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1.8.1. Legal framework

In Somalia, including Somaliland and Puntland, same-sex relationships are illegal.[755] Somalia's Provisional Constitution, adopted in 2012, confirms in Article 2 that Islam is the state religion and that 'No law can be enacted that is not compliant with the general principles and objectives of Shari'ah'.[756] Similar provisions exist in the constitutions of Somaliland (Article 5(2))[757] and Puntland (Article 9(4)).[758] Most Islamic scholars consider homosexuality as unlawful sexual intercourse which is called 'zina' in Islam.[759] Homosexual acts can be punished by death by stoning or flogging.[760] For more details see EUAA COI Report Somalia: Targeted profiles, Chapter 8.[761]

The Somali Penal Code, that was enacted in 1962 and entered into force in 1964, is the basis for criminal law across the whole area, including Somaliland, Puntland and south-central Somalia. It states that homosexuality is illegal.[762] Article 409 of the Penal Code provides: 'Whoever has carnal intercourse with a person of the same sex shall be punished, where the act does not constitute a more serious crime, with imprisonment from three months to three years. Where the act committed is an act of lust different from carnal intercourse, the punishment imposed shall be reduced by one-third.'[763] The last sentence refers to lesbians.[764] Article 410 provides a security measure that can be applied to crimes that violate Article 409 of the Penal Code. This allows police surveillance to be carried out in order to prevent re-offending.[765] The Somali constitution deals with the topic 'equality' in Article 11(3), that reads: 'The State must not discriminate against any person on the basis of age, race, colour, tribe, ethnicity, culture, dialect, gender, birth, disability, religion, political opinion, occupation, or wealth'.[766] Statutory laws in Somalia do not prohibit discrimination based on sexual orientation or gender identity. There are no '[h]ate crime laws or other criminal justice mechanisms [...] to aid in the prosecution of bias-motivated crimes against members of the LGBTQI+ community.'[767]

It is unclear to which degree the provisions of the Somali Penal Code are enforced in south-central Somalia. Based on anecdotal knowledge, Somalia expert Hoehne indicated that, occasionally, in the course of 2023 and 2024, Somali police has intensified anti-gay operations investigating suspects in the capital.[768] Although the death penalty for homosexuality is not possible under Somali criminal law, a strict interpretation of Sharia law can legitimise its use.[769] In Somaliland, same-sex relationships are penalised and the law is enforced. In March 2023 '40 persons were being held on charges of homosexuality; four persons were sentenced to eight years imprisonment, while the remainder awaited charges or had been released by year's end.' [770]

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