

Criminalising Homosexuality and Democratic Values

Democracy is of course about votes and elections – but it is also about far more than that. What we in Europe have learned the hard way is that we need “deep democracy”: respect for the rule of law, freedom of speech, respect for human rights, an independent judiciary and impartial administration.

Catherine Ashton, EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission, 11 May 2011¹

This is one in a series of notes produced for the Human Dignity Trust on the criminalisation of homosexuality and good governance. Each note in the series discusses a different aspect of policy that is engaged by the continued criminalisation of homosexuality across the globe.

The Human Dignity Trust is an organisation made up of international lawyers supporting local partners to uphold human rights and constitutional law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. We are a registered charity no.1158093 in England & Wales. All our work, whatever country it is in, is strictly not-for-profit.

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¹ Available at: http://europa.eu/rapid/press-release_SPEECH-11-326_en.htm

Overview

01. Democracy and human rights are intrinsically linked. The former cannot exist in its true form without the latter, and vice versa. Where democracy is lacking human rights are violated; where human rights are violated democratic values are undermined. This note demonstrates, via data and case studies, the link between democracy and the treatment of lesbian, gay, bisexual and transgender (LGBT) people. These data and case studies show that LGBT people are most likely to be criminalised where democracy is weak, that LGBT rights and democracy take root together, and that society turning its back on LGBT rights is a signal that democracy is in retreat. These case studies also provide examples of how progressing LGBT rights assists democracy to take root, and vice versa. Wherever stakeholders are attempting to foster democracy, LGBT rights and in particular the decriminalisation of homosexuality must be an integral part of that programme.

The meaning of democracy

02. Democracy literally means ‘rule by the people’. The constituent parts of democracy are somewhat open to debate. It is clear, however, that democracy requires more than universal suffrage. At a basic level, we can define democracy as a combination of political equality and popular control.

03. Democracy requires that there are some basic democratic and participatory rights that no government is entitled to remove, including:

- a) Protection from discrimination.
- b) Notions of privacy.
- c) The right to practise one’s own religion.
- d) Freedom of expression.
- e) Freedom of association.
- f) Freedom of assembly.

04. There is a relationship between democracy and human rights, which, as the British social theorist David Beetham explained:

“human rights constitute an intrinsic part of democracy, because the guarantee of basic freedoms is a necessary condition for the people’s voice to be effective in public affairs.”²

05. Yet, democracy and human rights are distinct, as majority rule does not necessarily protect human rights. As the US Supreme Court neatly captured:

“[T]o withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. [Human rights] may not be submitted to vote; they depend on the outcome of no elections.”³

06. This note will draw particular attention to the rights to freedom of expression and association, the exercise of which allow citizens to give and receive information, thus enabling a meaningful exercise of collective decision-making.

Evidencing the link between criminalisation and failed democracy

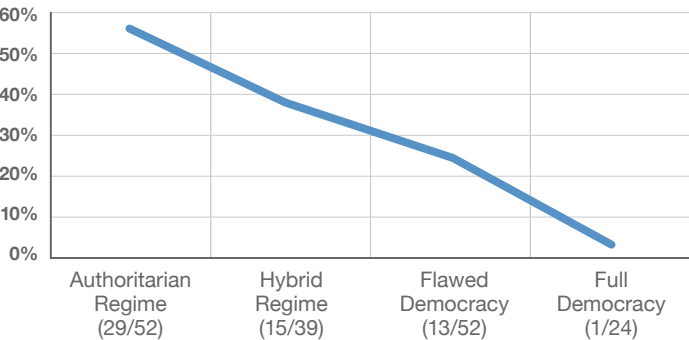
07. There are 78 jurisdictions that currently criminalise consensual same-sex intimacy. As demonstrated below, there is a direct correlation between the lack of democratic credentials and the propensity of a jurisdiction to criminalise. Appendix 1 to this note lists the criminalising jurisdictions in order of their democratic rating, as determined by the Economist Intelligence Unit in its 2014 survey of 167 independent states.⁴ The survey assessed democratic credentials against measures that capture many of the elements of democracy alluded to above: electoral process and pluralism, functioning of government, political participation, political culture and civil liberties. The survey classified countries into four regime types:

- a) Authoritarian Regime.
- b) Hybrid Regime.
- c) Flawed Democracy.
- d) Full Democracy.

08. 57 of the 78 criminalising countries were surveyed (the remaining 21 are mainly micro states). The link between criminalisation and an absence of democracy is striking. Of these 57 criminalising countries, over half (29) were classed as Authoritarian Regimes. Only one was deemed a Full Democracy (Mauritius, which scraped in towards the bottom of this top category).

09. Approaching this data another way, the survey identified 52 Authoritarian Regimes among the 167 states surveyed. Of these 52, 29 (56%) criminalise consensual same-sex intimacy. Of the 39 Hybrid Regimes identified, 15 (38%) criminalise. Of the 52 Flawed Democracies identified, 13 (25%) criminalise. Of the 24 Full Democracies identified, 1 (4%) criminalises. It is evident that properly functioning democracies do not criminalise consensual same-sex intimacy. As democracy improves, the propensity to criminalise falls. Further, criminalisation is a proxy indicator for a lack of democracy. These figures, and the direct correlation, are captured graphically below:

Propensity to criminalise consensual same-sex intimacy by regime type



² Beetham, D., ‘Human Rights and Democracy’, *Democracy and Human Rights*.

³ Justice Jackson of the United States Supreme Court in *West Virginia State Board of Education v. Barnette* 319 US (1943) 624, 638.

⁴ The Economist Intelligence Unit, *Democracy Index 2014*. Available at: http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115

Democracy and LGBT rights flourish or fail together

10. The promotion of democracy is the promotion of LGBT rights, and vice versa. Where democracy is taking root, LGBT rights progress. Where democracy is stalling, LGBT rights are reduced. This sentiment was neatly captured by Freedom House, the New York-based democracy-focused NGO:

“Gay rights have flourished in the very places where the Third Wave has been most successful in establishing political freedoms, civil society, and the rule of law, as in Spain, South Africa, and much of Latin America. By contrast, gay rights have had a difficult time gaining any traction where the Third Wave made relatively few, if any, inroads, as in most parts of Africa and the Middle East, and in China... More telling, perhaps, are places where democratization has stalled, as in Russia. Gay rights got off to a promising start there in 1991, but faltered as progress toward democracy was reversed, and especially since Vladimir Putin’s return to the presidency in 2012, which ushered in severe new attacks on political and civil freedoms.”⁵

11. These example countries, and others, are explored in further detail below, and the ‘third wave’ is discussed in more detail at paragraph 23.

Where democracy instils, LGBT rights flourish: South Africa, Spain and the Council of Europe

12. When South Africa moved from apartheid to democracy, the position rapidly changed from gay men⁶ being ‘un-apprehended felons’ to full equality for LGBT people. This process arose largely due to the strong human rights protection in South Africa’s constitution, as interpreted by impartial courts. The timeline of the emergence of LGBT rights included the following events:

- 1994: South Africa’s first democratic election held.
- 1996: The Constitutional Court approved the Constitution of the Republic of South Africa.
- 1997: The Constitution took effect.
- 1998: The Constitutional Court struck down South Africa’s laws that criminalised consensual male same-sex intimacy.⁷
- 2002: Same-sex couples gained the ability jointly to adopt children, via the Constitutional Court striking down the statutory provision that limited joint adoption to married couples.⁸
- 2003: Parliament passed legislation that allows a person to change their publicly recorded sex.⁹

⁵ Encarnacion, O.G., Why Democracy Matters for Gay Rights, *Freedom House*, 22 September 2014. Available at: <https://freedomhouse.org/blog/why-democracy-matters-gay-rights#.VZ5w2-v4uFI>

⁶ Sex between women was never criminal, albeit where men, women or both are criminalised, all LGBT people face a persecutory environment. This is discussed in the other briefing notes in this series.

⁷ *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* (CCT11/98) [1998] ZACC 15.

⁸ *Du Toit and Another v. Minister for Welfare and Population Development and Others* (CCT40/01) [2002] ZACC 20.

⁹ *Alteration of Sex Description and Sex Status Act, 2003*, Act No. 49 of 2003.

- 2005: The Constitutional Court ruled that same-sex couples have the constitutional right to marry.¹⁰
- 2007: Parliament passed legislation to equalise the age of consent for heterosexual and homosexual sex (at 16 years old).¹¹
- 13. Similar events occurred after Spain transitioned from the dictatorship of General Francisco Franco to democracy:
 - 1975: General Franco died.
 - 1977: Spain joined the Council of Europe.
 - 1978: The Spanish electorate voted in a referendum to adopt a new Spanish Constitution.
 - 1979: Consensual same-sex sexual activity was legalised, and the age of consent was equalised.¹²
 - 1986: Spain joined the European Union.
 - 1996: A law prohibiting discrimination in employment based on sexual orientation was passed.¹³
 - 2005: Same-sex marriage was legalised, and joint adoption permitted.¹⁴
- 14. The Republic of Ireland demonstrates a related pattern, albeit more nuanced:
 - 1937: The Constitution of Ireland came into force after a national referendum. The Constitution is democratic, but recognised the ‘special position’ of the Catholic Church.

- 1949: Ireland joined the Council of Europe as a founding member.
- 1968: A free public secondary school service was introduced, breaking the Catholic Church’s near-monopoly on education.
- 1973: The Constitution’s provision on the ‘special position’ of the Catholic Church was removed.
- 1973: Ireland joined the European Union.
- 1977: Ireland’s laws that criminalise homosexuality were challenged in the domestic courts.¹⁵
- 1988: After domestic appeals were exhausted, the challenge was referred to the European Court of Human Rights in Strasbourg, which held that criminalising laws breach the right to privacy.¹⁶
- 1993: Ireland formally repealed its criminalising laws and equalised the age of consent.¹⁷
- 1999: A law prohibiting discrimination in employment based on sexual orientation was passed.¹⁸
- 2011: Civil partnership law came into force.¹⁹
- 2015: The Irish electorate voted in a referendum to amend the Constitution to allow same-sex marriage.

¹⁰ *Minister of Home Affairs and Another v. Fourie and Another* (CCT 60/04) [2005] ZACC 19.

¹¹ *The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007* (Act No. 32 of 2007; also referred to as the Sexual Offences Act).

¹² International Lesbian and Gay Bisexual and Trans Association, *State-Sponsored Homophobia – A world survey of laws: Criminalisation, protection and recognition of same-sex love*, May 2013, 8th Edition, pp. 21 and 23, respectively. Available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf

¹³ *Ibid*, p. 25.

¹⁴ *Ibid*, pp. 30–32, respectively.

¹⁵ *Norris v. Attorney General* [1983] IESC 3.

¹⁶ *Norris v. Ireland* [1988] ECHR 22.

¹⁷ See n. 12, pp. 21–23.

¹⁸ *Ibid*, p. 25.

¹⁹ *Ibid*, p. 31.

15. The timelines above demonstrate that rapid change in LGBT rights occurs when genuine democracy takes hold in a state. Spain is perhaps the purest example of this, whereby democracy took root and quickly pervaded society, resulting not only in legal protection for LGBT people but also their ability to exercise that legal protection within an open and democratic civil society.
16. South Africa and Ireland provide more complex examples. South Africa's transition from apartheid to democracy allowed the swift incorporation of legal protection into South African law. These developments in South Africa are welcome and embraced. However, a number of challenges remain. LGBT people in South Africa still suffer egregious human rights violations, in particular lesbian women being subjected to so-called 'corrective rape'. These violations occur not due to the lack of legal protection or voting rights, but they are connected with poverty (an issue discussed in another briefing note in this series *Criminalising Homosexuality and LGBT rights in times of conflict, violence and natural disasters*). These continuing violations in post-apartheid South Africa show that democracy must pervade society for LGBT rights to be fully realised. Despite South Africa's enviable constitutional protection, it lags on the Economist Intelligence Unit's democracy rankings; in 2014 it was classed as a Flawed Democracy. For democracy and LGBT rights to be realised, more than black-letter legal protection is needed.
17. Whereas South Africa shows that a stratified society means unequal realisation of legal protection, Ireland demonstrates that majoritarian democracy does not necessarily result in freedoms for all. The vote of approval by the Irish people of the 1937 Constitution entrenched the influence of the Catholic Church into Irish politics, education and society. It was only after the link between church and state was broken that LGBT rights began to be recognised. For democracy and LGBT rights to be realised, more than majority consent is needed. Democracy is necessary for full enjoyment of LGBT rights, but it is not always sufficient. Change is multi-factorial. In Ireland democracy was in place, but it was only with the shedding of subservience to a homophobic faith tradition that the space for change created by democracy could be filled with LGBT rights.
18. Spain, South Africa and Ireland demonstrate, in different ways, that democracy is broader than one vote for each adult. Rather, democracy must be viewed as equal participation and equal recognition in ways that pervade state institutions and civil society more generally. US President, Barack Obama, recognised the importance of what he called 'inclusive democracy' during his 2015 annual address to the UN General Assembly.

As President Obama stated, an inclusive democracy includes LGBT rights:

“ I understand democracy is frustrating. ... But democracy – the constant struggle to extend rights to more of our people, to give more people a voice – is what allowed us to become the most powerful nation in the world. It's not simply a matter of principle; it's not an abstraction. Democracy – inclusive democracy – makes countries stronger. When opposition parties can seek power peacefully through the ballot, a country draws upon new ideas. When a free media can inform the public, corruption and abuse are exposed and can be rooted out...

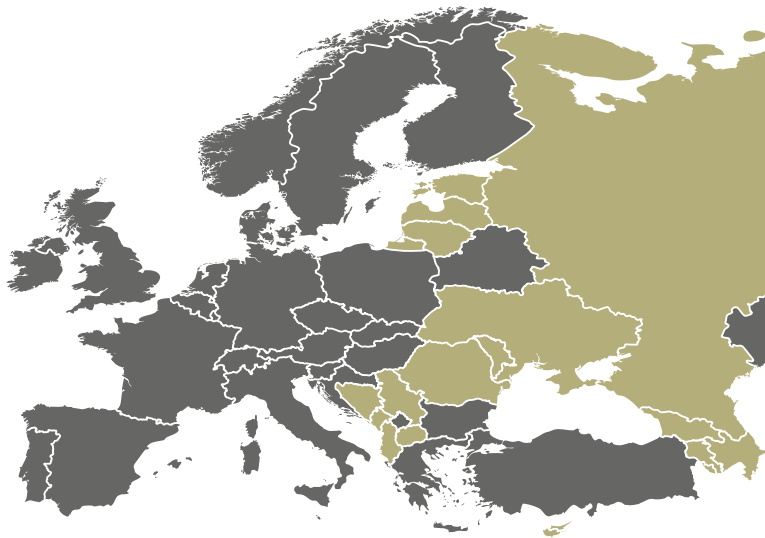
I believe that the fact that you can walk the streets of this city right now and pass churches and synagogues and temples and mosques, where people worship freely; the fact that our nation of immigrants mirrors the diversity of the world – you can find everybody from everywhere here in New York City – the fact that, in this country, everybody can contribute, everybody can participate no matter who they are, or what they look like, or who they love – that's what makes us strong.²⁰

19. It is within a genuine, one might say inclusive, democratic environment that LGBT rights take root. An early and crucial step in this journey is the decriminalisation of homosexuality.
20. The examples above looked at each country in isolation as if its journey to democracy and LGBT rights was self-contained. But this provides only part of the picture. The spread of democratic values by external actors has been crucial to the trend towards global decriminalisation, especially in Europe via the Council of Europe. The Council of Europe's values are: human rights, democracy, and the rule of law. It advocates 'freedom of expression and of the media, freedom of assembly, equality, and the protection of minorities'.²¹ These are important values for the realisation of LGBT rights. All members must ratify the European Convention on Human Rights (ECHR), which is interpreted by the European Court of Human Rights in Strasbourg.²² Fundamental rights contained in the ECHR may, in certain circumstances, be curtailed if it is 'necessary in a democratic society' and 'proportionate' to do so. The case law of the Strasbourg Court and the work of the Council of Europe definitively show that it is not, and never can be, necessary in a democratic society to criminalise consensual same-sex intimacy.²³

²⁰ Barack Obama, *Remarks by President Obama to the United Nations General Assembly*, 28 September 2015. Available at: <https://www.whitehouse.gov/the-press-office/2015/09/28/remarks-president-obama-united-nations-general-assembly>

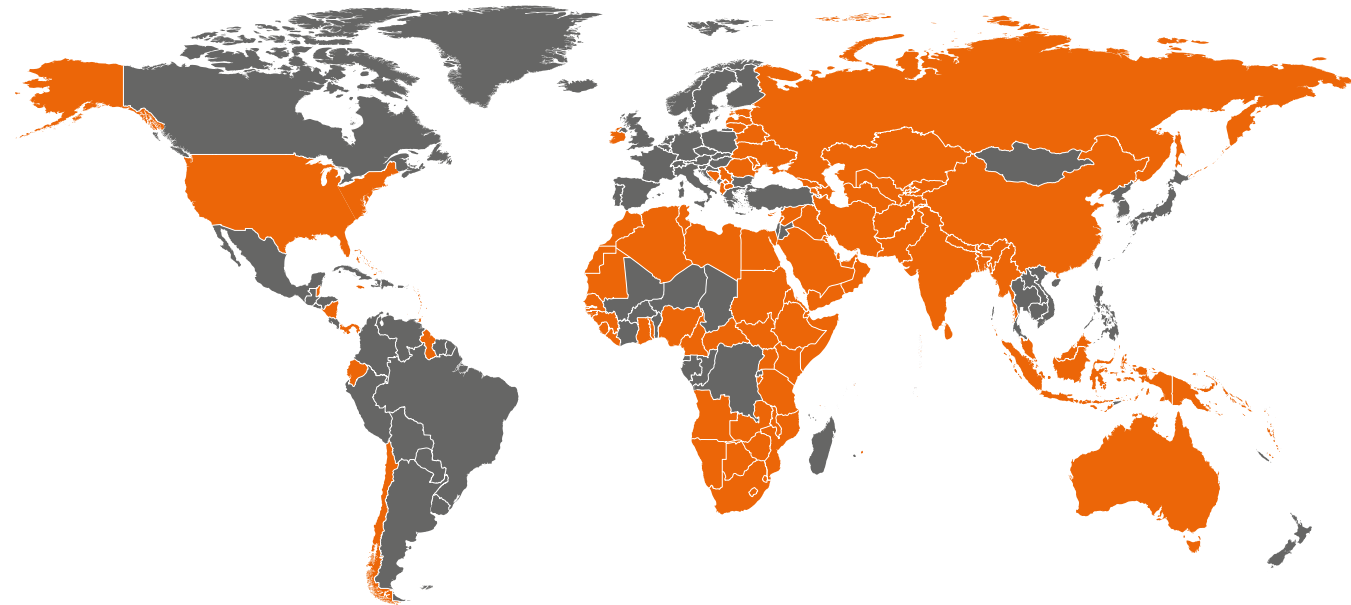
21. To join the Council of Europe, new member-states must undertake certain commitments, including conforming their criminal laws to the ECHR. As we know from the situation in Ireland described above, the ECHR right to privacy prohibits the criminalisation of homosexuality. By the time candidate states from Eastern Europe and the former Soviet bloc applied for membership of the Council of Europe, it was a condition of their accession to decriminalise.²⁴ By way of example, the following countries decriminalised at around the time they joined: Lithuania (joined the Council of Europe in 1993; decriminalised in 1993); Romania (1993; 1996), Ukraine (1995; 1991); Albania (1995; 1995), Macedonia FYROM (1995; 1996); Russia (1996; 1993), Bosnia and Herzegovina (2002; 1998-2001); Georgia (1999; 2000), Armenia (2001; 2003), Azerbaijan (2001; 2000).²⁵ The Council of Europe's efforts to spread democracy in Europe have resulted in Europe being the only criminalisation-free continent.

Council of Europe members to decriminalise since 1990

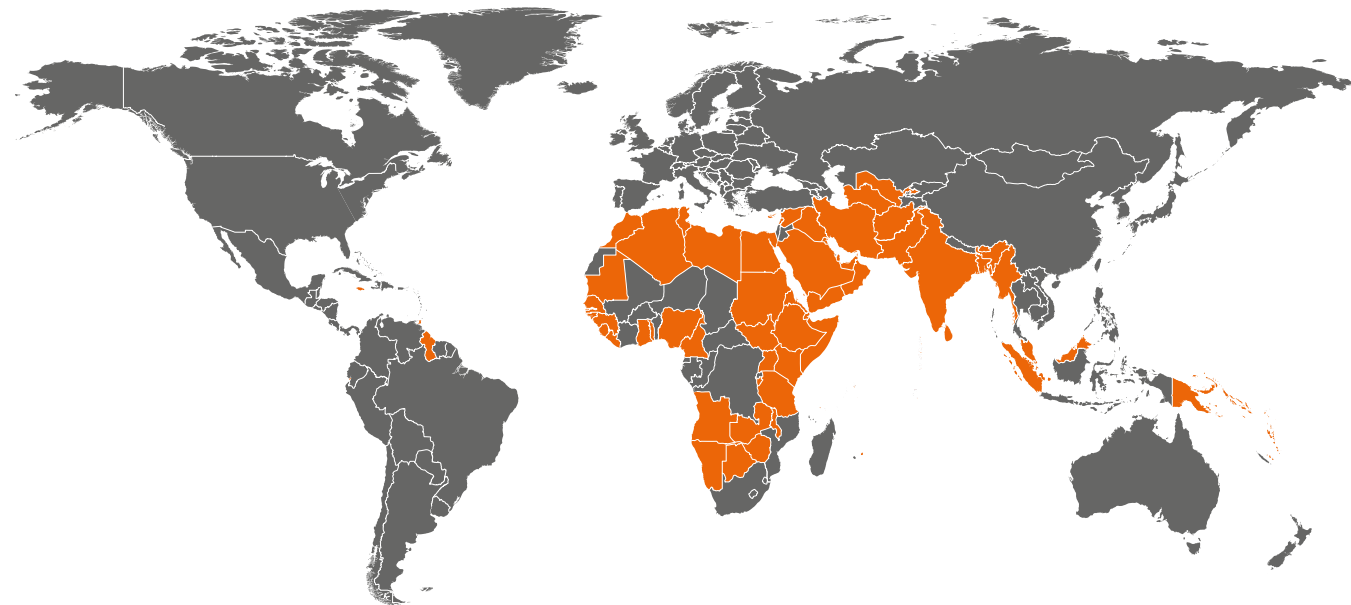


22. The link between the spread of democratic values and decriminalisation can be seen in the following two maps:

Criminalising countries in 1990



Criminalising countries in 2015



21 See: <http://www.coe.int/en/web/about-us/values>

22 See: <http://www.coe.int/en/web/about-us/who-we-are>

23 These issues, and related case law, are discussed in detail in other briefing notes in this series, *Criminalising Homosexuality and the Rule of Law* and *Criminalising Homosexuality and International Human Rights Law*.

24 Helfer, L.R., Voeten, E., *Do European Court of Human Rights Judgments Promote Legal and Policy Change?* 2011, p. 11. Available at SSRN: <http://ssrn.com/abstract=1850526> or doi:10.2139/ssrn.1850526, and *Opinion No. 176 (1993) on the Application by Romania for Membership of the Council of Europe*, para. 7.

25 For latter listed year, see ILGA at n. 12; for former listed year, see: <http://www.internationaldemocracywatch.org/index.php/council-of-europe->

23. The reference to the ‘third wave’ in the quote above at paragraph 10, is a reference to the so-called third wave of democracy that began in the mid-1980s as democracy spread first to the Philippines, South Korea and Taiwan, then to Eastern Europe and the ex-Soviet Union, and then to former dictatorships in Latin America. Countries that decriminalised since 1990 largely fall within the latter two of these groups in the third wave. It can be seen from the maps above, that as democracy spread to Eastern Europe, the ex-Soviet bloc and Latin America, the criminalisation of consensual same-sex intimacy came to an end in those regions. The two countries on continental America that continue to criminalise homosexuality are Belize and Guyana, both of which inherited Westminster-style democracy earlier than the third wave, but also inherited from Britain laws that criminalise homosexuality.

24. It is worth noting that in 1990 part of Australia (Tasmania), 24 States of the United States, and the Republic of Ireland still criminalised. The subsistence of these laws in developed democracies provides an important reminder that, although democracy is a crucial indicator of the treatment of LGBT people, the realisation of democratic values sometimes needs an external spark. In the case of each of these countries, the spark came from outside: for the United States it was a Federal Supreme Court decision that borrowed from the case law of the Strasbourg Court; for Australia it was a communication from the UN Human Rights Committee; and for Ireland it was a decision of the Strasbourg Court.²⁶

25. Additionally, it is worth noting that China decriminalised in this period. In 1997 China’s ‘hooliganism’ laws were repealed, which are believed to have criminalised homosexuality.²⁷ Unlike in the countries discussed above, since 1997 there has been no furtherance in China of the legal protection granted to LGBT people.

26. The remainder of this note focuses on up-to-date examples of countries where LGBT rights have progressed or, conversely, slid backwards. In the last two years, seven countries have experienced legislative change or court judgments that have affected the most fundamental rights of LGBT people. These countries are: Kenya, Botswana, Uganda, Russia, The Gambia, Nigeria and Mozambique. The outcome for the LGBT community directly correlates with the health of democracy in these countries.

The green shoots of LGBT rights are a sign that democracy is succeeding: Kenya and Botswana

27. Both Kenya and Botswana continue to criminalise consensual same-sex intimacy, but recently their courts have upheld basic human rights for LGBT people.

28. In Kenya, the claim related to the refusal of the Non-Governmental Organisations Co-ordination Board (NGO Board) to register an organisation with the phrase ‘*Gay and Lesbian Human Rights*’ as its proposed registered names. The NGO Board refused on the basis that applications lawfully can be rejected if ‘*such name is in the opinion of the director repugnant to or inconsistent with any law or is otherwise undesirable*’. As the Kenyan Penal Code outlaws same-sex intimacy, this criterion was, in the view of the NGO Board, engaged.

29. The NGO Board’s decision was challenged in the High Court of Kenya, on the basis that LGBT people enjoy protection under the Kenyan Constitution to freedom of association and non-discrimination. In April 2015, the High Court held that LGBT people do indeed enjoy the constitutional right to free association. Encouragingly, the court also held that the Kenyan Constitution’s non-discrimination clause implicitly protects against discrimination on the ground of ‘sexual orientation’. This is a major step forward for LGBT rights in Kenya and the region in general. Like most constitutions and human rights treaties, ‘sexual orientation’ is not expressly listed in the Kenyan Constitution’s non-discrimination clause. The absence of express protection has provided cover for many criminalising countries to claim that criminalisation is compatible with human rights law. However, the Kenyan High Court’s decision falls into line with the approach of courts around the world by its conclusion that ‘sexual orientation’ is implicitly protected. The NGO Board’s decision to refuse the registration was held to be unconstitutional.²⁸

²⁶ The role of international organisations is discussed in further detail in another note in this series, *Criminalising Homosexuality and Working Through International Organisations*.

²⁷ Kang, W., in *China in and Beyond the Headlines*, Weston, T.B. and Jensen, L.M., (eds), 2012, p. 230.

²⁸ *Eric Gitari v. NGO Board & 4 others*, [2015], Petition 440 of 2013, The High Court of Kenya at Nairobi.

30. Botswana's High Court reached a similar judgment in similar circumstances, where the Minister of Labour and Home Affairs refused to register as a society an organisation named Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). Registration could lawfully be refused if the society 'is likely to be used for any unlawful purpose'. LEGABIBO has as one of its purposes 'political lobbying for equal rights and decriminalization of same sex relationships'. The judge held that:

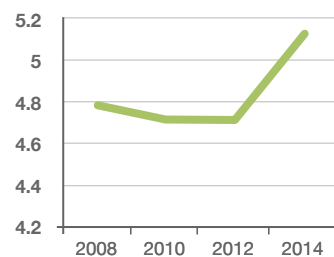
“It is in fact common in many democratic countries that lobby groups for various courses operate freely and lawfully for causes, such as; decriminalisation of abortion in certain circumstances, decriminalisation of consumption of drugs (such as Marijuana) decriminalisation of prostitution. ... In a democratic society asking for a particular law to be changed is not a crime, neither is it incompatible with peace and welfare and good order.”²⁹

31. The Botswanan High Court held that LGBT people enjoy the same fundamental rights as others under the Botswanan Constitution, and concluded that the refusal to register infringed the constitutional rights to freedom of expression, assembly and association.³⁰ These 'green shoots' of LGBT rights are greatly welcome. Free expression, assembly and association are absolutely necessary for activists to vocalise their rights, including the basic right not to be criminalised.

32. It is difficult to establish a direct link between these specific events in Kenya and Botswana and the health of democracy. However, Kenya and Botswana are two countries whose democratic credentials have improved in recent years according to the Economist Intelligence Unit's *Democracy Index*. Appendix 2 provides data on these countries, which are plotted in the charts below:

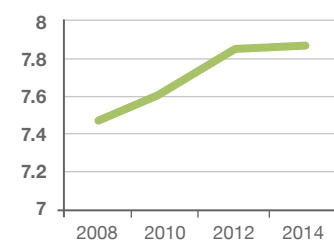
Kenya

Democratic credentials over time



Botswana

Democratic credentials over time



33. Between 2008 to 2014, Botswana steadily increased its ranking. It remained a Flawed Democracy throughout, yet it now ranks ahead of Italy and just four places short of being a Full Democracy.³¹ In the same period, Kenya climbed from rank 103 to rank 97, remaining in the Hybrid Regime category, but with steep progress being made between the surveys of 2012 and 2014.

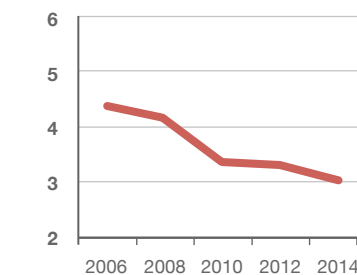
34. A more curious example is that of Uganda, whose democratic credentials have been tested by a series of legislative proposals that would operate to curtail severely the rights of LGBT people. Uganda's democracy score steadily improved between 2008 and 2012 from 5.03 to 5.22. At the same time, Uganda's legislature passed the *Anti-Homosexuality Act* in December 2013, which was signed into law by President Yoweri Museveni in February 2014. Among other new offences, the *Anti-Homosexuality Act* included an offence of 'aggravated homosexuality' and criminalised the 'promotion of homosexuality'.³² This Act was passed without the requisite quorum required under the Ugandan Constitution. The passage of the *Anti-Homosexuality Act* is a worrying anti-democratic trend, as is the fact that the Speaker allowed it to proceed without Parliament being quorate. But, Uganda's legal framework proved itself to be sufficiently robust for the Constitutional Court to annul the Act due to lack of quorum.

Retreating freedoms for LGBT people is a sign that democracy is failing: The Gambia and Russia

35. Conversely, where democracy retreats, the rights of LGBT people suffer. Our two example countries are The Gambia and Russia, both of which have passed new anti-gay laws within the last two years. These two countries have experienced a dramatic decline in their democratic credentials, according to the Economist Intelligence Unit's surveys, as plotted below (with full data in Appendix 2):

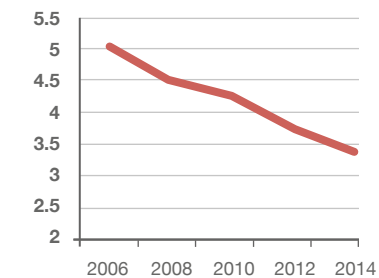
The Gambia

Democratic credentials over time



Russia

Democratic credentials over time



²⁹ *Thuto Ramogae & others v. the Attorney General of Botswana*, MAHGB-000175-13, paras. 21 and 23.

³⁰ *Ibid.*, para. 34.

³¹ The Economist Intelligence Unit, *Democracy Index 2014*. Available at: http://www.eiu.com/public/topical_report.aspx?campaignid=Democracy0115 and, The Economist Intelligence Unit, *Democracy Index 2008*. Available at: <http://graphics.eiu.com/PDF/Democracy%20Index%202008.pdf>

³² More information is available on our website at: <http://www.humandignitytrust.org/pages/OUR%20WORK/Briefings>

36. In 2006, The Gambia was ranked number 108 by the Economist Intelligence Unit's survey and classed as a Hybrid Regime. Since that time, it has fallen down the rankings to position number 141 and is now classed as an Authoritarian Regime.³³ Likewise, Russia has fallen from rank 102 with Hybrid Regime status to 132 and Authoritarian Regime status. In the same period, the governments of The Gambia and Russia have taken active steps by passing legislation aimed at curtailing LGBT rights and the LGBT identity.
37. The Gambia, like many former British colonies, inherited anti-sodomy and gross indecency laws during its colonial history. The Gambia, however, has gone further when, on 9 October 2014, President Yahya Jammeh signed his assent to the *Criminal Code (Amendment) Act, 2014*. This Act introduces new offences described as 'aggravated homosexuality'. These offences attract a life sentence, up from the 14 years in the colonial-era laws. Aggravated homosexuality includes, *inter alia*, 'serial offenders' and when the 'offender is a person living with HIV Aids'.³⁴ These offences apply when the conduct is consensual.

38. This new law was passed at a time when President Jammeh publicly incited violence against LGBT people. In a speech on state television to mark the 49th anniversary of The Gambia's independence from Britain, he said:

“ We will fight these vermins called homosexuals or gays the same way we are fighting malaria-causing mosquitoes, if not more aggressively... As far as I am concerned, LGBT can only stand for Leprosy, Gonorrhoea, Bacteria and Tuberculosis; all of which are detrimental to human existence.³⁵

39. The Gambia is one of only two countries that has passed and retained enhanced criminalising laws. The other is Nigeria, with its *Same-Sex Marriage (Prohibition) Act, 2013*, which goes much further than its name suggests. This Act not only prohibits marriage, but also outlaws the registration of gay clubs, societies and organisations; the public showing of same-sex amorous relationships directly or indirectly; and same-sex couples living together.³⁶ This new legislation attempts to completely eradicate the LGBT identity. Perhaps unsurprisingly, it originates from a country that is consistently classed as an Authoritarian Regime (see Appendix 2).

40. Russia's slide to authoritarianism has also been accompanied by the passing of new laws to restrict the ability of LGBT people to exercise their rights. In Russia consensual same-sex intimacy is not a criminal offence; if it were Russia would lose its membership of the Council of Europe. President Vladimir Putin's regime, however, has passed a new administrative law to harass the LGBT community. On 29 June 2013, amendments to the federal law 'On the Protection of Children From Information Liable to be Injurious to their Health and Development' were signed into force by President Putin. Russian federal law now prohibits any form of expression of homosexuality (referred to as 'non-traditional sexual values' and 'information promoting non-traditional sexual relations') to minors. Those who breach this legislation face a fine.
41. This new law severely restricts the freedom of expression and association of LGBT people. With this law in force, it is an administrative offence to live in Russia as an openly LGBT person. In theory, the law technically is not a criminal law and no custodial sentence is provided for, but non-payment of the administrative fine can result in a prison sentence. This legislation in effect re-criminalises homosexuality in Russia and represents a huge step backwards on the continent where democracy offers a bulwark against state-sponsored homophobia. Other countries

are considering passing similar laws, for example Ukraine, Moldova and Kyrgyzstan. There is hope that this development will be short-lived in Europe, as a similarly worded regional law is currently the subject of a claim at the Strasbourg Court against Russia for breaching its obligations to allow freedom of expression and to prohibit discrimination, and the court may have to determine whether this law amounts to re-criminalisation.³⁷ This decision will have repercussions in other Council of Europe member states, but not Central Asia.

42. Our final country to have experienced a change in LGBT rights via legislation or court judgment is Mozambique. Mozambique is the most recent country to decriminalise, which it did discreetly in June 2015 by its legislature passing a new penal code, thus erasing Mozambique's Portuguese-era law on 'vices against nature'. Mozambique's democratic credentials have been sliding backwards since 2006 (see Appendix 2). It remains to be seen whether decriminalisation is the first step towards Mozambique's reversing this backsliding or whether this is a one-off change.

³³ The Economist Intelligence Unit, *Democracy Index 2006*. Available at: http://www.economist.com/media/pdf/DEMOCRACY_TABLE_2007_v3.pdf

³⁴ *Criminal Code (Amendment) Act, 2014*, section 144A.

³⁵ 18 February 2014. Available at: <http://www.reuters.com/article/2014/02/18/us-gambia-homosexuality-idUSBREA1H1S820140218>

³⁶ *Same-Sex Marriage (Prohibition) Act, 2013*, sections 4(1) and (2).

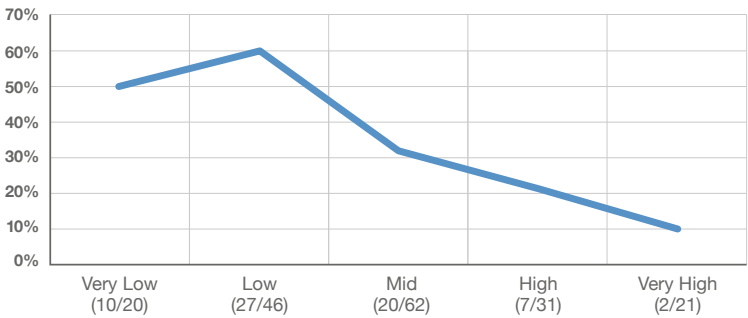
³⁷ *Bayev v. Russia*, Application no. 67667/09.

Freedom of the press
and criminalisation

43. As referred to above, free expression, association and assembly are key ingredients in a democracy, which allow informed collective decision-making. A free press enables these rights and thus enables a vibrant democracy. As shown by the data below, there is a direct link between the freedom of the press and the propensity to criminalise consensual same-sex intimacy. The significance of this is two-fold: the lack of a free press indicates a lack of democracy, which in turn creates an oppressive environment for LGBT people, and a free and vibrant media is a key ingredient in nurturing basic rights including the decriminalisation of homosexuality.
44. Appendix 3 to this note lists the criminalising jurisdictions in order of their press freedom rankings determined by Reporters Without Borders' survey in 2015 of 180 states.³⁸ The survey colour-codes countries into five types, which we describe below as:
- a) Very Low Press Freedom.
 - b) Low Press Freedom.
 - c) Mid Press Freedom.
 - d) High Press Freedom.
 - e) Very High Press Freedom.

45. A total of 66 criminalising states were surveyed. The link between criminalisation and press freedom is, again, striking. Of these 66 criminalising states, over half (37) had Low Press Freedom or Very Low Press Freedom. Only two criminalising states (Namibia and Jamaica) were classed as having Very High Press Freedom.
46. Approaching this data another way, the survey identified 20 countries with Very Low Press Freedom among the 180 surveyed. Of these 20, 10 (50%) criminalise consensual same-sex intimacy. Of the 46 with Low Press Freedom, 27 (59%) criminalise. Of the 62 with Mid Press Freedom, 20 (32%) criminalise. Of the 31 with High Press Freedom, 7 (22%) criminalise. Of the 21 with Very High Press Freedom, only two (9.5%) criminalise. These figures, and a near direct correlation, are shown graphically below:

Propensity to criminalise consensual same-sex intimacy against freedom of the press



47. Botswana, Belize and Jamaica are among the best ranking countries among those that criminalise (Appendix 3). Botswana is discussed above. In May 2013, the Belizean Courts heard a constitutional challenge to Belize's laws that criminalise consensual same-sex intimacy. Judgment is pending. The free press played a vibrant role during the time of the litigation, sparking a public debate on the issue of criminalisation. Jamaica provides another example of the potential power of a free press to assist the pursuit of democratic aims. Jamaica's legislature has taken steps to lock-in its laws that criminalise homosexuality. In 2011, Jamaica's Parliament amended the Constitution to dis-apply constitutional human rights protection to Jamaica's sexual offences laws, including those that criminalise homosexuality. The effect of the amendment is to bar LGBT people from the same constitutional protection enjoyed by heterosexual people on matters of sexual intimacy.³⁹ This amendment has serious rule of law consequences, as discussed in more detail in another note in this series, *Criminalising Homosexuality and the Rule of Law*. However, Jamaica enjoys Very High Press Freedom (ranked 17th globally). The press has been able to discuss LGBT rights and question politicians' stance on the matter,⁴⁰ and very recently LGBT people have been allowed to organise a gay pride event.⁴¹

48. A free press can help sow the first seeds of change, which may later lead to decriminalisation and fuller rights for LGBT people. Forthcoming events in Belize and Jamaica may evidence this.

³⁸ Available at: <https://index.rsf.org/#/>

³⁹ *The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011* repealed and substituted Chapter III of the Constitution (Charter of Fundamental Rights and Freedoms). The new Chapter III continues to protect fundamental rights, such as privacy and equality. Yet, it includes a new section 13(12) that states: 'Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to – (a) sexual offences; (b) obscene publications; or (c) offences regarding the life of the unborn, shall be held to be inconsistent with or in contravention of the provisions of this Chapter.'

⁴⁰ For instance, in: http://www.jamaicaobserver.com/news/LGBT-issues-raise-new-challenges-for-Jamaica_-19000791

⁴¹ See: <http://www.theguardian.com/world/2015/aug/10/jamaica-first-gay-pride-celebration-symbol-change>

Conclusions

49. The above data and case studies on LGBT rights give colour to a commitment to democracy. Human rights and democratic credentials are intrinsically linked. The treatment of LGBT people is a test for democracy. Where democracy properly takes root, LGBT rights progress, as was seen in South Africa and Spain. There are encouraging signs that nascent democratic reforms in Kenya and Botswana are bettering the position of LGBT people. These green shoots of democracy should be nurtured, and other countries encouraged to follow suit. Where democracy is in retreat, LGBT rights suffer, as is being seen in The Gambia and Russia. Where democracy is already absent, LGBT rights suffer further, as is being seen in Nigeria.

50. Protecting LGBT rights is integral to democratic values and the foreign governments' aim to promote these values. Democracy cannot be encouraged without LGBT rights being a part of the dialogue of democracy.

Appendix 1: democratic rating of each criminalising country

Democratic credentials of the jurisdictions that criminalise consensual same-sex intimacy.⁴²

Economist Intelligence Unit, *Democracy Index 2014*

State	Democratic Rating	Rank	Status
1. Syria	1.74	163	Authoritarian Regime
2. Saudi Arabia	1.82	161	Authoritarian Regime
3. Turkmenistan	1.83	160	Authoritarian Regime
4. Iran	1.98	158	Authoritarian Regime
5. Eritrea	2.44	155	Authoritarian Regime
6. Uzbekistan	2.45	154	Authoritarian Regime
7. Sudan	2.54	153	Authoritarian Regime
8. United Arab Emirates	2.64	152	Authoritarian Regime
9. Afghanistan	2.77	151	Authoritarian Regime
10. Zimbabwe	2.78	150	Authoritarian Regime
11. Yemen	2.79	149	Authoritarian Regime
12. Guinea	3.01	143	Authoritarian Regime
13. The Gambia	3.05	141	Authoritarian Regime
14. Myanmar (Burma)	3.05	141	Authoritarian Regime
15. Swaziland	3.09	140	Authoritarian Regime
16. Oman	3.15	139	Authoritarian Regime
17. Egypt	3.16	138	Authoritarian Regime
18. Qatar	3.18	136	Authoritarian Regime
19. Burundi	3.33	134	Authoritarian Regime
20. Angola	3.35	133	Authoritarian Regime
21. Cameroon	3.41	130	Authoritarian Regime
22. Togo	3.45	129	Authoritarian Regime
23. Comoros	3.52	127	Authoritarian Regime
24. Ethiopia	3.72	124	Authoritarian Regime
25. Nigeria	3.76	121	Authoritarian Regime
26. Kuwait	3.78	120	Authoritarian Regime
27. Libya	3.80	119	Authoritarian Regime
28. Algeria	3.83	117	Authoritarian Regime
29. Morocco	4.00	116	Authoritarian Regime
30. Mauritania	4.17	112	Hybrid Regime
31. Iraq (status unclear)	4.23	111	Hybrid Regime
32. Sierra Leone	4.56	109	Hybrid Regime
33. Pakistan	4.64	108	Hybrid Regime
34. Gaza (Occupied Palestinian Territory)	4.72	106	Hybrid Regime
35. Bhutan	4.87	102	Hybrid Regime
36. Liberia	4.95	101	Hybrid Regime
37. Lebanon	5.12	98	Hybrid Regime
38. Kenya	5.13	97	Hybrid Regime
39. Uganda	5.22	96	Hybrid Regime

42 The Economist Intelligence Unit, *Democracy Index 2014*.

Economist Intelligence Unit, *Democracy Index 2014*

State	Democratic Rating	Rank	Status
40. Malawi	5.66	89	Hybrid Regime
41. Sri Lanka	5.69	87	Hybrid Regime
42. Tanzania	5.77	86	Hybrid Regime
43. Bangladesh	5.78	85	Hybrid Regime
44. Guyana	5.91	78	Hybrid Regime
45. Papua New Guinea	6.03	75	Flawed Democracy
46. Singapore	6.03	75	Flawed Democracy
47. Senegal	6.15	74	Flawed Democracy
48. Namibia	6.24	73	Flawed Democracy
49. Tunisia	6.31	70	Flawed Democracy
50. Ghana	6.33	68	Flawed Democracy
51. Zambia	6.39	67	Flawed Democracy
52. Malaysia	6.49	65	Flawed Democracy
53. Indonesia (South Sumatra and Aceh Province)	6.95	49	Flawed Democracy
54. Trinidad & Tobago	6.99	48	Flawed Democracy
55. Jamaica	7.39	43	Flawed Democracy
56. Botswana	7.87	28	Flawed Democracy
57. India	7.92	27	Flawed Democracy
58. Mauritius	8.17	17	Full Democracy

Appendix 2: tracking LGBT rights and democracy 2006 to 2014

Shifting democratic credentials of selected countries where the legislature or the courts have been active on fundamental rights for LGBT people⁴³

Economist Intelligence Unit *Democracy Index*, scores 2006 to 2014

Country	2006	2008	2010	2012	2014
Kenya	5.08 (Hybrid)	4.79 (Hybrid)	4.71 (Hybrid)	4.71 (Hybrid)	5.13 (Hybrid)
Botswana	7.60 (Flawed)	7.47 (Flawed)	7.63 (Flawed)	7.85 (Flawed)	7.87 (Flawed)
Uganda	5.14 (Flawed)	5.03 (Hybrid)	5.05 (Hybrid)	5.16 (Hybrid)	5.22 (Hybrid)
The Gambia	4.39 (Hybrid)	4.19 (Hybrid)	3.38 (Authoritarian)	3.31 (Authoritarian)	3.05 (Authoritarian)
Russia	5.02 (Hybrid)	4.48 (Hybrid)	4.26 (Hybrid)	3.74 (Authoritarian)	3.39 (Authoritarian)
Nigeria	3.52 (Authoritarian)	3.53 (Authoritarian)	3.47 (Authoritarian)	3.77 (Authoritarian)	3.76 (Authoritarian)
Mozambique	5.28 (Hybrid)	5.49 (Hybrid)	4.99 (Hybrid)	4.88 (Hybrid)	4.66 (Hybrid)

43 The Economist Intelligence Unit, *Democracy Indices 2006, 2008, 2010, 2012 and 2014*.

Appendix 3: press freedom rating of each criminalising country

Press freedom of the jurisdictions that criminalise consensual same-sex intimacy:⁴⁴

Reporters Without Borders, *World Press Freedom Index 2015*

State	Press Freedom Rating	Rank	Status
1. Eritrea	84.86	180	Very Low Freedom
2. Turkmenistan	80.83	178	Very Low Freedom
3. Syria	77.29	177	Very Low Freedom
4. Somalia	75.31	172	Very Low Freedom
5. Sudan	72.34	174	Very Low Freedom
6. Iran	72.32	173	Very Low Freedom
7. Yemen	66.36	168	Very Low Freedom
8. Uzbekistan	61.14	166	Very Low Freedom
9. Sri Lanka	60.28	165	Very Low Freedom
10. Saudi Arabia	59.41	164	Very Low Freedom
11. Pakistan	50.46	159	Low Freedom
12. Egypt	50.17	158	Low Freedom
13. Iraq (status unclear)	47.76	156	Low Freedom
14. Swaziland	47.28	155	Low Freedom
15. Libya	45.99	154	Low Freedom
16. Singapore	45.87	153	Low Freedom
17. The Gambia	44.5	151	Low Freedom
18. Malaysia	43.29	147	Low Freedom
19. Bangladesh	42.95	146	Low Freedom
20. Burundi	42.93	145	Low Freedom
21. Myanmar (Burma)	42.08	144	Low Freedom
22. Ethiopia	41.83	142	Low Freedom
23. Gaza (Occupied Palestinian Territory)	41.01	140	Low Freedom
24. Indonesia (South Sumatra and Aceh Province)	40.75	138	Low Freedom
25. India	40.49	136	Low Freedom
26. Cameroon	39.63	133	Low Freedom
27. Zimbabwe	39.19	131	Low Freedom
28. Morocco	39.19	130	Low Freedom
29. Oman	38.83	127	Low Freedom
30. Tunisia	38.68	126	Low Freedom
31. South Sudan	38.04	125	Low Freedom
32. Angola	37.84	123	Low Freedom
33. Afghanistan	37.44	122	Low Freedom
34. Brunei	36.76	121	Low Freedom
35. United Arab Emirates	36.73	120	Low Freedom
36. Algeria	36.63	119	Low Freedom
37. Qatar	35.35	115	Low Freedom
38. Zambia	34.35	113	Mid Freedom
39. Maldives	34.32	112	Mid Freedom

44 Reporters Without Borders, *2015 World Press Freedom Index*. Available at: <https://index.rs.org/#/>

Appendix 3: press freedom rating of each criminalising country

Press freedom of the jurisdictions that criminalise consensual same-sex intimacy:⁴⁵

Reporters Without Borders, World Press Freedom Index 2015

State		Press Freedom Rating	Rank	Status
40.	Nigeria	34.09	111	Mid Freedom
41.	Bhutan	32.65	104	Mid Freedom
42.	Guinea	32.56	102	Mid Freedom
43.	Kenya	32.07	100	Mid Freedom
44.	Lebanon	31.81	98	Mid Freedom
45.	Uganda	31.65	97	Mid Freedom
46.	Seychelles	31.55	96	Mid Freedom
47.	Kuwait	30.84	90	Mid Freedom
48.	Liberia	30.78	89	Mid Freedom
49.	Togo	28.5	80	Mid Freedom
50.	Sierra Leone	28.47	79	Mid Freedom
51.	Tanzania	28.09	75	Mid Freedom
52.	Senegal	27.77	71	Mid Freedom
53.	Mauritius	27.69	68	Mid Freedom
54.	Guyana	27.21	62	Mid Freedom
55.	Malawi	26.41	59	Mid Freedom
56.	Papua New Guinea	25.87	56	Mid Freedom
57.	Mauritania	25.27	55	Mid Freedom
58.	Comoros	24.52	50	High Freedom
59.	Trinidad & Tobago	23.39	41	High Freedom
60.	Tonga	23.37	44	High Freedom
61.	Botswana	22.91	42	High Freedom
62.	Samoa	22.32	40	High Freedom
63.	Belize	18.54	30	High Freedom
64.	Ghana	15.5	22	High Freedom
65.	Namibia	12.5	17	Very High Freedom
66.	Jamaica	11.18	9	Very High Freedom

⁴⁵ Reporters Without Borders, 2015 World Press Freedom Index. Available at: <https://index.rsf.org/#/>

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