

EFFECTIVE INCLUSION OF LGBTQ PERSONS: SPOTLIGHT ON REGIONAL UNDERSTANDING OF SEXUAL ORIENTATION AND GENDER IDENTITY

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Abstract

Globally, LGBTQ persons face harassment, violence, and discrimination on the basis of sexual orientation, gender identity, gender expression and sex characteristics. LGBTQ persons are often discriminated in fields like employment, housing, and access to services. Despite the acknowledgment of the principle of equality and non-discrimination in various international human rights instruments, lately with increased global media attention on violent acts of persecution inflicted on LGBTQ persons, a crucial question before the world community today is whether gay rights are indeed included under basic human rights. This question is not only slowly taking center stage at the United Nations but is also being debated in the regional context, particularly, within the wider framework of the right to privacy and prohibition of discriminatory practices. This paper, therefore, reflects upon the issues of privacy and general discrimination concerning sexual minorities at the regional level with a particular focus on the work of the ECHR and the ACHR in prohibiting discrimination against sexual minorities.

Keywords: LGBTQ, Sexual Minorities, Human Rights, Discrimination, Yogyakarta

INTRODUCTION

The journey of human rights movement is brimming with moments that point towards the prejudice, discrimination and violence faced by those who are identified to be different than the majority in any society. Belonging to minority groups makes individuals vulnerable to recurring forms of discriminatory practices (Moeckli, Shah and Sivakumaran, 2014). Therefore, today most international treaties focus on the condition of ethnic, racial, indigenous, religious, and other minority communities (Bantekas and Oette, 2020). Though, international law has only provided a certain level of protection to minority groups it is noteworthy that contemporary international human rights law has also been to a large extent quite flexible in acknowledging the predicament of groups that though despite their vulnerability have until now been left out of the protection accorded by international law (De Schutter, 2019). One such vital contemporary human rights issue is that of protecting the rights of sexual minorities under international law (Shelton, 2015). As noted by Shelton (2015),

‘Everywhere in the world, whatever the cultural or religious environment, human rights violations are perpetrated on the grounds of people’s real or perceived sexual orientation or gender identity, including some of the most egregious such as arbitrary detention, torture, and extrajudicial executions. Many countries have discriminatory national legislation and practices, as well as laws that criminalize expressions of sexual orientation and gender identity. This often tends to ‘legitimize’ human rights violations against gay, lesbian, bisexual and transgendered persons.’

Sexual minorities are comprised of individuals such as homosexuals, bisexuals, gays, lesbians, transsexuals, transgender, and inter-sex (International Labour Organization, 2022). Due to the existence of various terminologies and its usages for identifying sexual minorities (also considering the manner in which some of them though undergoing change over time remain controversial like the term ‘queer’) it has been difficult to apply existing provisions of international human rights law to the situation of sexual minorities (Moeckli, Shah and Sivakumaran, 2014). Nevertheless, bearing in mind not only the sensitive nature of the issue but also the need for highlighting the challenges faced by sexual minorities who constitute a vulnerable social group and are often victims of persecution, discrimination and gross human rights violations, the current discourse on human rights law has shown a tendency to focus on at least two significant issues of sexual minorities namely ‘sexual orientation’ and ‘gender identity’ (United Nations Human Rights Office of the High Commissioner, 2019). The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (Yogyakarta Principles), the document that purports to reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity defines sexual orientation as:

‘Sexual 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’ (The Yogyakarta Principles, 2007).

The Yogyakarta Principles defines gender identity as:

‘Gender 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, speech and mannerisms’ (The Yogyakarta Principles, 2007).

Note that as much as the Yogyakarta Principles seeks to restate existing international human rights law, they also seek to codify developing elements of the law that are helpful to victims of discrimination but have not yet achieved binding status (Moeckli, Shah and Sivakumaran, 2014). The above stated definitions therefore are no more than intellectual constructs but nevertheless act as a starting point to highlight the discrimination and violence faced by sexual minorities. This paper will to the extent possible rely on the understanding of ‘sexual

orientation' and 'gender identity' as described in the Yogyakarta Principles in order to examine the existing protection given to sexual minorities under international human rights law.

Prior to understanding the applicable human rights law to the current situation of sexual minorities in the regional context it is vital to briefly look at the extent of marginalization and exclusion of lesbian, gay, bisexual, trans and gender-diverse persons.

I. Marginalization and Exclusion

As of 2021, there are 69 countries in the world that criminalize homosexuality for either transgressing gender norms or for challenging predominant conceptions of gender (BBC, 2023). As a minority group, LGBTQ persons are placed in a position of vulnerability in society which in turn increases their susceptibility to discrimination and violence. The UN Special Rapporteur on torture has noted in his report that,

'Attitudes and beliefs stemming from myths and fears associated with gender, sexuality and HIV/AIDS, contributes to the stigma and discrimination against sexual minorities...His report catalogues graphic manifestations of ill-treatment specifically arising from hostility towards a particular sexual orientation and gender identity, male to female transsexual women have been beaten intentionally on their breasts and cheekbones which has been enhanced by silicone implants, causing the implants to burst and as a result releasing toxic substances into their bodies. Ill-treatment against sexual minorities is believed to have also been used, inter alia, to force sex workers to leave certain areas, in so called 'social cleansing' campaigns, or to discourage sexual minorities from meeting in certain places, including clubs and bars' (International Commission of Jurists, 2009).

Violence and discrimination against sexual minorities is often the result of them freely expressing their gender identity and sexual orientation that are perceived to be 'abnormal/non-traditional' by those subscribing to anti-LGBTQ sentiments (United Nations Human Rights Office of the High Commissioner, 2019) Violence against sexual minorities is essentially 'backlash' for transgressing predetermined gender roles. However, in some cases it is difficult to understand the reasons behind such violence because of multiple intersecting social factors that fuel such violence. For instance, violence meted out to lesbians because of their gender can be at times difficult to separate from violations directed against them because of their sexual orientation (Bantekas and Oette, 2020). There have been examples of 'corrective rape' often arranged by family members to 'cure' young girls in the family of their homosexuality (Moeckli, Shah and Sivakumaran, 2014). Additionally, sexual minorities continue to remain underrepresented in social, cultural, political, and other fields that can have a fundamental role in ensuring their inclusiveness. Fostering social inclusion of sexual minorities enables them to enjoy protection from violence and discrimination. However, in order to ensure social inclusion of sexual minorities in all spheres of life it is necessary to adequately analyze the causes and consequences of violence and discrimination from an intersectional viewpoint (International Labour Organization, 2022). As per the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity,

‘Sexual minorities experience violence and discrimination in ways that are compounded by factors such as ethnicity/race, indigenous or minority status, colour, socioeconomic status and/or caste, language, religion or belief, political opinion, national origin, marital and/or maternal status, age, urban/rural location, health status, disability, and property ownership. No particular identity will ever encapsulate the entire complexity of the lived human experience, but each one of them can nonetheless serve as a point of entry, a prism through which an attempt can be made to describe the infinite richness of human aspirations and experiences, and the depths of misery to which some persons are sunk by violence and discrimination’ (International Commission of Jurists, 2009).

Sexual minorities have been subjected to various forms of discrimination in areas of education, employment, housing, health etc. For example, LGBTQ students and children of LGBTQ parents face abuse in educational settings such as name-calling, intimidation, social isolation, cyberbullying. These abuses take place both inside and outside the classroom which inhibit their participation in curricular and extra-curricular activities (S. Winer, 2015). Discrimination against sexual minorities has also been noted in different stages of the employment cycle for instance, in hiring, advancement, training, compensation, termination and in availing of employment related benefits. The manner in which human resources departments collect data, including by requiring information on partner and family status, can enable discrimination and can translate to discrimination related to benefits and policies, or to policies that do not meaningfully include a diverse workforce, including with regard to providing health insurance, pension contributions, parental leave and other benefits on an equal basis with cisgender and heterosexual co-workers. In addition, it is rare that health benefits cover gender-affirming care, even in the presence of evidence that any costs would be offset by increased productivity, psychological benefits and improved mental and physical health. Access to housing has also been denied to sexual minorities mainly due to the discriminating behaviour of both public and private landlords, estate agencies and credit providers. Same-sex couples are often harassed by neighbours and even evicted without due notice. Given that most countries have no designated shelters for sexual minorities who have become homeless, in such situations, sexual minorities are forced to conceal their identities while seeking access to housing mainly because of the fear of being either turned away or evicted (United Nations Human Rights Office of the High Commissioner, 2019). Health disparities among sexual minorities have mostly been the result of the unfair treatment meted out to them due to factors such as criminalization and pathologization of homosexual behaviour. Homosexuality was removed from the International Classification of Diseases in 1990 and Tran’s identities from the chapter on mental disorders in May 2019. Despite this, some countries continue to classify homosexuality as an illness and in almost all countries Trans persons are treated as if they were by definition sick or disordered. This has led to neglect by most countries in taking strong proactive measures for sexual minorities making access to health service inaccessible. Furthermore, existing barriers in the healthcare system such as lack of gender sensitization among health workers also acts as a deterrent for sexual minorities to come forward for testing and treatment (Moeckli, Shah and Sivakumaran, 2014).

II. Existing Legal Framework: Regionally

According to international human rights, particularly, the principle of non-discrimination and the right to equality, all human beings are equal under the law and are not to be discriminated regardless of their sexual orientation or gender identity (De Schutter, 2019). However, it has been argued that since core international human rights treaties do not categorically provide protection to sexual minorities there is no intention at the international level to incorporate sexual orientation or gender identity under the prohibited grounds of discrimination (De Schutter, 2019).

Note that the discussion on obligations of States to safeguard the human rights of sexual minorities under core international human rights treaties though acknowledged is not being reflected upon here by the authors, rather a brief focus is being provided to issues related to sexual orientation or gender identity at the regional level. Regionally, the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR) in particular have played a significant role in developing the jurisprudence on prohibition of discrimination against sexual minorities (which the authors have chosen to emphasize in this paper). The focus, however, has been majorly on protection of privacy rights and recognizing various forms of discrimination in both public and private life. These two aspects will be dealt with in this section.

A. Privacy Rights

Right to privacy is a protected right under several international human rights instruments. Right to privacy, often used as an umbrella term takes within its ambit ‘integrity of the home, body and family, the determination and development of one’s own personality, personal identity, and inter-personal relationships’ (International Commission of Jurists, 2009). ECHR under article 8 and ACHR under article 11 contain provisions for the protection of the right to privacy (S. Winer, 2015). Right to privacy or the notion of ‘private life’ has been understood by the Inter-American Commission on Human Rights to mean a sphere belonging to every individual in which no one can intrude without permission (International Commission of Jurists, 2009). As per the European Court of Human Rights:

‘It would be too restrictive to limit the notion of ‘private life’ to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings’ (International Commission of Jurists, 2009).

Right to privacy can very well include the physical and social identity of an individual, for instance, gender, sexual orientation, and sexual life (European Parliament, 2022). Note that it was under the ECHR that the first successful international human rights case in reference to sexual orientation was brought invoking the existence of the right to privacy in relation to same-sex sexual activity. The European Court of Human Rights in the case of *Dudgeon v United Kingdom* (Application No. 7525/76) 1980 deemed the criminalization of same-sex sexual activity as a violation of article 8 of the ECHR. In the case of *Lustig-Prean and Beckett v United*

Kingdom (Applications nos. 31417/96 and 32377/96) 2000, the court struck down laws that excluded gays and lesbians from the military and opened up an interpretation of privacy that envisaged the public manifestations of the gay experience. The court framed its reasoning as follows:

‘The court considers that in the circumstances of the present case the applicants’ complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence amounts in effect to the same complaint, albeit seen from a different angle, that the court has already considered in relation to article 8 of the convention.’

The Inter-American Court of Human Rights in *Atala Riffo and Daughters v Chile*, 2012 has also recognized a violation of the right to privacy pertaining to sexual orientation in a case wherein a loss of parenting rights was claimed by a woman who was divorced from the father of her children and was living with a same-sex partner.

Although the European Court of Human Rights has recognized issues of gender identity as violations of the right to privacy, the cases before the court have been mostly about addressing the positive obligation on part of the States to take necessary administrative actions for protecting the right to choose one’s own gender identity (Bantekas and Oette, 2020). For instance, in *Van Kück v Germany* 35968/97, 2003

‘With respect to the alleged violation of Article 8 of the Convention (guaranteeing respect for private life), the Court noted that gender identification falls within the sphere protected by Article 8 and that the State may be required to take positive steps to guarantee this respect for private life. The Court determined that the central issue was the impact of the German courts’ decision not to require reimbursement for the cost of gender reassignment surgery on the applicant’s right to respect for her sexual self-determination as one of the aspects of her right to respect her private life. The Court concluded that the German courts on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant and had also disproportionately placed the burden of proving the medical necessity of treatment in an intimate area of private life on the applicant.’

Under the United Nations Human Rights Treaty Body System sexual orientation as a category is perceived as a category for protection against discrimination. For example, as per the Human Rights Committee, the reference to equal and effective protection against discrimination under article 26 of the International Covenant on Civil and Political Rights (ICCPR) is inclusive of discrimination on grounds of sexual orientation. Furthermore, with respect to the right to privacy, the Human Rights Committee though restricting itself at the moment to considering right to privacy claims only related to criminalization has notably in the case of *Toonen v Australia* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994) held that laws criminalizing homosexuality constituted an unlawful interference with the right to privacy, protected and guaranteed by article 17 of the ICCPR and the guarantee to enjoy the right under article 2. As observed in the *Toonen* case:

‘The Human Rights Committee has not considered relevant applications of the right to privacy other than with regard to criminalization. This, in itself, does not tell us anything about the position of the Committee, since it can only develop case specific jurisprudence on the basis of the complaints that are submitted to it. In this regard it is notable to observe that the Human Rights Committee seem now to be exploring the range of applications of a privacy approach in the context of its review of periodic reports submitted by States to the ICCPR. For instance, in 2015, it invoked the privacy provision of the ICCPR in expressing concern regarding the restrictive requirements for legal recognition of gender reassignment in the Republic of Korea.’

B. Discrimination

Despite the gains made internationally in protecting rights of sexual minorities, the issue of discrimination against sexual minorities remains commonplace in most countries. For instance,

‘As per a survey conducted by the Center for American Progress in January 2017, one in four LGBT respondents had experienced discrimination based on sexual orientation or gender identity in 2016 in the United States. Further, in an amicus brief filed in late 2017, LGBT organization Lambda Legal noted that it had received nearly a thousand reports of discrimination against LGBT people in public accommodations, including in reproductive services, childcare, medical services, retail and service establishments, hotels, restaurants, recreational facilities, homeless shelters, transportation services, and funeral services, from 2008 to 2017’ (Human Rights Watch, 2018).

According to international human rights law every individual has an equal right to live a life which is free from violence, persecution, discrimination, and stigma. International human rights law also obligates States to take effective measures to ensure that every individual without distinction is free to enjoy basic rights in his/her public and private life. Yet, millions of LGBTQ individuals continue to face widespread human rights violations around the world (Human Rights Watch, 2018). Note that, discrimination is understood as ‘as any distinction, exclusion, restriction or preference, or other differential treatment, that is directly or indirectly based on a prohibited ground of discrimination and that has the intention or effect of nullifying or impairing the recognition, enjoyment, or exercise, on an equal footing, of rights guaranteed under international law’ (The International Convention on the Elimination of All Forms of Racial Discrimination, 1969).

States are prohibited to differentiate among individuals on any of the prohibited grounds, however, a difference in treatment by the State can be justified if it is reasonable, objective, necessary and proportionate (United Nations Human Rights Office of the High Commissioner, 2019). As noted earlier, a failure by the State to uphold the human rights of sexual minorities and protect them against discrimination has a far reaching impact on the enjoyment of their civil, political, economic, social and cultural rights. Some of the areas in which discrimination against sexual minorities have often been noted are health, education, employment, housing, access to justice, participation in public life etc (Moeckli, Shah and Sivakumaran, 2014). These violations necessitate a pressing response by governments, parliaments, judiciaries and national

human rights institutions. Community, religious and political leaders, the private sector, health providers, civil society organizations and the media also have an important role to play in strengthening efforts to protect rights of sexual minorities. Human rights are universal - cultural, religious and moral practices and beliefs and social attitudes cannot be invoked to justify human rights violations against any group, including sexual minorities (Moeckli, Shah and Sivakumaran, 2014).

The European Court of Human Rights has also generated a substantial body of jurisprudence relating to discrimination on grounds of sexual orientation and gender identity including discrimination in areas of personal/family matters and freedom of expression (Guide on case-law of the Convention, 2022). Most of the cases before the Court, however, have been focused on the enjoyment of rights and freedoms as mentioned under article 14 of the ECHR also keeping in mind proving the existence of an objective and reasonable justification for any differential treatment (Guide on case-law of the Convention, 2022). The Court has also been mindful of the fact that gender norms prevailing in society for a long period of time may not be treated as a reasonable ground for discriminating against sexual minorities including placing restrictions on their right to protect their private life (Guide on case-law of the Convention, 2022).

In view of the above, it can be said that the regional courts have to a large extent engaged with rights of sexual minorities and also expressed concerns regarding violent crimes perpetrated against persons of minority sexual orientation. However, as noted in this paper, the regional courts (and the treaty bodies) have only applied international human rights principles to a limited number of circumstances. As a result, there is a gap between international human rights principles and their practice particularly in safeguarding the rights of people of diverse sexual orientations and gender identities. To address this gap, the Yogyakarta Principles were drafted. In twenty-nine principles, the Yogyakarta Principles purports to reflect the existing state of international human rights law in relation to issues of sexual orientation and gender identity. But, as noted earlier, the Yogyakarta Principles have not yet achieved binding status.

CONCLUSION

This paper has only reflected upon the issues of privacy and general discrimination concerning sexual minorities at the regional level with a particular focus on the work of the ECHR and the ACHR in prohibiting discrimination against sexual minorities. Note that the recent discourse on the application of human rights law vis a vis protecting rights of sexual minorities is filled with uncertainty because of varying concepts of gender identity across the world and a wide range of gender identities and gender expressions. The uncertainty not only stems from the difficulty raised by the terminological confusion but also due to the distinct life experiences of individuals belonging to sexual minorities resulting from the interlink ages of their gender identity with other factors such as race, ethnicity, political and economic status. Therefore, the initiatives to undo this uncertainty must address institutional violence and discrimination against sexual minorities through evidence-based measures that consider the various factors that exacerbate violence against people based on gender identity. Social dialogue involving

governments and employers' and workers' organizations is critical in moving forward. It is also important to engage with organizations representing LGBTQ persons.

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