is a discernible pattern among LGBTQ respondents who had experienced mistreatment from the MPF or GAD. Respondents generally did not file complaints

<sup>124</sup> Section 57(2) of the Criminal Procedure Code (India Act V 1898)

<sup>125</sup> Interview Respondent No. 40, 27 September 2018.

about mistreatment because they believed that, at best, their complaints would be ignored. Furthermore, some of them expressed their fear that filing complaints with the authorities would expose them to a risk of reprisals from the MPF or GAD officers who had mistreated them in the first place.

Fears of reprisals are not unfounded. One respondent reported that a police officer warned her not to report what he had done to her to anyone, saying that the police would seek revenge.<sup>126</sup> Another respondent, a transgender woman, said that after she posted a Facebook video complaining about her friends and herself being mistreated by the police, the police arrested her and broadcast her arrest via Facebook Live. The police explicitly told her that she “deserved” to have her face shown on Facebook Live because she had previously used Facebook to shame the police.<sup>127</sup>

In one case, which unfortunately appears to be an exception, a transgender woman named Moe Thida complained about her experience of police mistreatment. A police officer had arrested her accusing her of violating The Rangoon Police Act; he had beaten her with a wooden stick until it had broken, and had humiliated her by making her perform 100 squats. Because Moe Thida’s uncle is a high-ranking government official, he was able to secure her release without paying any money. Following her release, Moe Thida complained to the GAD and the perpetrator was transferred to a different police precinct.<sup>128</sup> However, Moe Thida’s complaint did not result in a criminal investigation, let alone criminal proceedings being opened against her abuser. Furthermore, among the reports collected during the research, Moe Thida’s case was exceptional, and it appears that its outcome was due to her personal connections.

Fear of discriminatory and violent behaviour from law enforcement officers also affects the way that LGBTQ people view the police when they are themselves victims of crimes committed by non-State actors. LGBTQ respondents who cannot or do not wish to “pass” as cisgender heterosexuals reported that they avoid seeking police assistance due to their fears about the police’s reaction. One transgender woman stated, “they should be protecting us from criminal perpetrators, but the police themselves are the perpetrators of criminal offences [against transgender women], and that is why I cannot trust the police.”<sup>129</sup> Other LGBTQ respondents said that they would strategically attempt to “pass” as cisgender heterosexuals when interacting with the police.

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126 Interview Respondent No. 61, 14 November 2018.

127 Interview Respondent No. 14, 26 September 2018.

128 Interview Respondent No. 3, 24 September 2018.

129 Interview with Respondent No. 47, 13 November 2018.



# Part Five

## Obstacles to Fair Adjudication

Many of the respondents described Myanmar's criminal courts as an obstacle to justice. This complaint is consistent with existing critiques of the overall weaknesses plaguing Myanmar's judicial system.<sup>130</sup> Systemic corruption within the justice system has created an environment where bribery, delays and obstructions are commonplace,<sup>131</sup> creating barriers to justice for all individuals in Myanmar. Still, respondents reported additional obstacles beyond those that characterize Myanmar's court system more generally. This chapter examines the ways in which the court system unfairly treats LGBTQ defendants in criminal cases.<sup>132</sup>

### A. Discriminatory Treatment in Court

Several respondents stated that either they, or another LGBTQ person they knew, had been unduly induced by the police to confess to alleged crimes in court, even though they were innocent.<sup>133</sup> According to these testimonies, the police told the defendants that they would receive lighter sentences if they confessed to their crimes before a judge. Once in court charged with committing a criminal offence, LGBTQ defendants did not receive any directions from judges discouraging them from admitting to crimes they had not committed. Nor did they have access to a lawyer who might have explained their rights to them.

Several respondents said that they have witnessed judges or court staff openly treat LGBTQ people with disdain. Hnin, a staff member of an LGBTQ organization, told

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130 Refer to ICJ Publications, 'Right to Counsel: The Independence of Lawyers in Myanmar', 2013, and 'Handbook on Habeas Corpus in Myanmar', 2016, see also: 'Rule by Law and Impunity Undermine Prevention of and Accountability for Human Rights Violations in Myanmar' by Dr. Daniel Aguirre <https://teacircleoxford.com/2018/06/04/rule-by-law-and-impunity-undermine-prevention-of-and-accountability-for-human-rights-violations-in-myanmar/>, the report of the independent international fact-finding mission on Myanmar, presented at the 39<sup>th</sup> session of the Human Rights Council in September 2018 acknowledges the deep impunity entrenched in the State's political and legal system.

131 Ibid, page 5

132 See 2016 Law Reports of the Supreme Court: [http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/2016\\_rulling\\_0.pdf](http://www.unionsupremecourt.gov.mm/sites/default/files/supreme/2016_rulling_0.pdf)

133 E.g., Interview with Respondent No. 4, 24 September 2018; Interview with Respondent No. 5, 25 September 2018; Interview with Respondent No. 14, 26 September 2018; Interview with Respondent No. 58, 14 November 2018.

researchers: “I’ve seen a lot of judges bullying accused LGBTQ persons. The judge will say ‘you guys are just criminal people.’ This is very common.”<sup>134</sup> Hnin said that, in addition to judges, courtroom staff would mock LGBTQ persons. Other respondents corroborated Hnin Hnin’s observations. For example, one transgender woman reported that the judge presiding over her case and the courtroom staff both derided her. She said, “they blamed me [and said] a man should behave as a man.”<sup>135</sup> Another transgender woman said of the courtroom staff, “they jeered me for dressing as a woman; they saw me as a joke.”<sup>136</sup>

The negative comments made by judges presiding over cases involving LGBTQ defendants and by courtroom staff give rise to concern that Myanmar’s adjudication system is tainted by homophobia and transphobia, which, in turn, creates a real risk of discriminatory, biased and unfair adjudication of cases involving LGBTQ defendants, to the point where their rights to a fair trial and to equality before the law and equal protection of the law without discrimination are threatened.

Beyond insults and derision, reports of discriminatory treatment were also common among respondents. One transgender woman reported that when she was accused of committing a crime, she sought to have another transgender woman called to give evidence as a witness on her behalf. However, a policeman told her bluntly that LGBTQ people could not stand as witnesses.<sup>137</sup> According to the community member working on the case: “The courts don’t consider us as credible witnesses; if we want to stand as a witness, the court won’t accept us.”<sup>138</sup>

Another advocate described a different and more subtle way in which the courts fail to treat transgender people with dignity and respect. The advocate explained how judges and courtroom staff would generally refuse to address transgender people using pronouns and other language recognizing the gender with which the person concerned self-identified. He said that even if a transgender woman referred to herself using feminine pronouns, the judge would refer to her as a man.<sup>139</sup>

Despite the reported discriminatory attitudes of judges and courtroom staff, some LGBTQ defendants have successfully challenged in court spurious criminal charges brought against them. One advocate explained that in cases where he helped to defend a number of transgender women, the judges released the women from

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134 Interview with Respondent No. 4, 24 September 2018.

135 Written Survey Response No. 68.

136 Written Survey Response No. 47.

137 Interview with Respondent No. 26, 27 September 2018.

138 Interview with Respondent No. 26, 27 September 2018.

139 Interview with Respondent No. 1, 24 September 2018.

police custody upon a verbal agreement that the women would not go outside again at night. The judges, however, refused to enter a formal acquittal.<sup>140</sup>

## B. 'Avoiding the court' whenever possible

The majority of respondents who had been accused of crimes sought to resolve their cases outside of court. Among the respondents who avoided court appearances, some decided to pay a “fine” to the police in order to be released. Others explained that they had managed to be released by directly confronting the police about the spurious allegations of criminal behaviour the police had made against them, usually with the help of professional LGBTQ advocates, lawyers found by community members, or some other third party. In addition, while most respondents had no personal experiences in court, a troubling number of them reported they were aware of unfair treatment in court of others.

Indeed, LGBTQ people are generally sceptical of the judicial system, and are particularly reluctant to appear in court. As one respondent put it: “Even if we do not have personal experience with lawyers and court and judges, that doesn’t mean we do not have any problems with them. They never recognize our identity. Even if we go to court, we would only get their disrespect in return, and that’s why we never bring our cases to court.”<sup>141</sup> Another respondent echoed this sentiment, stating “the judge—she or he doesn’t care whether the case [against transgender persons] is true or not... Whenever a transgender case is brought before the court, the court will always convict us.”<sup>142</sup>

It is very rare to hear of cases and legal challenges filed by LGBTQ persons, especially in cases raising human rights issues.<sup>143</sup> Technically, the courts have the power to uphold LGBTQ people’s constitutional rights. The Supreme Court of Myanmar has limited jurisdiction over constitutional matters, and should refer constitutional questions to the Constitutional Tribunal.<sup>144</sup> However, such referrals entail a cumbersome process and rarely occur.<sup>145</sup> Mistrust of the court system also deters LGBTQ individuals from seeking justice in court.

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140 Id.

141 Interview with Respondent No. 32, 27 September 2018.

142 Interview with Respondent No. 48, 14 November 2018.

143 As mentioned in the methodology section, court records of cases are also extremely difficult to access. The Supreme Court – Myanmar’s apex court –only recently started providing public access to written decisions in select commercial cases, and it produces a digest of selected cases on an annual basis.

144 Section 322 of the 2008 Myanmar Constitution

145 The process is laid out in Section 325 and 326 of the 2008 Constitution.





## Part Six

# Myanmar's obligations under international human rights law

Myanmar, as a party to several human rights treaties is obligated to respect, protect and fulfil LGBTQ people's human rights. This duty requires Myanmar to protect LGBTQ persons from human rights violations carried out by state actors, private actors, and other third parties. Treaties by which Myanmar is bound include the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>146</sup> the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),<sup>147</sup> the Convention on the Rights of the Child (CRC)<sup>148</sup> and the Convention on the Rights of Persons with Disabilities (CRPD).<sup>149</sup> While to date Myanmar is not yet a party to the International Covenant on Civil and Political Rights (ICCPR), the NLD-led Government has stated that it plans to accede to the Covenant, and is reportedly taking steps toward doing so. Full accession, however, is expected to take a number of years.

Several key human rights principles are reflected in Myanmar's Constitution. The 2008 Constitution of Myanmar identifies equality, liberty, and justice as three "eternal principles" for which the country strives.<sup>150</sup> The Constitution refers to these principles in its Preamble and twice in Chapter I's enumeration of Basic Principles. For example, section 21(a) states that "Every citizen shall enjoy the right of equality,

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146 International Covenant on Economic, Social And Cultural Rights (ICESCR), entered into force 3 January 1976, Myanmar signed in 16 July 2015 and ratified on 6 October 2017

147 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), entered into force 3 September 1981, Myanmar acceded on 22 July 1997

148 The Convention on the Rights of the Child (CRC), entered into force, 2 September 1990, Myanmar acceded on 15 July 1991.

149 The Convention on the Rights of Persons with Disabilities (CPD), entered into force 3 May 2008, Myanmar acceded on 7 December 2011.

150 Constitution of Myanmar (2008), Preamble.

the right of liberty and the right of justice, as prescribed in this Constitution.”<sup>151</sup> Regardless of an individual’s citizenship status, section 347 of the Constitution states that: “The Union shall guarantee [emphasis added] *any person* to enjoy equal rights before the law and shall equally provide legal protection.”<sup>152</sup>

The treatment of LGBTQ people under Myanmar’s criminal law and justice system contravenes Myanmar’s constitutional commitments to equality, liberty and justice, and amounts to a violation of binding international human rights law.

Moreover, the situation of LGBTQ people in Myanmar compares negatively with the growing advancements in human rights protection from which LGBTQ persons in other jurisdictions around the world have benefitted in recent years.

The following section will draw on international human rights law and standards to analyse the ways in which Myanmar’s criminal law and justice system violates the interrelated principles of equality, liberty and justice set out in the Constitution.

## A. Rights to Equality and Non-discrimination

International human rights treaties require Myanmar to respect, protect and fulfil, among others, the twin principles of equality and non-discrimination as they relate to sexual orientation and gender identity/expression. The International Covenant on Civil and Political Rights<sup>153</sup> (ICCPR) and the International Covenant on Economic, Social and Cultural Rights<sup>154</sup> (ICESCR) are among the core human rights treaties prohibiting SOGIE-based discrimination.

While Myanmar is one of the few States that has yet to become a party to it, the ICCPR, with 173 States parties to date, reflects the contemporary universal standard with respect to the rights to equality and non-discrimination, including the right to equality before the law and equal protection of the law without discrimination. In addition, the jurisprudence produced by its supervisory body, the UN Human Rights Committee, is an authoritative source for identifying the scope and content of these

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151 *Id.*, Preamble, Sections 6, 21(a). Many of the rights including in the Constitution are paired with a clause designed to enable contravention of this right in certain circumstances. However, international and comparative law suggest that there are no legitimate ground for restricting the LGBTQ human rights discussed in this chapter of the report.

152 For a discussion, see: ICJ, “Citizenship and Human Rights in Myanmar: Why Law Reform is Urgent and Possible,” June 2019, pp. 7.

153 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171, entered into force 23 March 1976.

154 International Convention on Economic Social and Cultural Rights (ICESCR), 993 UNTS 3, entered into force 3 January 1976.

rights under general international law. Indeed, the fundamental aspects of the non-discrimination principle and the right to equality before the law and equal protection of the law, contained in Article 2 and 26 of the ICCPR, respectively, constitute customary international law, and are thus binding on Myanmar.

Both the ICCPR and ICESCR do not explicitly refer to sexual orientation or gender identity/expression, but they are nonetheless understood to prohibit SOGIE-based discrimination. For example, the UN Human Rights Committee has held that the ICCPR's prohibition of discrimination based on "sex" in Articles 2 and 26 of the Covenant should be read to include discrimination based on sexual orientation.<sup>155</sup> The Committee has also confirmed that the ICCPR prohibits discrimination based on gender identity.<sup>156</sup> Similarly, the UN Committee on Economic, Social and Cultural Rights has stated that the ICESCR's prohibition of discrimination based on "other status" in Article 2(2) includes sexual orientation; and it has also affirmed that "gender identity is recognized as among the prohibited grounds of discrimination", even though it is not explicitly listed among those grounds in Article 2(2).<sup>157</sup>

Myanmar is also bound by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>158</sup> Although CEDAW does not explicitly refer to sexual orientation or gender identity/expression, the UN CEDAW Committee has stated repeatedly that CEDAW's prohibition of sex discrimination requires protecting lesbians, bisexual and transgender women from discrimination.<sup>159</sup> Myanmar is also bound by the Convention on the Rights of the Child (CRC).<sup>160</sup> Although the CRC does not explicitly mention sexual orientation or gender identity/expression, the UN Committee on the Rights of the Child has stated that the CRC requires protecting young people against discrimination on the grounds of sexual

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155 *Toonen v. Australia*, UN Human Rights Committee, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994), para. 8.7.

156 *G v. Australia*, UN Human Rights Committee, Communication No. 2172/2012, UN Doc. CCPR/C/119/D/2172/2012 (2017), para 7.12.

157 Committee on Economic, Social and Cultural Rights, *General Comment 20: Nondiscrimination in Economic, Social and Cultural Rights (Art. 2, Para. 2, of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc. E/C.12/GC/20 (2009), para. 32.

158 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1249 UNTS 13, entered into force 3 September 1981, Myanmar acceded in 1997.

159 See, e.g., CEDAW Committee, *General Recommendation No. 36 (2017) on the Right of Girls and Women to Education*, UN Doc. CEDAW/C/GC/36 (2017), para. 46(i); CEDAW Committee, *General Recommendation No. 35 on Gender-based Violence against Women, Updating General Recommendation No. 19*, UN Doc. CEDAW/C/GC/35 (2017), paras. 12, 29(c)(i); CEDAW Committee, *General Recommendation on Women's Access to Justice (General Recommendation No. 33)*, UN Doc. CEDAW/C/GC/33 (2015), para. 8; CEDAW Committee, *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*, UN Doc. CEDAW/C/GC/28 (2010), para. 18.

160 Convention on the Rights of the Child (CRC), 1577 UNTS 3, entered into force 2 September 1990, Myanmar acceded in 1991.

orientation and gender identity,<sup>161</sup> which should be understood to include gender expression as well.<sup>162</sup>

The impermissibility of SOGIE-based discrimination under international human rights law is further clearly articulated in the Yogyakarta Principles,<sup>163</sup> an influential restatement on the application of international human rights law to SOGIE issues.<sup>164</sup> The Yogyakarta Principles Plus 10 also recognize the right to State protection from violence, discrimination and other harm by State and non-state actors.<sup>165</sup> Accordingly, Myanmar has a clear obligation under treaty-based international human rights law to prohibit and combat SOGIE-based discrimination.<sup>166</sup>

Myanmar may also wish to consider how other countries' domestic laws have recently advanced the protection of LGBTQ persons' human rights. In parallel with analogous

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161 Committee on the Rights of the Child, *General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence*, UN Doc. CRC/C/GC/20 (2016), para. 24; Committee on the Rights of the Child, *General Comment No. 4: Adolescent Health and Development in the Context of the Convention on the Rights of the Child*, UN Doc. CRC/GC/2003/4 (2003), para. 6; Committee on the Rights of the Child, *General Comment No. 3: HIV/AIDS and the Rights of the Child*, UN Doc. CRC/GC/2003/3 (2003), paras. 8-9.

162 On the relationship between gender identity and gender recognition, see the Preamble of the Yogyakarta Principles Plus Ten (discussed below in note 94), which notes that "'gender expression' is included in the definition of gender identity in the Yogyakarta Principles and, as such, all references to gender identity should be understood to be inclusive of gender expression as a ground for protection." Similarly, this report takes the view that the prohibition of discrimination based on gender identity should be understood to include the proscription of discrimination on the ground of gender expression.

163 The International Commission of Jurists and the International Service for Human Rights, on behalf of a coalition of human rights organizations, undertook a project to develop a set of international legal principles on the application of international law to human rights violations based on sexual orientation and gender identity to bring greater clarity and coherence to States' human rights obligations. In 2006, in response to well-documented patterns of abuse, a distinguished group of international human rights experts met in Yogyakarta, in Indonesia, to outline a set of international principles relating to sexual orientation and gender identity. The result was *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity: a universal guide to human rights which affirm binding international legal standards with which all States must comply*. The Yogyakarta Principles outline the ways in which international human rights law applies to issues concerning sexual orientation and gender identity. They describe sexual orientation and gender identity, respectively, as follows: "(s)exual orientation is understood to refer 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"; "(g)ender identity is understood to refer 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 the 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, and mannerisms.

164 The Yogyakarta Principles are often regarded as an authoritative statement and have been cited by numerous national and international tribunals. In 2017, international human rights experts updated the Yogyakarta Principles by adopting the *Additional Principles and State Obligations 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* (also known as the "Yogyakarta Principles Plus Ten" and "YP+10"). The Yogyakarta Principles and YP+10 are available at <https://yogyakartaprinciples.org>.

165 Yogyakarta Principles, principles 5 and 7; Yogyakarta Principles plus 10, principle 30.

166 As noted in the Yogyakarta Principles, Principle 2(a): "[States shall e]mbody the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein, including by means of amendment and interpretation, and ensure the effective realisation of these principles."

developments in the context of international human rights law and standards, several foreign courts have interpreted their countries' constitutional protections against discrimination to encompass a prohibition of discrimination based on sexual orientation and/or gender identity even though their constitutional texts do not explicitly list sexual orientation or gender identity as protected categories.<sup>167</sup>

In Asia, in recent years, the apex courts of Hong Kong, India, Nepal, the Philippines, and Taiwan have ruled that sexual orientation discrimination is unconstitutional even though their constitutions do not explicitly mention sexual orientation.<sup>168</sup> India's Supreme Court has ruled that the country's Constitution prohibits gender identity discrimination as a form of sex discrimination.<sup>169</sup> Similarly, Nepal's highest court has ruled that its interim Constitution prohibited gender identity discrimination even though gender identity was not explicitly mentioned in the text.<sup>170</sup> In Thailand, the Constitutional Drafting Assembly stated in its report, "Intentions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)", that the Constitution's reference to "sex" in its non-discrimination clause encompassed discrimination based on "sexual identity," "gender," and "sexual diversity."<sup>171</sup>

Examples of judicial interpretation of SOGIE related constitutional provisions are provided (next page):

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167 See Holning Lau, "Sexual Orientation and Gender Identity Discrimination," 2.2 *Comparative Discrimination Law* 1, 1-24 (2018).

168 See *Secretary for Justice v. Yau Yuk Lung Zigo*, [2007] 10 HKCFAR 335 (Hong Kong 2017); *Navtej Singh Johar v. Union of India* (India); *Sunil Babu Pant and others v Nepal Government and Others*, 2 NJA Law Journal 261 (2008) (Nepal); *Ang Ladlad LGBT Party v. Commission on Elections*, G.R. No. 190582 (Philippines 2010); *J.Y. Interpretation 748* (Taiwan 2017). In 2015, Nepal adopted a new Constitution that explicitly recognizes "gender and sexual minorities" as a protected group.

169 *National Legal Services Authority (NALSA) v. Union of India*.

170 *Sunil Babu Pant and others v Nepal Government and Others*.

171 Busakorn Suriyasarn, "Gender Identity and Sexual Orientation in Thailand" (International Labour Organization 2014), p. 20, quoting the government report titled "Intentions of the Constitution of the Kingdom of Thailand B.E. 2550 (2007)."

## India

Article 15 of India's constitution protects equality by stating that "The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them." Like Myanmar's constitutional provisions concerning equality and non-discrimination, Article 15 of India's constitution does not explicitly refer to sexual orientation or gender identity. However, in *National Legal Services Authority (NALSA) v. Union of India*, the Supreme Court of India ruled that the Constitution's prohibition of sex discrimination encompasses discrimination based on gender identity. Similarly, the Supreme Court stated in *Navtej Singh Johar v. Union of India* that the constitutional prohibition on sex discrimination covers sexual orientation discrimination.

## Nepal

Nepal's Interim 2063 (2007 AD) Constitution did not explicitly refer to sexual orientation or gender identity. Nonetheless, pursuant to that constitution's protection of equality, the Constitutional Court of Nepal stated that the government should annul all laws that discriminate against LGBTI persons.

In its 2007 landmark decision in the case of *Sunil Babu Pant and others v. Nepal Govt and Others*, the Supreme Court directed the government of Nepal to take necessary measures to ensure that people of diverse identities and sexual orientations could fully enjoy their rights without discrimination. Such measures were to include the adoption of new laws or amending existing laws.

Myanmar's Constitution states that, "The Union shall guarantee any person to enjoy equal rights before the law and shall equally provide legal protection."<sup>172</sup> It also requires that: "The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth."<sup>173</sup> As evident from international and comparative law jurisprudence, SOGIE-based discrimination is both a form of sex discrimination and a form of *status*

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172 *Id.*, Section 347.

173 *Id.*, Section 348.

discrimination. Accordingly, Myanmar's constitutional prohibition of sex and status discrimination should be understood to prohibit SOGIE-based discrimination.

The prohibition of discrimination on the grounds of real or imputed SOGIE gives rise to numerous obligations under international human rights law. Crucially, Myanmar must "respect, protect and fulfil" LGBTQ people's rights to non-discrimination and to equality before the law and equal protection of the law without discrimination,<sup>174</sup> among others. This obligation entails not only providing redress for discrimination after it happens, including through ensuring effective access to justice and judicial remedies in certain circumstances, but also taking steps to prevent discrimination from occurring. Indeed, in a 2015 report about discrimination and violence against individuals based on their sexual orientation and gender identity, the Office of the UN High Commissioner for Human Rights (OHCHR) affirmed that: "States have an obligation to ensure that laws, policies and programmes executed by State authorities do not discriminate against individuals. They also have an obligation to address discriminatory practices, including by private actors, and to take action to prevent, diminish and eliminate the conditions and attitudes that contribute to substantive or de facto discrimination."<sup>175</sup>

Conversely, however, multiple aspects of Myanmar's criminal law and justice system continue to foster and give rise to discrimination against LGBTQ people. Myanmar must address these problems. Section 377 of the Penal Code is discriminatory insofar as it criminalizes consensual same-sex sexual conduct. With respect to this, the CEDAW Committee, the Committee on Economic, Social and Cultural Rights<sup>176</sup> and CRC Committee have all emphasized the importance of repealing discriminatory laws that criminalize people based on sexual orientation or gender identity.<sup>177</sup> This is relevant because Myanmar is bound by CEDAW, ICESCR and the CRC.

By repealing Section 377, Myanmar would join a growing number of States around the world that have repealed or otherwise abolished laws that criminalize consensual same-sex sexual conduct.<sup>178</sup>

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174 Office of the UN High Commissioner for Human Rights (OHCHR), *Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, UN Doc. A/HRC/29/23 (2015), para. 10.

175 *Id.*, para. 41.

176 In its General Comment on Sexual and Reproductive Health (22/2016), the ICESCR Committee stated that criminalization of LGBTI activity, as well as regulations requiring LGBTI persons to undergo treatment as mental patients, are violations of the right to sexual and reproductive health under the ICESCR.

177 CEDAW Committee, *General Recommendation No. 35* (note 158) para. 29(c)(i); Committee on the Rights of the Child (CRC Committee), *General Comment No. 20* (note 160), para. 34.

178 As Justice Malhotra of the Indian Supreme Court noted in 2018: "The trend of decriminalizing anti-sodomy laws world over has gained currency during the past few decades since such laws have been recognised to be violative of human rights." *Navtej Singh Johar v. Union of India* (Malhotra, J., concurring, para. 10). The countries that most recently abolished criminal prohibitions of consensual same-sex sodomy include Trinidad and Tobago (2018), India (2018), Angola (2019) and Botswana (2019).



Other aspects of Myanmar's criminal law and justice system also discriminate against LGBTQ people. As detailed in previous chapters, such discrimination is the trigger for police targeting of LGBTQ individuals through the prejudicial enforcement of the law.<sup>179</sup> As mentioned earlier, judges and court staff too often discriminate against LGBTQ people by treating them less favourably than other people partly or wholly because of bias, animus, hostility and hatred against their real or imputed LGBTQ identity.<sup>180</sup> Myanmar must take steps to prevent such discrimination and provide a remedy when it occurs.

In sum, the government of Myanmar must prohibit SOGIE-based discrimination. Doing so would be an initial, critical step toward greater compliance with international human rights law, including, in particular, the country's treaty obligations under the ICESCR, CEDAW and CRC. Such a move would also bring Myanmar's legislative discrimination framework closer to the practice of a growing number of jurisdictions both within Asia and around the world.

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179 See Chapter III.1.

180 See Chapter IV.

## The right to challenge administrative decisions

It is a general principle of law that courts have competency to review procedural questions, and that people challenging administrative procedures should have effective access to a judicial authority. LGBTQ individuals in Myanmar have constitutional rights to seek judicial review of administrative decisions by executive powers, including those taken by ministers, civil servants and statutory bodies.

Constitutional writs are a mechanism for the judicial review of decisions taken by administrative bodies in their exercise of executive power.

In Myanmar, the Supreme Court may issue a prerogative writ (an order) either by its own initiative or in response to the application of an individual.<sup>181</sup>

Five different constitutional writs may be issued by a Court:

- 】 **Certiorari:** to cancel an unlawful decision by an executive power.
- 】 **Prohibition:** to prohibit and prevent an illegal act by an executive power.
- 】 **Mandamus:** to direct an official to perform their duties or correct an illegal action.
- 】 **Habeas corpus:** to review the legality of an individual's detention.
- 】 **Quo warranto:** to prevent a person from carrying out unauthorized acts.

Constitutional writs can be a powerful tool as a check on executive power. However, there are significant barriers to utilizing writs in practice.<sup>182</sup> A court acting *suo moto* may provide another pathway to reviewing and potentially altering an administrative decision. *Suo moto* describes a situation where a court acts of its own initiative, rather than being seized of a particular matter through an application to the court in a given case.

Early jurisprudence in Myanmar includes cases where judges have sought to act *suo moto*. Some current judges say they have a right to act *suo moto*; however, it is unclear if they have applied this principle in practice.<sup>183</sup>

181 Article 18, 296, 378 of the Myanmar 2008 Constitution

182 For applicants, these challenges include costs associated with the preparation and processing of documentation and with travel to the Supreme Court in Nay Pyi Taw. See: 2011 Procedural Rules and Regulations for the Application of Writs. See also: Melissa Crouch, "The Common Law and Constitutional Writs: Prospects for Accountability in Myanmar" in *Law, Society and Transition in Myanmar*, Hart Publishing, 2014, pp. 155. For the judiciary, it lacks independence from the executive. See: ICJ, "Handbook on Habeas Corpus in Myanmar," May 2016, pp. 19-22.

183 A preliminary study of available jurisprudence did not establish if these acts had been upheld. For an example of its intended application, see: *Pwa Thein v. Tin Shwe*, *Burma Law Reports* (1956) pp. 228

## **B. Rights to Privacy, Freedom from Arbitrary Arrest and Detention, Freedom of Movement, and Other Protected Liberties**

Liberty is the second “eternal principle” in Myanmar’s Constitution. The principle of liberty, as expressed in the Constitution, encompasses numerous rights that are protected by international human rights law, including the rights to: liberty and security of person, in particular freedom from arbitrary arrest and detention; to privacy; and to freedom of movement and security.

The right to privacy safeguards a person’s ability to make decisions about one’s own private life.<sup>184</sup> Section 357 of the Constitution of Myanmar protects people’s “privacy and security of home.” As the UN Human Rights Committee explained in *Toonen v. Australia*, the criminalization of consensual same-sex conduct violates both the right to privacy and the right to be free from discrimination based on sexual orientation.<sup>185</sup> Regional human rights bodies and many apex domestic courts have similarly concluded that the criminalization of consensual same-sex sexual conduct conflicts with both equality and privacy rights.<sup>186</sup>

As mentioned above, the principle of liberty also encompasses people’s right to be free from arbitrary arrest and detention. The Universal Declaration of Human Rights provides in Article 9 that “no one shall be subjected to arbitrary arrest, detention or exile.”<sup>187</sup> Subsequent treaties echo this principle.<sup>188</sup> Moreover, as the United Nations Working Group on Arbitrary Detention has explained: “the prohibition of all forms of arbitrary deprivation of liberty forms a part of international customary law and constitutes a pre-emptory or *jus cogens* norm.”<sup>189</sup> Thus, the rule against arbitrary arrests and detention applies to States regardless of whether or not they are a party to relevant treaties.

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184 For further discussion on the relationship between liberty and privacy, see Bert-Jaap Koops et al., “A Typology of Privacy,” 38 *University of Pennsylvania Journal of International Law* 483 (2017).

185 *Toonen v. Australia*, UN Human Rights Committee, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (1994), para. 8.7

186 For a discussion of relevant jurisprudence, see Andrew Novak, “Using International and Foreign Law in Human Rights Litigation: The Decriminalization of Homosexuality in Belize,” 10 *Journal of Human Rights Practice* 346 (2018). See also *Navtej Singh Johar v. Union of India* (note 7); *Jones v. Attorney General of Trinidad and Tobago* (note 37).

187 Universal Declaration of Human Rights (UDHR), adopted 10 Dec. 1948, GA Res. 217A(III), UN Doc. A/810.

188 See El Hadji Malick Sow (Chair-Rapporteur), *Report of the Working Group on Arbitrary Detention*, UN Doc. A/HRC/22/44 (2012), para. 42, citing Art. 9 of the ICCPR; Art. 6 of the African Charter of Human and Peoples’ Rights; Art. 7, para. 1 of the American Convention on Human Rights; Art. 14 of the Arab Charter on Human Rights; and Art. 5, para. 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

189 *Id.* at p. 2.

The UN Office of the High Commissioner for Human Rights has stated that: “[a]rrests and the detention of individuals on charges relating to sexual orientation and gender identity—including offences not directly related to sexual conduct, such as those pertaining to physical appearance or so-called ‘public scandal’—are discriminatory and arbitrary.”<sup>190</sup> According to this reasoning, the use of vague Shadow Laws to arrest and detain LGBTQ people is both discriminatory and arbitrary. Myanmar must remedy and prevent such arbitrary practices.<sup>191</sup>

International human rights law also requires that the enforcement of the criminal law should only result in the deprivation of an individual’s liberty when doing so comports with the principle of legality, which is a general principle contained in almost every international human rights instrument,<sup>192</sup> and a basic tenet of criminal law.<sup>193</sup> It requires that crimes – and corresponding sanctions – be defined in law in an intelligible manner, and that conduct that is criminalized be clearly defined. Vague and overbroad laws purporting to prevent intangible social harms, such as Myanmar’s Shadow Laws, which can be used to punish a wide range of behaviours and enforced in an abusive manner, violate the principle of legality.<sup>194</sup>

As discussed in Chapter III, Shadow Laws also restrict LGBTQ individuals’ freedom of movement. Under the CEDAW Convention, for example, Myanmar has an obligation to provide women with the same rights pertaining to the freedom of movement of men.<sup>195</sup> Yet, Shadow Laws disproportionately impinge upon transgender women’s freedom of movement.

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190 Toonen v. Australia (note 97), paras. 8.1-11. See also OHCHR (note 111), para. 43

191 For further discussion on states’ obligation to prevent and remedy arbitrary deprivations of liberty based on SOGIE status, see Yogyakarta Principles (note 163), Principle 7.

192 See, ICCPR, e.g. Article 15(1) in respect of the principle of *nullum crimen sine lege*.

193 See S Lamb, ‘*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law’ in A Cassese & P Gaeta, et al. (eds.). The principle of legality covers several rules, which are interconnected and sometimes overlapping. First, the prohibition on the retroactive application of the criminal law: no act may be punished as a crime that was not a criminal offence under a law applicable to the accused at the time of the act, and the rule that upon conviction the accused may not be punished with a higher penalty than that which was provided in law when the action took place. Second, the rule that the criminal law must be sufficiently clear to provide notice that the act was prohibited at the time it was committed (principle of *lex certa*). Third, the rule that a crime may not be created through analogous application of criminal law (prohibition against analogy or *lex stricta*). Fourth, in line with these rules, it is often also accepted that only criminal law statutes can define a criminal offence and prescribe a penalty (principle of *lex scripta*). See, Piet Hein van Kempen, ‘Introduction – Criminal Law and Human Rights’, in: P.H.P.H.M.C. van Kempen (ed.), *Criminal Law and Human Rights, The International Library of Essays on Criminal Law, England/USA*: Ashgate, 2014, p. XI-XXXIII. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2953285](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2953285). See also, some of the general principles of criminal law enshrined in the Rome Statute of the International Criminal Court, e.g., Article 22 *Nullum crimen sine lege*, Article 23 *Nulla poena sine lege*, Article 24 on non-retroactivity *ratione personae*, and Article 25 on individual criminal responsibility.

194 See, e.g., Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights.

195 CEDAW Art. 15(4).

International human rights law also sets standards concerning States' treatment of persons who are deprived of their liberty. There is a peremptory norm against torture and other cruel, inhuman or degrading treatment or punishment.<sup>196</sup> The preceding chapters recounted reports of LGBTQ respondents' mistreatment at the hands of law enforcement officials, including in detention. Certain forms of mistreatment may amount to violations of prohibition of torture and other cruel, inhuman or degrading treatment or punishment. Because the norm is peremptory, it applies without exception to Myanmar. The law and the practice in Myanmar should be reformed in compliance with this international obligation.

Effectively obliging LGBTQ persons to conceal and or to renounce their SOGIE identities constitutes the suppression of a fundamental aspect of one's personhood.<sup>197</sup> As the Court of Justice of the European Union explained in the cases of *X, Y AND Z v Minister voor Immigratie en Asiel*, "requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person's identity that the persons concerned cannot be required to renounce it".<sup>198</sup> The same can be said of gender identity. When state actors pressure someone to conceal their sexual orientation or gender identity, the individual's liberty to live as their authentic self is severely compromised.<sup>199</sup>

### C. Right to access to justice and effective remedies

Justice is the third "eternal principle" in Myanmar's constitution. The right of access to justice and effective remedies requires States to provide victims of human rights abuses not only fair and effective adjudicatory mechanisms, but also with effective remedies for such abuses.<sup>200</sup> This right is enshrined in numerous international human rights instruments.

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196 See e.g., *Report of the International Law Commission, Sixty-Sixth Session (5 May–6 June and 7 July–8 August 2014)*, UN Doc. A/69/10, Annex, pp. 274-282; OHCHR, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers* (2003), pp. 318-319; David Weissbrodt & Cheryl Heilman, "Defining Torture and Cruel, Inhuman, and Degrading Treatment," *29 Law & Inequality* 343, 361-363 (2011).

197 For elaboration on this point, see International Commission of Jurists, *Refugee Status Claims Based on Sexual Orientation and Gender Identity, a Practitioner's Guide*, page 58.

198 *Ibid*, Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voor Imigratie en Asiel*, Court of Justice of the European Union, Fourth Chamber, 7 November 2013, para 70

199 *Refugee Status Claims Based on Sexual Orientation and Gender Identity, a Practitioner's Guide* by ICJ, page 60

200 See p.g 15 from the International Commission of Jurists' *A Practitioners' Guide on the Right to a Remedy and Reparation for Gross Human Rights Violations* (2018): <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>

For example, the Universal Declaration of Human Rights states: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”<sup>201</sup> This principle is echoed in a host of international human rights treaties.<sup>202</sup> Because Myanmar is a party to CEDAW, it is worth noting that the CEDAW Committee has held that CEDAW requires States parties to guarantee the right to justice of all women, including lesbians and transgender women.<sup>203</sup>

The right to access to justice requires providing people with effective access to justice both *de jure* and *de facto*.<sup>204</sup> Writing about access to justice for people living in poverty, the Special Rapporteur on extreme poverty and human rights put it well:

States have an obligation to construct a legal and institutional framework which facilitates access to independent and effective judicial and adjudicatory mechanisms and ensures a fair outcome for those seeking redress, without discrimination of any kind. However, guaranteeing *de jure* access to judicial and adjudicatory mechanisms is not sufficient to ensure that all individuals have *de facto* access to justice. States must also take positive measures to ensure laws and policies are substantively non-discriminatory, including measures to eliminate conditions, which cause or help to perpetuate discrimination.<sup>205</sup>

The Special Rapporteur’s observations about States’ obligation to provide *de facto* access to justice to people living in poverty are equally applicable to all LGBTQ people in Myanmar.

The UN Human Rights Committee has also recommended that all 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”.<sup>206</sup>

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201 UDHR, Art. 8.

202 ICCPR, Art. 2.3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, entered into force 26 June 1987, Art. 13; International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, entered into force 4 January 1969, Art. 6.

203 CEDAW Committee, *General Recommendation No. 33* (note 158), para. 8.

204 See e.g., *id.*, para. 15(b).

205 Magdalena Sepúlveda Carmona (Special Rapporteur), *Extreme Poverty and Human Rights*, UN Doc. A/67/278 (2012), para. 11.

206 Para 8, Committee, Committee on the Elimination of Discrimination against Women, General recommendation on women’s access to justice, CEDAW/C/GC/33, 23 July 2015, available at: [http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_33\\_7767\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_7767_E.pdf)



In previous chapters, this report has documented accounts of anti-LGBTQ biases among law enforcement officials, judges and courtroom staff.<sup>207</sup> These prejudices hinder LGBTQ people's ability to receive fair treatment if they try to report mistreatment and enforce their human rights. Indeed, many respondents said they lack confidence in Myanmar's justice system, and therefore decline to seek assistance from it when they became victims of crime. Myanmar must address this situation by dismantling the barriers to justice faced by LGBTQ people.

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207 See Chapters III & IV.



## Part Seven

# Conclusion and Recommendations

This report has summarized and analysed respondents' accounts concerning LGBTQ people's experiences with Myanmar's criminal law and justice system. The report has also discussed the ways in which these lived experiences at times constitute violations of LGBTQ persons' human rights under international and domestic law. Critical areas of human rights violations that need to be addressed relate to freedom from discrimination, equality before the law, equal protection of the law without discrimination, liberty and security of person, freedom from torture or other ill-treatment, and the right to access to justice and effective remedies for human rights violations, the right to privacy, the right to freedom of movement and the right to freedom of expression and association, among others. These rights are enshrined in constitutional and international human rights law binding on Myanmar. In light of the preceding analysis, the following section sets out recommendations to the authorities of Myanmar with a view to addressing the concerns documented in the report.

### To the Parliament of Myanmar<sup>208</sup>

- a. To repeal Section 377 of the Penal Code, the provision for 'unnatural offences'.

An important and urgent reform to pursue is repealing Section 377 of the Penal Code, at least insofar as it criminalizes consensual same-sex sexual conduct.

Section 377 must be repealed or at the bare minimum amended to meet Myanmar's international law obligations because it violates the

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<sup>208</sup> The Assembly of the Union is the bicameral Parliament in Myanmar that promulgates national-level legislation for the Union. It was established by the 2008 Constitution. Section 12 of the 2008 Constitution defines legislative power of the Union as shared amongst the national level Parliament (Pyidaungsu Hluttaw), Region and State Hluttaws. Section 12(b) defines the two houses of Parliament, one representing townships and populations, while the other house is represented from the States and Regions (divided into the House of Nationalities, the Amyotha Hluttaw and the House of Representatives, the Pyithu Hluttaw). Section 96 of the 2008 Constitution provides for the powers of the Pyidaungsu Hluttaw to enact laws for the entire country or any part of the country, so long as it falls within the Schedule One of the Union Legislative List.

non-discrimination principle, the right to equality before the law and equal protection of the law without discrimination, as well as the rights to liberty and security of person and to private life, among other rights, and contributes to the stigmatization of LGBTQ people. This lends false legitimacy to the anti-LGBT prejudice common throughout Myanmar's criminal justice system.

- b. To enact anti-discrimination legislation in Myanmar.
- c. To become a party to nine core international human rights treaties.<sup>209</sup>
- d. To establish legal gender recognition for transgender persons.
- e. To reform vague and discriminatory laws.

Parliament should review and repeal or reform vaguely worded laws that invite discriminatory application, especially where such laws enable arrests to be made solely based on prejudice, discrimination, etc. on SOGIE grounds. Specifically, Section 35 of the Police Act 1945, Section 30 of the Rangoon Police Act 1899 (the so-called Shadow Laws) are legal provisions that should be amended or repealed as a matter of priority.

## To the Myanmar National Police and General Administrative Department

- a. To cease discriminatory arrests and detentions.

The Myanmar National Police (MPF) officers must stop arresting members of the LGBTQ communities on the mere suspicion of 'engaging in unnatural sex'. MPF officers must also cease applying laws selectively to target individuals for their assumed sexual orientation or gender identity/expression, especially with regard to Section 30 of the Rangoon Police Act and Section 35 of the Police Act.

- b. The police have a duty to promptly, thoroughly, independently and impartially investigate all crimes and human rights violations

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209 Please refer to page 36, footnote 150

perpetrated against LGBTQ individuals. These investigations should be carried out with a view to identifying those responsible and bringing them to justice in proceedings that comply with international fair trial standards. This will include offences perpetrated by GAD officers.

- c. Crimes perpetrated by police, the military and other law enforcement agencies should be tried exclusively by civilian courts, especially gross violations of human rights. Civilian courts must be empowered by law to be able to conduct inquiries, prosecute and try members of the police force, the military and other law enforcement agencies, as a decisive step towards combating all forms of impunity.
- d. Undertake sensitivity training.

The Government of Myanmar should provide mandatory training to MPF and GAD officers with a view to dismantling prejudicial attitudes and behaviours toward LGBTQ people.

## To the Judiciary, Lawyers and Other Actors in the Court System

- a. To proactively prevent discrimination.

The judiciary, lawyers and other actors in the court system should take an active role in preventing discrimination against LGBTQ persons involved in court proceedings.

- b. To issue writs to uphold constitutional rights and international human rights.

The Supreme Court should ensure that LGBTQ detainees can file writ petitions to the Court to challenge the legality of their arrest. The Court must independently and impartially hear these cases, and issue writs to uphold constitutional rights and international human rights. The Court's reasoned decisions in these cases should be made available through publicly accessible judgments.

- c. To ensure the security of LGBTQ individuals and to guarantee their right to a fair trial.



Ensure the right of LGBTQ individuals who are defendants in criminal proceedings to be tried in proceedings complying with international fair trial standards, including, in particular, the right to adequate legal advice and representation, the right to be brought before the court in a dignified manner free from discrimination and the right to a fair hearing. This must ensure that LGBTQ individuals who suffer human rights violations while in detention are able to seek accountability and reparation without fear of reprisal.

- d. The members of the legal profession should provide LGBTQ defendants with adequate, fair and dignified legal representation.

The members of the legal profession must recognize that discrimination based on sexual orientation and gender identity or expression is baseless and unwarranted, and creates a barrier to justice for LGBTQ people. The members of the legal profession should provide LGBTQ defendants with adequate, fair and dignified legal representation and pro bono legal aid service, whenever necessary and possible, and without discrimination.

## To the Myanmar National Human Rights Commission (MNHRC)

- a. To ensure its policy, public statements, reports and investigations actively address violence and discrimination based on sexual orientation and gender identity.

The MNHRC must ensure that the human rights of lesbian, gay, bisexual, transgender and queer persons feature in its national strategy, policy and objectives with the view to addressing the stigmatization, discrimination, violence and other abuse LGBTQ persons face.

- b. To ensure transparent, timely and expedient availability of reports that are accessible by the public.

The MNHRC must make its investigations, especially its investigations in cases of LGBTQ persons publicly available, while ensuring their protection, the confidentiality of their complaint and the prioritization of their personal security.

- c. To create and implement a plan of action on discrimination and violence based on sexual orientation and gender identity/expression.

The MNHRC should conduct an inquiry with the objective of documenting human rights violations faced by LGBTQ persons in Myanmar. This should include recommendations aimed at providing better public awareness about such violations as well as greater protection and security for LGBTQ individuals. It is critical that such an inquiry includes adequate and detailed consultation with LGBTQ persons.

- d. To increase accessibility of the public to the MNHRC's complaint mechanisms, it is recommended that regional and state offices are created throughout Myanmar. This is to ensure that the Commission will be able to receive complaints and develop policies that are reflective of the country's diverse religious, ethnic groups, and LGBTQ people from all around Myanmar will be able to access these mechanisms with little difficulty.



Photo: Thar Ko



# Appendices

## Appendix A: Identity Terminology

Myanmar has long had local terms to refer to SOGIE minorities, such as *apwint* and *apôn*.<sup>210</sup> Representatives from community organizations, however, informed the research team that a growing number of SOGIE minorities in Myanmar reject these labels because of their negative connotations. Representatives from community partners urged researchers to refer to respondents using the terms *lesbian*, *gay*, *bisexual*, *transgender*, and *queer*, in lieu of Myanmar’s local terms.<sup>211</sup>

SOGIE minorities in Myanmar are increasingly adopting the terms *lesbian*, *gay*, *bisexual*, *transgender*, and *queer* into local discourse. Yet, local definitions of these terms have been inconsistent. For example, some people in Myanmar use the term “lesbian” to refer to all women who are attracted to other women. Meanwhile, others use the term “lesbian” to refer only to women who are attracted to other women *and also* present themselves in a manner that is culturally coded as feminine. For the sake of clarity, this report adopts the following definitions, which draw primarily from the definitions provided in the Yogyakarta Principles and used by United Nations agencies. Because the term ‘third gender’ has not gained popularity and is not widely used in Myanmar, this report does not use it.

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210 Apwint are “biological males who identify in public and private as feminine,” and apôn are “biological males who identify as feminine but maintain a masculine appearance in all or most spheres of life.” Chua & Gilbert (note 24), p.12.

211 On 23 February 2019, the research team carried out a workshop on terminology with the SOGIE community leaders in Myanmar. This report’s perspective on terminology is informed heavily by the input that the research team received during the workshop.

## Gay

**Gay** is a term used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although gay can also be used to describe both gay men and women (lesbians).<sup>212</sup>

## Lesbian

**Lesbian** is a woman whose enduring physical, romantic and/or emotional attraction is to other women.<sup>213</sup>

## Bisexual

**Bisexual** describes an individual who is physically, romantically and/or emotionally attracted to both men and women.<sup>214</sup>

## Transgender

**Transgender** describes people whose gender identity differs from the biological sex they were assigned at birth.<sup>215</sup> The term transgender refers to a person's gender identity, not the person's sexual orientation. Thus, a transgender individual may be heterosexual, gay, lesbian, or bisexual. A transgender man is someone who identifies as a man, but was assigned female at birth. A transgender woman is someone who identifies as a woman, but was assigned male at birth.

## Cisgender

**Cisgender** describes people whose gender identity matches the biological sex they were assigned at birth.

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212 This definition derives from the UNHCR 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, 23 October 2012, HCR/GIP/12/01 (hereafter: the UNHCR SOGI Guidelines).

213 See UNHCR SOGI Guidelines.

214 See UNHCR SOGI Guidelines.

215 See UNAIDS, *Transgender People*, 16 October 2014, <http://www.unaids.org/en/resources/documents/2014/Transgenderpeople>. See also UNHCR SOGI Guidelines ("Transgender describes people whose gender identity and/or gender expression differs from the biological sex they were assigned at birth. Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual, NB: the term transgender may include, but is not limited to, transsexuals (an older term which originated in the medical and psychological communities), cross-dressers and other gender variant people."")

## Queer

**Queer** is a term used by this report as an umbrella term to refer to all SOGIE minorities who do not identify themselves as gay, lesbian, bisexual, or transgender. This includes (but is not limited to) individuals who identify as asexual or questioning.

## Gender Identity

**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.<sup>216</sup>

## Gender Expression

**Gender expression** refers to each person's presentation of the person's gender through physical appearance—including dress, hairstyles, accessories, cosmetics—and mannerisms, speech, behavioural patterns, names, and personal references.<sup>217</sup>

## Sexual Orientation

**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.<sup>218</sup>

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216 See Yogyakarta Principles (note 163).

217 See id.

218 See Yogyakarta Principles Plus Ten (note 163).

## Appendix B: Excerpts from Legal Codes

### Myanmar's 2008 Constitution

348. The Union shall not discriminate any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, official position, status, culture, sex and wealth.
352. The Union shall, upon specified qualifications being fulfilled, in appointing or assigning duties to civil service personnel, not discriminate for or against any citizen of the Republic of the Union of Myanmar, based on race, birth, religion, and sex. However, nothing in this Section shall prevent appointment of men to the positions that are suitable for men only.
359. The Union prohibits forced labour except hard labour as a punishment for crime duly convicted and duties assigned by the Union in accord with the law in the interest of the public.
368. The Union shall honour and assist citizens who are outstanding in education irrespective of race, religion and sex according to their qualifications.

### Criminal Law Provisions Referenced in Chapter II of this Report

#### 1861 Penal Code, Section 377

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with transportation for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

#### 1945 Police Act, Section 35

- (a) Any person found armed with any dangerous or offensive instrument whatsoever, who is unable to give a satisfactory account of his reasons for being so armed;
- (b) any reputed thief found between sunset and sunrise remaining or loitering in any bazaar, street, road, yard, thoroughfare or other place, who is unable to give a satisfactory account of himself;

- (c) any person found between sunset and sunrise having his face covered or otherwise disguised, who is unable to give a satisfactory account himself;
- (d) any person found within the precincts of any dwelling-house other building whatsoever, or in any back-drainage space, on board any vessel, without being able satisfactorily to account for his presence therein; and
- (e) any person having in his possession, without lawful excuse, any implement of housebreaking, may be taken into custody by any police-officer without a warrant, and shall be punishable on conviction with imprisonment for a term which may extend to three months.

#### 1899 Rangoon Police Act, Section 30

- (a) Any person found armed with any dangerous or offensive instrument whatsoever, and who is unable to give a satisfactory account of his reasons for being so armed;
- (b) any reputed thief found between sunset and sunrise lying or loitering in any bazaar, street, road, and, thoroughfare or other place, who shall not give a satisfactory account of himself;
- (c) any person found between sunset and sunrise having his face covered or otherwise disguised and who is unable to give a satisfactory account of himself;
- (d) any person found within the precincts of any dwelling-house or other building whatsoever, or in any back-drainage space, or on board any vessel, without being able satisfactorily to account for his presence therein; and
- (e) any person having in his possession, without lawful excuse, any implement of house-breaking, may be taken into custody by any police-officer without a warrant, and shall be liable to imprisonment which may extend to three months.

## Additional Criminal Provisions

*The following are additional criminal provisions that may be applied in ways that harm LGBTQ persons.<sup>219</sup>*

### 1861 Penal Code, Sections 269, 270, 290, 292, 294, 312(c), 375, 496

**269.** Whoever unlawfully or negligently does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

**270.** Whoever malignantly does any act which is, and which he knows or has reason to believe to be, likely to spread the infection of any disease dangerous to life shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

**290.** Whoever commits a public nuisance in any case not otherwise punishable by this Code shall be punished with fine . . .

**292.** Whoever

(a) sell, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purpose of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever,...

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

**294.** Whoever, to the annoyance of others,...

(a) does any obscene act in any public place,...

shall be punished with imprisonment of either description for a term which may extend to three months, or with fine, or with both.

**312(c).** Whoever voluntarily allows oneself to be sterilized by surgery, unless such sterilization is certified by the Board appointed by Government on this behalf to be necessary for reasons of physical or mental health, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

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<sup>219</sup> Most of these provisions were previously discussed in Colors Rainbow's 2015 report concerning transgender, gay, and bisexual men in Myanmar. See Colors Rainbow (note 24), pp. 14-15.

**375.** A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions

**First.** – Against her will.

**Secondly.** – Without her consent.

**Thirdly.** – With her consent, when her consent has been obtained by putting her in fear of death or of hurt.

**Fourthly.** – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

**Fifthly.** – With or without her consent, when she is under sixteen years of age.

**Explanation.** – Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

**Exception.** – Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.<sup>220</sup>

**496.** Whoever, dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven-years, and shall also be liable to fine.

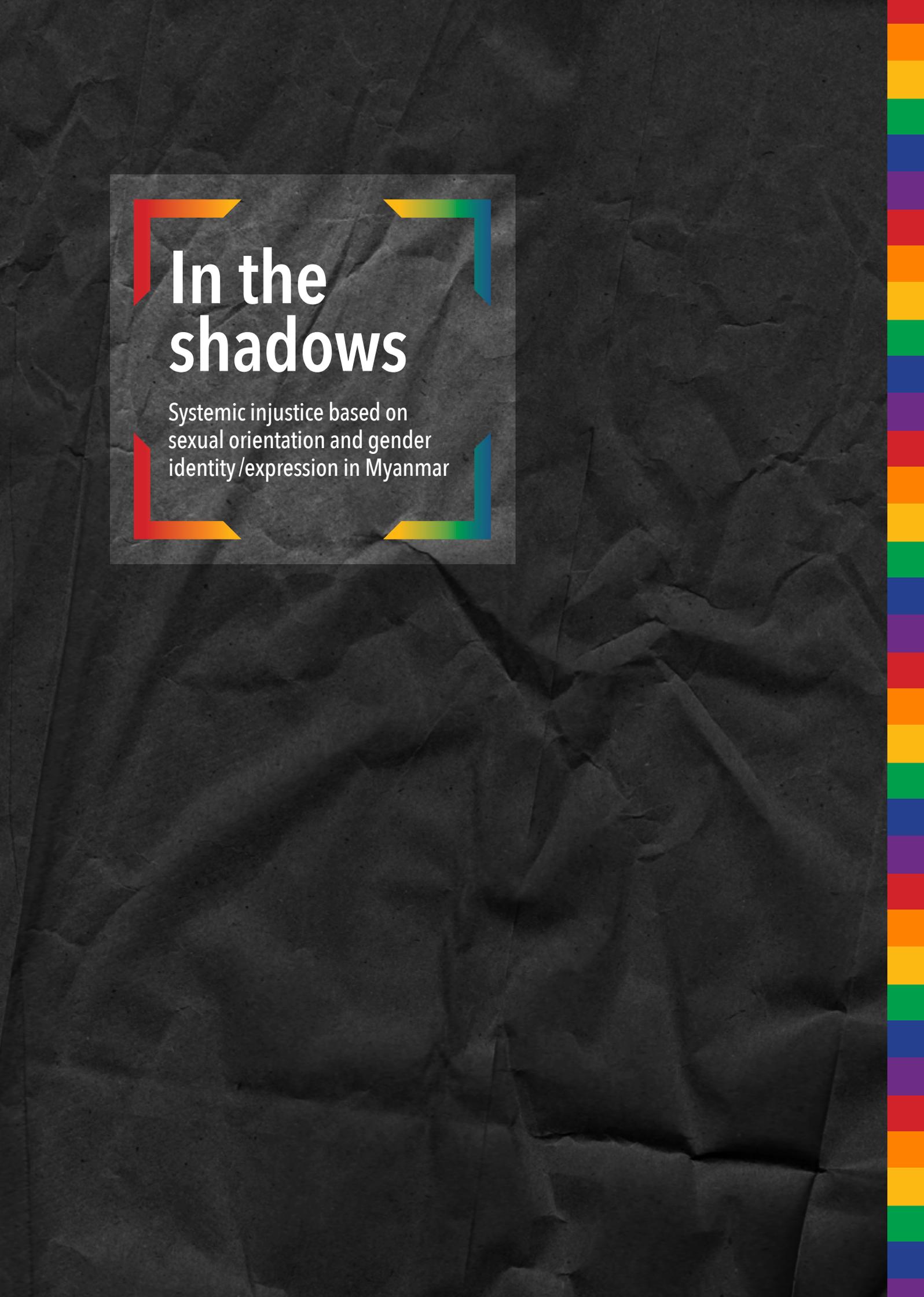
## 2005 The Anti - Trafficking in Persons Law

**11.** In order not to adversely affect the dignity of the trafficked victims: (a) if the trafficked victims are women, children and youth, the relevant Court shall, in conducting the trial of offences of trafficking in persons, do so not in open Court, but in camera for the preservation of their dignity, physical and mental security.

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<sup>220</sup> Punishment for rape. 376 of the Penal Code. (1) Whoever commits rape except the offences of rape contained in sub-sections (2) and (3), shall be punished with imprisonment for a term of twenty years, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

(2) Whoever commits rape against a woman who is his own wife and is not under twelve years of age, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both. (3) Whoever commits rape against a woman who is under twelve years of age shall be punished with imprisonment for life, or with imprisonment for a term of twenty years.



# In the shadows

Systemic injustice based on  
sexual orientation and gender  
identity/expression in Myanmar