

INTERNATIONAL
JOURNAL FOR LEGAL
RESEARCH & ANALYSIS
(ISSN 2582 - 6433)

VOLUME 2 ISSUE 6
(April 2022)

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Website – www.ijlra.com



IJLRA

INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS

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INTERNATIONAL JOURNAL
FOR LEGAL RESEARCH & ANALYSIS
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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS
ISSN

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RIGHT TO SEXUAL ORIENTATION AND CHANGING DIMENSIONS OF FUNDAMENTAL RIGHTS.

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ABSTRACT

Human rights are based on the assumption that all people are created equal. As a result, all humans possess dignity and should be treated equally. Anything that diminishes that dignity is a transgression, as it goes against the notion of equality and allows prejudice to flourish. The fundamental rights protected by Articles 14, 15, and 21 of the Indian Constitution include the concept of privacy along with the guaranty in the protection of sexual orientation. Lesbian, gay, bisexual, transgender and intersex people's human rights are gaining traction around the globe, with significant progress in several countries in recent years, including the introduction of new legislative protections. The preamble of the Indian Constitution talks about equality and liberty for all. The determining concept of the right to equality under Articles 14 and 15 and liberty under Article 21 is founded on the universal concept of human rights. This paper will analyse the evolution of the right to sexual orientation in India with respect to the judicial precedents and the changing dimensions with respect to social and constitutional morality. The paper also undertakes a comparative analysis of the United States and Australia in relation to the rights of sexual minorities. The legislative endeavours and the judicial approach of the U.S and Australia are deliberated to find out if it has contributed towards the emancipation of the rights of the queer people.

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INTRODUCTION

Much of the twentieth century of the Christian era, especially its latter half, stands justly hailed as the Age of Human Rights. No preceding century in human history witnessed such a proliferation of endless normativity of human rights standards as a core aspect of the politics of intergovernmental desire. Never before has there been a discourse so varied and diverse. Human Rights are simply what every human being owes to every other human being and as such represent universal moral obligation. These rights can be summarized as the right to life, to freedom from unprovoked violence and arbitrary coercion, to be dealt with honestly, to receive aid in distress, and to be respected as a human person. These rights are inherent to all human beings, whatever one's language or any other status; all are equally entitled to these human rights without discrimination. These rights are all inter-related, interdependent and indivisible. As the then secretary General of

the United Nations was perhaps right to observe in the 1993 Vienna conference that human rights constitute a 'common language of humanity'. This paradigm seeks to promote the notion that universal human rights are designed for the attainment of dignity and well-being of socially and economically vulnerable people and communities.

As we all know it is with the adoption of the Universal Declaration of Human Rights, these rights got a more concrete and universally accepted form. The preamble of UDHR recognizes the inherent dignity and the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world. The UDHR, 1948 is not a binding treaty but by observance and acceptance by the international community it has acquired the status of peremptory norm of international human rights. Human rights get transformed into legal rights when they are recognised and incorporated in the law of the state. The UDHR was followed by various international covenants and conventions containing elaborate enumeration of human rights. Among them the most important are International Covenant on Civil and Political Rights, The International Covenant on Economic and Cultural Rights, Convention on the Elimination of All Form of Discrimination against Women, Convention on the Rights of Child etc.¹ The impact of these conventions can be seen in the Constitutions of various countries. Thus, in the Indian Constitution all the civil and political rights have been included as fundamental rights. Fundamental Rights enshrined in the Constitution are the basic rights of the individuals and the inherent rights of the people which preserve human dignity. Many of these fundamental rights are either universal or citizen centric. Certain rights under the Indian Constitution are universal in application e.g., right to equality (Art.14) and the right to life and personal liberty (Art.21) whereas certain fundamental rights like the right against prohibition of discrimination on the basis of religion, race, caste, sex or place of birth (Art.15) is available only to citizens of India. Another significant development was the enactment of the Protection of Human Rights Act, 1983, which defines human rights as the right relating to life, liberty and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants enforceable by courts in India.

¹UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS,34 (Oxford publications 2014).

CONCEPT OF SEXUAL ORIENTATION

The right to sexual orientation is considered to be a significant part of the right to privacy of an individual. Sexual orientation can often be described as an enduring emotional, sexual, romantic affection towards another individual. Sexual orientation is like that of a pendulum which contains numerous aspects within its ambit. The concerns relating to sexual freedom are not something that has emerged out of blue but now it has received due public attention due to the expansive legal scrutiny and changing public opinion. As with any other element of the right to privacy, the right to sexual orientation also depends on the explicit and implicit interpretation of constitutional provisions. At first, the analysis focuses on whether such rights are accepted by the Constitutional courts or whether any such protection is given in the constitutional text. But keeping aside such legal recognition if one is to think philosophically or even normally with regard to human rights, it often becomes apparent that the whole concept behind it depends on two fundamental assumptions, one is that a living person should be considered autonomous in deciding his way of life and

secondly, they are by all means entitled to receive equal respect and consideration with respect to their way of life. So, then the question that arises is what exactly is individual autonomy.

Autonomy is a revolutionary concept in the theory of human rights which actually is an assumption that rests on the notion that people have a number of choices or considerations that can direct the course by which their life is to be lived.²

The sexual minorities are referred by the acronym LGBTQIA which includes lesbian, gay, Bisexual, Transgender, queer/questioning, intersex, and asexual which is now usually alluded by the name queer which is an umbrella term for all the sexual and gender minorities. Homosexuality is a normal sexual deviation as identified by Indian and American psychiatric associations.³ A study conducted by Gay and Lesbian Vaishnava association found that homosexuality existed in India from the Vedic age as tritiya prakriti. Hinduism, India's largest religion always considered homosexuality as something natural and joyful. It is evident from numerous sculptures located at the temples of Puri and Tanjore and also Khajuraho in Madhya Pradesh and many religious documents including Mahabharata and Ramayana also direct lights towards this direction. Ancient Indian society is rooted in the ideology of Loka Samastha Sukhino Bhavantu and Vasudeva Kutumbakam which basically means the inclusion of all despite the differences. But for a long time, due to the dominance of heteronormous sexual relations as the only form of normal acceptable relations within the society, individuals who are identified as having same-sex sexual preferences are ridiculed and ostracized by their own family and are left with very limited support structures and networks of community that provide them conditions of care and support.

² K.C. JOSHI, INTERNATIONAL LAW AND HUMAN RIGHTS 36 (EBC 2015).

³ Sandra S. Klein, Sexual Freedom and your right to privacy: A Selective Bibliography, 114-116 (1994).

THE CONCEPT OF MORALITY AND TRANSVALUATION OF VALUES

It's no coincidence that proponents of the right to privacy see it as a right, rather than an advisable, compassionate, or even wise concession. Rights are viewed by proponents as positive moral goods that may be demanded and enforced as one's due, rather than as human flaws or excusable flaws that others should benevolently accept. Accordingly, the constitutional right to privacy is, in part, to be understood in terms of a transvaluation of values. Transvaluation of values refers to changes in the rules and conventions in the light of contemporary evidence and conditions as it cannot be justified by ultimate moral considerations. For instance, one prominent paradigm holds that "sex is only appropriate for the purpose of reproducing."⁴ But the truth is procreation is not the only outcome of sex and it is just one among many. Intensified cultural constraints barring types of non-procreational sex are no longer viewed as justified to the degree that now the traditional concept of sexuality is jettisoned in favour of a non-procreational model. We must resort to the consideration of the roots of constitutional morality in terms of giving fair criteria for assessing the reasonability of these adjustments. It is true that autonomy, equitable concern, and tolerance justify human rights' constitutional protection against political bargaining. Because public morality is one of the most prominent bases for political negotiation, however, the constitutional values put forward that

the substance of public morality is squared with the underlying values of constitutional morality.

CHALLENGES WITH REGARD TO SEXUAL ORIENTATION

Arrests, torture, abuse, and death are only a few illustrations of human rights violations based on sexual orientation and gender identity. States often impose restrictions on freedoms of expression, assembly, and association on the basis of sexual orientation and gender identity, claiming that allowing public discussion of such topics would jeopardize public health, order, and morals. Students who do not go with gender stereotypes may be denied access to education, either as a result of bullying and harassment or as a result of expulsion. Forced "therapy" for sexuality and gender nonconformity infringes on the right to the best health possible, as well as the right to be free of medical mistreatment and forced treatment. Access to healthcare facilities and programmes, as well as public housing, has been denied on the basis of sexual orientation and gender identity nonconformity at various periods and places. Their needs and concerns are excluded from the various health policies and programmes. Only the National AIDS prevention and Control policy recognize sexual minority and homosexuals in the context of identifying 'high risk behaviour'. But pervasive discrimination from the health providers delays or deters their health seeking. Hence, they remain excluded from the process of government surveillance carried among the high-risk population in the context of HIV/AIDS. The surveillance amongst 'MSM' or men, who have sex with men, is usually carried out by NGOs and through support groups. They also undergo considerable amounts of psychological stress. Individual human rights abuses rooted on sexual orientation and gender identity are common, and they frequently occur with government approval. Lesbian rape to "correct" them of their sexual orientation has lately been reported as frequent in

⁴Gender-and-sexual-orientation, Yale law journal (Nov 5, 2021, 10:04 AM)<https://www.yalelawjournal.org/tag/gender-and-sexual-orientation>

Southern Africa, sometimes with police cooperation.⁵

On Easter Sunday 2007, for example, police in Mandeville, Jamaica, permitted a crowd to storm the funeral of a man suspected of being gay, then seized some of the visitors and inspected their automobiles for information of their alleged illegal conduct. In October 2008, police in Bangalore, India, assaulted and detained hijra (transgender) activists who came to a police station to complain concerning their arbitrarily detained friends. Even where same-sex sexual conduct is not prohibited, however, police violence exists. In March 2007, authorities in Honduras imprisoned a gay rights activist and advised his cellmates to rape him, something they did. A transgender lady was beaten in a police station in Tennessee two years ago by an officer who put handcuffs around his fist. She was then assassinated. Despite the fact that the beatings were recorded by the police station's security cameras, no charges were brought in either case.

Recently there are certain positive changes like employing transgenders in metros and creating pride metro stations, the Indian Medical Council removing homophobic literature from the syllabus, and increased public awareness and television debates on the issues. But these changes are still not bringing a sudden shift in the public perception and we have a long way to go.

EVOLUTION OF THE RIGHT TO SEXUAL ORIENTATION IN INDIA

One of the first ripples of change came in the year 1994, when the ABVA filed the first legal challenge to Section 377's constitutionality in the Delhi High Court. The petition was based on the principle of non-discrimination and lamenting the fact that Section 377 effectively denied LGBT people access to healthcare, as well as HIV and AIDS prevention, detection, and medication. We could see that the goal of this petition was to emphasise LGBT people's legal equality and to prohibit the state from effectively discriminating against them. The petition was however dismissed by the court on certain grounds. In 2001, Naz foundation have filed a writ petition in the Delhi high court against Article 377 which was however not considered by the Delhi court on the ground of lack of locus standi but however the Supreme Court have sent the case back to the high court directing to consider it on merits. Later a number of organizations have joined the cause and a number of legal concerns were raised for the first time. Later the Delhi High Court in its judgement have read down the law in relation to consensual sex between adults in private space. As a result, the Court recognised that certain rights and liberties could not be taken away, even if the majority of people in a country were adamantly opposed to them. This was not only a commendable discharge of constitutional courts' role institutions that stand for human rights, but also a reaffirmation of the principle that human rights should not be realised in exchange for social recognition. The Delhi High Court verdict, however, was quickly contested by a diverse array of religious organisations and individuals, who contended, among other things, that a prohibition on homosexuality was necessary to protect cultural values.

On December 11, 2013, a Supreme Court Division Bench, consisting of Justices Singhvi and

⁵Gaiety Gom, *Right to Privacy*, Harvard Civil Rights Civil Liberties Law Review, 233, 234-286 (2012)

Mukhopadhyaya, handed down its decision on the appeals, reversing the High Court's decision⁶. After more than four years since the High Court struck down 377, this ruling, dubbed "koushal," basically recriminalized the existence of LGBT people across the country. The court's disregard for the subjective experiences of LGBT people who have been affected by the law is notable. The Court ruled that such people are a "minority" of the population thus reaffirmed majoritarian privileges. Many of the fundamental concept of privacy, liberty and dignity were almost ignored in this judgement.

Another landmark judgement that revolutionised the right to autonomy under Article 21 is the case of *NALSA v. Union of India*⁷, where the supreme court recognised transgenders as third genders and recognised their right to self-expression. The Supreme Court determined the matter of *Puttaswamy v. Union of India*⁸ on August 24, 2017, while the curative petitions against 377 were still pending. The Supreme Court recognised everyone's Fundamental Right to Privacy and singled out the Koushal decision as a conflicting note in the Constitution's definition of rights. It's worth noting that this decision threw down Koushal's decision as unfit for sustained investigation. The court did not touch on 377, however, because it was not an issue before it. The Supreme Court's acceptance of the right to privacy in the Puttaswamy case is linked to the dignity that all humans possess.

The most celebrated battles against Article 377 commenced before the Supreme Court with the filing of Navtej Singh Johar writ petition and the other intervening petitions. The Supreme Court, in a majority decision delivered on September, 2018, read down 377 as a violation of the Indian

Constitution's guarantees of equality, self-expression, privacy, and dignity. The Supreme Court demonstrated a deep knowledge of individual rights and constitutional morality. It reaffirmed the Delhi High Court's judgment in favour of the petitioners in 2009. The LGBT movement blossomed into a strident and public demand for rights and respect during the time that Section 377 was challenged. The reliance on fundamental and internationally recognised personal freedoms has been a consistent theme running through legal triumphs in the struggle against legal discrimination. Not only have these rights entered the language of constitutional adjudication and interpretation as a result of the decisions listed above, but they have also improved our comprehension of the Indian Constitution.

Last year the Madras High Court in *S. Sushama v. Commissioner of Police (2021)* has prohibited 'conversion therapy'. Conversion therapy which is also known by the name "reparative therapy", is the attempt to medically cure or change the sexual orientation of LGBTQIA+ people. It is high time that we, the society have to accept them as equals and the State has to frame new laws for protecting them as vulnerable for contributing towards the purpose of a more egalitarian society. The lack of legal provisions for same sex marriage in civil law and personal laws means the shift will require either amendments in the Special Marriage Act or altogether a new law for sexual minorities. For these certain statutes in the nature of anti-discriminatory laws concerning gender identity, same-sex marriage, recognition of same-sex couples (e.g., unregistered cohabitation, life partnership), stepchild adoption by same-sex couples, joint adoption by same-sex couples, access to IVF for lesbian couples, commercial surrogacy for gay male couples, donation of blood, serving openly in the military etc has to be brought forth. So, for the advancement of these sexual minority's laws have to be developed with regard to their marriage, inheritance, joint adoption by same-sex couples etc. It should be ensured that proper and adequate sex education is provided to

⁶Suresh Kumar Koushal v. Naz Foundation, civil appeal no. 10972 OF 2013

⁷ Naz foundation v. Government of N.C.T, 160 Delhi Law Times 277

⁸NALSA v. Union of India, A.I.R 2014 SC 1863.

them and also various policies have to be implemented for the protection of sexual as well as mental health of these minorities.⁹

UNITED STATES OF AMERICA

When it comes to the right to sexual orientation in the United States, lesbian, gay, bisexual, and transgender (LGBT) people may confront legal and social obstacles that non-LGBT residents do not face. The United States Supreme Court has decided in favour of the multiplicity of the rights of sexual minorities. The rights exercised by them depend on the jurisdiction, and discrimination in respect of employment and housing remains legal in most of the states. The Equality Act propounded would make discrimination based on sexual orientation and gender identity illegal throughout the United States. Sexual behaviour between consenting adults and adolescents of the same sex has been permitted in the United States since June 26, 2003, thanks to a Supreme Court judgment in *Lawrence v. Texas*¹⁰. As a result of the Supreme Court ruling in *Obergefell v. Hodge*¹¹, all states now licence and accept marriage between same-sex partners as of June 26, 2015. While various federal decrees have provided limited safeguards, there is no federal statute that prohibits anti-LGBT discrimination on a national level in the United States. LGBT-related family law and anti-discrimination laws in employment, residence, and personal and government services differ by state, leaving residents in some places without protection. Moreover, the age of sexual consent differs by jurisdiction, ranging from 16 to 18, with some jurisdictions having distinct consenting ages for males and females. The Supreme Court has made the most significant advances

in LGBT rights in the United States. From 1996 - 2015 the Supreme Court struck down several state laws prohibiting protected class recognition based on homosexuality, quashed sodomy laws across the country, declared illegal Section 3 of the Defence of Marriage Act, and rendered same-sex marriage legal across the country. Discriminatory practises on the grounds of sexual orientation is illegal in twenty states plus Washington, D.C. and Puerto Rico, and exclusion grounded on gender identity or expression is illegal in twenty states plus Washington, D.C. and Puerto Rico. The Hate Crimes Prevention Act of 2009 makes hate crimes based on sexual orientation or gender identity illegal under federal law. The Equal Job Opportunity Commission determined that gender identity-based employment discrimination is illegal under Title VII of the Civil Rights Act of 1964 because it is considered sexual discrimination. Following the Supreme Court's decision in *Obergefell v. Hodges*¹² in June 2015, adoption of children by same-sex married couples has been legal nationwide, though Mississippi's same-sex adoption ban was not overturned until March 2016. Adoption policies differ widely from one jurisdiction to the next. Some states allow all couples to adopt, while others prohibit all unmarried couples from doing so.

⁹ Westin, Alan F. Science, *Privacy and Freedom*, 66 Columbia Law Review, 103, 103-110 (2019).

¹⁰ *Lawrence v. Texas*, 539 U.S. 558 (2003)

¹¹ *Obergefell v. Hodges*, 576 U.S. 644 (2015)

AUSTRALIA

Since the late twentieth century rights of sexual minorities in Australia have developed immensely. In Australia, LGBT people are protected from discrimination and are treated as individuals with the same rights and duties as everyone else. From 1975 to 1997 most of the anti-homosexuality legislation stretching back to the British rule were gradually overturned by the states and territories.¹³ All the different jurisdictions in Australia have the same age for sexual consent now. Expunction procedures are available in all jurisdictions for those prosecuted or convicted of consenting sexual activities that are no longer prohibited. From 2003 most of all kinds of privileges such as civil and domestic partnership are provided to sexual minorities. From 2017 same-sex marriage is lawful in Australia. Transgender and intersex rights depend on the jurisdiction with which it is exercised. Queensland and NSW mandate a person to go through a sexual reassignment surgery before altering their legal sex on birth records. Non-binary Australians have the legal right to register as "non-specific" sex on federal legal documents and in some state and territory records. Opinion polls like the Australian Marriage Law Postal Survey show strong public support for same-sex marriage in Australia, making it to be one of the most LGBTQIA+ accommodating countries in the world.



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¹³*Developments in the Law: SEXUAL ORIENTATION & GENDER IDENTITY*, 127 Harvard Law Review, 1680–1814, (2014).

CONCLUSION

The expression of autonomy allows a person to find fulfilment, increase self-esteem, form meaningful connections, and to live life according to their needs. The dignity ingrained in a person and the privacy rights are both recognised as characteristics of Article 21 in the Indian Constitution. The goal of bringing particular rights to the status of basic rights is to protect them from majoritarian scorn, either statutory or cultural. Any discrimination that affects a person's legitimate way of life cannot be tolerated to any extent. And just because an individual does not conform to mainstream notions is not a ground in any respect for his/her/they/them exclusion. The LGBTQIA community has historically faced persecution and disrespect that goes against the concept of dignity ingrained in the very notion of right to life. Even though in the present context those rights of sexual minorities are accorded protection it is the need of the hour to bring effective legislations to that effect. In India it's been five years since 377 has been decriminalized but no legislation is enacted by the parliament to provide them with the rights that are available to normal citizens including that of marriage, divorce, adoption etc. And recently a chief officer of the Indian Army is found openly saying that the sexual minorities will not be accommodated in the Indian military in any respect. And in a very recent context Uttar Pradesh Government have opposed same-sex marriage in the Allahabad High Courton the basis that it is not in accordance with Indian culture. So, this points towards the attitude of the high-level officers and the fact that we have a long way to go in terms of inclusion of the community within the Indian diaspora. It is now intelligible that creation of a transnational and comprehensive system of international security and peace is the need of the hour for protecting the human rights of these people. This is possible only if every nation is able to accept the changing needs of its vulnerable sections and contributes towards their progress and development. Let us hope to move towards a new world order where the Queer people will really be free, where their wings will not be tied, their souls will not be caged and they will finally be accepted for who they are.

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