



An Analysis of Rights of Sexual Minorities

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ABSTRACT

Sexual minorities represent a demographic whose sexual identity, orientation, or behaviors diverge from those of the predominant societal norms. Individuals who experience attraction to the same sex are commonly identified as homosexual. Typically, sexual minorities include lesbians (women attracted to women), gay men (men attracted to men), bisexual individuals, and transgender persons. The acronym LGBTQ+ encompasses these groups, as well as intersex and queer individuals, among others. Since the term "homosexuality" was first coined, the contentious topic of sexual minorities and homosexuality has persisted. This is mainly because homosexuality is perceived as abnormal and does not align with societal norms or legal standards. In order to demonstrate the advancement of the gay liberation movement and its influence on the creation of laws in society, it is necessary to briefly review the evolution of the laws governing these populations and their impact on the changing attitudes of society toward homosexual relationships and transgender people. In addition to the stigma associated with homosexuality, many myths have been created about it. In recent years, the rights of sexual minorities have increasingly attracted attention both internationally and nationally. The focus is primarily on the decriminalization of actions associated with individuals from sexual minorities, as well as the establishment of legal frameworks aimed at preventing various forms of discrimination against them. The impetus for these movements stems from the heightened vulnerability of individuals within sexual minorities to violence and forced displacement. The rights of the sexual minorities are protected by various provisions of Constitution and other laws.

Keywords: Sexual minorities, meaning, protection, rights, laws.

Introduction

Sexual minorities in India, encompassing lesbian, gay, bisexual, transgender, intersex and queer (LGBTQI) persons, have historically experienced systemic discrimination, social exclusion and denial of rights.¹ Despite constitutional guarantees of equality under the law regardless of sex and gender, the LGBTQI community suffered oppression and marginalization in the decades following independence.² The term 'sex' has traditionally referred to the biological differences between males and females, specifically the anatomical and physiological distinctions involved in sexual reproduction³ over time, the meaning and interpretation of 'sex' have expanded beyond this binary biological understanding. There has been a growing recognition that 'sex' encompasses a broader spectrum of sexual and gender identities, including sexual orientation and gender identity. In India, the expansion of the term 'sex' holds particular significance concerning the rights of sexual minorities. Section 377 of the Indian Penal Code, implemented during British colonial rule in 1860, criminalized homosexual acts, effectively denying basic rights to lesbian, gay, bisexual, transgender and

1 Alok Gupta, "Section 377 and the Dignity of Indian Homosexuals," *Economic and Political Weekly* 41, no. 46 (2006): 4815-823, <https://www.jstor.org/stable/4418738>.

2 Gautam Bhatia, "'The Freedom to Choose Who I Am': Navtej Singh Johar v Union of India and the Right to Identity," *Human Rights Law Review* 19, no. 2 (2019): 344, <https://doi.org/10.1093/hrlr/ngy042>.

3 Indian Kanoon, "Section 377 in the Indian Penal Code," accessed February 26, 2021, <https://indiankanoon.org/doc/1836974/>.

queer/questioning (LGBTQ) individuals.⁴The controversial law was struck down by the Supreme Court in 2018 in a landmark judgment that decriminalized same-sex relations.⁵

The concept of "sex" has been a focal point in regulating human relationships. Human sexual conduct has been shaped by various beliefs and perspectives worldwide. Despite being a fundamental aspect of people's lives, society generally maintains a conservative stance on sexuality and sexual orientation. In India, where a large portion of the population still upholds traditional views, non-conforming sexual orientations are regarded as taboo.⁶

The phrase "sexual minority" has established itself in contemporary discourse as a means to denote sexual orientations and identities that diverge from heteronormative standards. Broadly, this term serves two primary functions. Firstly, it promotes inclusivity for individuals and communities that may be classified as a minority, while circumventing the cumbersome identity labels like "LGBT". Secondly, in contrast to the term "queer", it sidesteps potential criticism of being derogatory or exclusive.⁷

It is important to define the some of the term about sexual minorities. Normally, people use the term LGBTQ, means "lesbian",⁸ "gay",⁹ "bisexual",¹⁰ "transgendered",¹¹ "transsexual".¹² LGBTQ community also known as Sexual minority. These LGBTQ are also referred as "Queer Community" or the "Rainbow Community".

Protection of Sexual Minorities – Initiatives at International Level

In recent years, the rights of sexual minorities have increasingly attracted attention both internationally and nationally. This focus emphasizes the decriminalization of actions associated with sexual minorities and the establishment of legal frameworks aimed at preventing various forms of discrimination against these groups. The impetus for these movements stems from the heightened vulnerability of individuals within sexual minorities to violence and forced displacement. Lately, there has been a shift in attitudes towards safeguarding the rights of sexual minorities, leading to advancements in their human rights. The term "sexual minorities" encompasses a broad category, allowing different groups like lesbians, gays, and transgender individuals to assert their rights. Consequently, the rights of sexual minorities are categorized as collective rights, group rights, or third-generation human rights.

In contemporary international law, it is widely recognized that all individuals, irrespective of their sexual orientation or gender identity, are entitled to access all human rights outlined in the Universal Declaration of Human Rights. Sexual orientation and gender identity are inherent aspects of every person. However, when someone's sexual orientation or gender identity diverges from the majority, they frequently become targets for discrimination and abuse. The consequences are dire: millions worldwide face execution, imprisonment, torture, violence, and discrimination on the basis of their sexual orientation or gender identity. Moreover, the mere acknowledgment of these issues by many states is perceived as a threat to the fundamental principle of the universality of human rights.

There are no human rights instrument at the international level specifically discuss about the rights of the sexual minorities. The Magna Carta of human rights¹³ provides that all human beings are entitled to the rights enunciated in the document and explicitly states that this entitlement shall apply "without distinction

4 Krishnadas Rajagopal, "Supreme Court Decriminalises Section 377," *The Hindu*, September 6, 2018, <https://www.thehindu.com/news/national/supreme-court-decriminalises-section-377/article24880994.ece>.

5 Maayan Sudai, "Toward a Functionalist Analysis of 'Sex' in Federal Antidiscrimination Law" (2018), <https://semanticscholar.org/paper/4a5853fb2f4814b58e2ea923ae53ec06c02961c6>.

6 Dr. Abhishek Kumar Singh, *Acceptance of Sexual Minorities: Constitutional Morality Shaping Social Morality*, AD VALOREM- Journal of Law: Volume 5: Issue IV: Part-II: October-December 2018, p.no. 74.

7 Robert C. Mizzi, Gerald Walton, *Catchalls and Conundrums: Theorizing "Sexual Minority" in Social, Cultural, and Political Contexts*, *Paideusis*, Volume 22 (2014), No. 1, p.no. 81.

8 Women who identify as gay and who have romantic or sexual inclinations towards other women are known as lesbians.

9 Most frequently, the term "gay" is used to refer to homosexuals or homosexuality. Lesbians are occasionally referred to as "gay," but male homosexuals are the group to which the term is most frequently applied.

10 Bisexuality encompasses the experience of romantic attraction, sexual attraction, or sexual activity directed towards individuals of both male and female genders. Additionally, it includes the capacity for romantic feelings or sexual interactions with individuals of any sex or gender identity.

11 A transgender person is someone whose gender identity differs from the gender they were assigned at birth. The term "trans" is frequently used to describe this phenomenon.

12 Feel uneasy about their assigned gender or have a gender identity that is not shared by their culture.

13 Universal Declaration of Human Rights, 1948

of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴ But, this instrument doesn't speak anything about sexual minorities or people having different sexual orientation. The ICCPR¹⁵ and ICESCR¹⁶, does not discuss sexual orientation or the protection of those who identify as sexual minorities or with a different sexual orientation. Although there are no explicit references to sexual minorities in any of the human rights instruments, it does not imply that international human rights law is not applicable to them. This is because, in recent decades, there has been a trend to include the term "sexual orientation" in major international human rights instruments when interpreting their provisions.

One of the pivotal interpretations regarding the safeguarding of sexual minorities within the framework of general human rights law is articulated by the Human Rights Committee in the land mark case of *Toonen v. Australia*.¹⁷ In this instance case, the complainant, Toonen, contended that the Tasmanian legislation criminalizing consensual sexual activities between adults was in violation of the International Covenant on Civil and Political Rights (ICCPR), specifically concerning articles that address anti-discrimination and privacy rights. The Human Rights Committee determined that the law infringed upon Toonen's right to privacy as enshrined in Article 17. The Committee asserted that the term "sex" in Article 2(1) of the ICCPR should be interpreted to encompass sexual orientation. Additionally, the Committee emphasized that sexual orientation does not constitute a reasonable or objective basis for making exceptions to the prohibition of discrimination.

The Human Rights Committee, in its ruling on *Young v. Australia*,¹⁸ determined that the refusal to grant a veteran's pension to a same-sex partner of the deceased constituted discrimination based on sexual orientation. The Committee explicitly recognized that sexual orientation falls under the "other status" category as outlined in Article 26 of the International Covenant on Civil and Political Rights (ICCPR). Similarly, in the case of *X v. Colombia*,¹⁹ the Committee found that denying pension transfer rights due to sexual orientation violated Article 26 of the ICCPR. Consequently, the terms 'sex' and 'other status'. In international human rights treaties should be interpreted to encompass sexual minorities and individuals with diverse sexual orientations. This indicates that the jurisprudence of the Human Rights Committee implies that while general human rights treaties may not explicitly address the rights of sexual minorities, they nonetheless provide indirect protection for these rights.²⁰

Constitutional and Legal Safeguards of Rights of Sexual Minorities

Numerous studies have documented the prevalence of homosexual orientation in nearly all cultures and societies. However, the main cause of homophobia is a Judeo-Christian morality that was exported by European colonialism, which brought its laws and morals to new regions of the world.²¹ A group whose sexual identity, orientation, or practices deviate from the majority of the surrounding society is referred to as a sexual minority. Although the term appears to apply to a wide range of groups, including sex workers, it is more commonly used to refer to individuals who identify as Lesbian, Gay, Bisexual, and Transgender (LGBT).²² Even at the international level, the minorities who are protected, restricted to linguistic, cultural and religious minorities.²³ Sexual minorities are not protected technically at the any international instruments.

The legal framework categorizes individuals strictly as either male or female based on their genital anatomy. This binary classification is established at birth, with the newborn's sex recorded as either male or female on the birth certificate. The primary functions of this official designation appear to include the collection of demographic data and likely, the support of governmental regulations and initiatives that differentiate

14 Article 2 of UDHR, 1948

15 International Covenant on Civil and Political Rights, 1966

16 International Covenant on Economic, Social and Cultural Rights, 1966

17 Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

18 Communication No 941/2000, UN Doc CCPR/C/78/D/941/2000

19 Communication No 1361/2005, UN Doc CCPR/C/89/D/1361/2005

20 DR. Aneesh V. Pillai, *Rights of Sexual Minorities*.

<https://ebooks.inflibnet.ac.in/hrdp04/chapter/rights-of-sexual-minorities-i/>

21 *Human rights violations against sexuality minorities in India*

<https://feministlawarchives.pldindia.org/wp-content/uploads/sexual-minorities.pdf>

22 Sylvie Namwase & Adrian Jjuuko, *Protecting the human rights of sexual minorities in contemporary Africa*, Pretoria University Law Press (PULP), 2017, p.no. 4.

23 Article 27 of the International Covenant on Civil and Political Rights (ICCPR) provides 'In those States in which ethnic, religious or linguistic minorities exist, persons belonging to these minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'

between the sexes. The state's classification of individuals by sex entails both explicit and implicit legal ramifications.²⁴

India has long been renowned for its wide variety of cultures and religions. India's distinct way of life has always been shaped by its religious traditions. India's constitution guarantees the freedom to practice one's religion, which has contributed to the development of a respectful and understanding environment among the nation's diverse religious communities. Minority groups are valued for their distinctiveness in a diverse and inclusive democracy like India; however, although members of these groups are entitled to certain privileges within the greater community, the decision to identify as a member of a minority or not is ultimately up to each individual. Constitution of India provides protection to its citizens through various rights including sexual minorities also.²⁵ Constitution, in its preamble, fundamental rights,²⁶ directive principles of state policy²⁷ provides various provisions for protection of sexual minorities.

India's legal system has developed from religious prescription to its current constitutional framework. India's legal system dates back to the Vedic era, and it is likely that the Bronze Age and the Indus Valley civilization both followed some form of civil law. The British East India Company introduced the common law system, which is a body of law founded on documented court decisions, to India. The fundamental law of the land is recognized as the Constitution. The Fundamental Rights are the rights that are explained in Chapter III of the Indian Constitution. These rights are essential because without them, a person's personality cannot fully develop on all levels and they may not be able to live in dignity if they lack any of these rights. These rights guarantee the efficient use of certain advantages that are necessary in a democracy. The Six Fundamental Rights Enshrined in the Constitution of India:

- Right to Equality
- Right to Freedom
- Right against Exploitation
- Right to Freedom of Religion
- Cultural and Educational Rights
- Right to Constitutional Remedies

The Preamble of the Constitution of India encapsulates the fundamental principles underlying the document. It articulates the core values that embody the Constitution's spirit, which include justice in the eyes of the law, the freedom of individual existence, equality in status and opportunity, and fraternity that fosters a sense of brotherhood and respect for human dignity. From the perspective of LGBT rights, Constitution provides various rights under different provisions, such as Article 14,²⁸ Article 15,²⁹ and Article 21³⁰. These articles are considered more important from the point of protection of rights of LGBT.

Article 14 explains about principle of Equality before law. Article 14 provides that, the State shall not deny to any person equality before law and equal protection of law within the territory of India. The said provision provides that, everybody is equal before the law that includes sexual minorities also.

Article 15 enhances the right to equality for citizens by asserting that no individual shall face any disability, liability, restriction, or condition solely based on religion, race, caste, sex, place of birth, or any combination thereof. This provision ensures that all the citizens have equal right to access to shops, public restaurants, hotels, and venues for public entertainment, as well as to wells, tanks, bathing ghats, roads and other public spaces that are maintained wholly or partially with State funds or are designated for public use.

The provision need to be interpreted in wider perspective, because the term citizens also include the sexual minorities like LGBT. There is a much importance should be given to protect their rights under the basic law of the land.

The most important and celebrated provision of the Constitution is **Article 21**, explains about Right to Life and Personal Liberty. No person shall be deprived of his life and personal liberty except according to procedure established by law. The main objective of Article 21 is to protect the public from encroachment of others upon the personal liberty and deprivation of life other than the procedure established by law.

24 Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 Hastings L.J. 1131 (1979).

Available at: https://repository.uchastings.edu/hastings_law_journal/vol30/iss4/6

25 Ankita Sharma, *Indian Constitution and the Rights of Minorities: A Critical Analysis*, *Quest Journals Journal of Research in Humanities and Social Science* Volume 12 ~ Issue 3 (2024), p.no. 150.

26 Part – III of the Indian Constitution

27 Part – IV of the Indian Constitution

28 Right to Equality

29 Prohibition of Discrimination

30 Protection of life and Personal Liberty.

According to Article 21 of the Constitution, everybody is assured with right to life with dignity. So, it is the fundamental duty of the State to protect the interest of the sexual minorities through enactment of laws and other measures. Otherwise the aim of the Article 21 of the Constitution is defeated.

The fundamental principle that can be identified as the core theme of the Indian Constitution is that of inclusivity. It remains to be examined whether the Indian socio-legal framework has effectively aligned with the Constitutional mandate to embrace sexual minorities.³¹

Apart from the Constitutional protection, the State has enacted some of the laws that protect the interest of sexual minorities. Such laws as follows:

Transgender Persons (Protection of Rights) Act, 2019, prohibits any such discrimination against transgenders in the employment, recruitment, promotion and related issues by any person or any organization.

The Citizenship Act, 1955 outlines the process for acquiring and determining Indian citizenship. Notably, it does not explicitly or implicitly mandates a specific, sex or gender identity as a prerequisite for obtaining citizenship. To qualify as a voter, an individual must be a citizen of India, and transgender individuals are also permitted to register as electors.

The **Registration of Births and Deaths Act, 1969**, to register in case of birth or death, the law does not mention anything about 'sex' or 'gender'. This Act is neutral about the gender. So, the law doesn't impose any restriction to the sexual minorities from the provisions of the Act.

The **Immoral Traffic Prevention Act (ITPA), 1956** is the primary instrument which prevents and protects the trafficking of women and children into prostitution. With the Amendment,³² the scope and ambit of the Act became applicable to both male and female sex workers and also to those whose **gender identity was indeterminable**.

The **UGC Anti-Ragging Regulation, 2009** mandates that both public and private universities address complaints related to homosexual assaults. Additionally, in 2016, the UGC acknowledged gender identity and sexual orientation as valid basis for ragging and discrimination.

Challenges faced by the Sexual Minorities

The sexual minorities face different challenges at the different levels. The society will not protect the interest of the sexual minorities equal to that of others. The way how society treats these sections will results in violation of their rights. There is a adequate steps need to be taken to protect the interest of the sexual minorities. Some of the challenges need to be faced by the sexual minorities is as follows:

Inequality and Violence

The LGBT members of the society are more vulnerable to some of the problems, such as intolerance, discrimination, harassment and also violence because of their sexual orientation. The sexual minorities deprive to access to healthcare and benefits of retirement, among other social protection and are subjected to unfairness. Members of the "Hijra" community in India frequently face violence, even at the hands of the police.

Lack of Social Acceptance:

Not even their own families can fully accept sexual minorities. They are frequently shunned or kept apart from people. They frequently wind up in juvenile jail. There is frequently pressure on young people who come out as gay or lesbian to get married in order to "cure" them. In order to change their orientation, they are also made to undergo conversion therapy.

Health Issues:

Rejection and social isolation are significant factors that can contribute to mental health challenges, such as heightened stress and diminished self-worth. These psychological struggles may subsequently result in substance abuse, including alcoholism and drug dependency. Furthermore, insufficient awareness and limited access to healthcare services can place individuals at an increased risk for sexually transmitted infections, including HIV/AIDS. For instance, the Centers for Disease Control and Prevention (CDC)

31 South Asia Human Development Sector, Report No. 55, *Charting a Programmatic Roadmap for Sexual Minority Groups in India* July 2012

32 Amendment of 1986

33 Rights of Sexual Minorities in India(LGBTQ+Rights): Status and Challenges – Explained pointwise
<https://forumias.com/blog/rights-of-sexual-minorities-in--india-lgbtq-rights-status-and-challenges-explained-pointwise/>

reported that in 2013, gay and bisexual men constituted approximately 2% of the US population, yet they represented 55% of all individuals living with HIV/AIDs in the country.³³

Political Under-Representation:

Due to their low proportion, Sexual minorities feature low on the priority list of political parties. They have no political representation as they fail to get even the opportunity to contest due to social prejudice. This leads to absence of their perspective in legislation e.g., the **Assisted Reproductive Technology (Regulation) Act, 2021** allows only heterosexual couples to use ARTs. Similarly Rights of Sexual Minorities are not covered under **Maternity Benefits Act, 2017**.

Conclusion

The section of people faces so many problems are called as sexual minorities, these minorities faced discrimination, violation of rights and other problems from a long period of time. Though we are living in 21st century our thinking level not changed up to the mark. There is a need to change in our thinking level from a broaden perspective. State being the protector of the fundamental rights guaranteed under Constitution, need to take necessary action to protect the interest of the sexual minorities. There is a need to create awareness about the rights and protection of sexual minorities to bring change in the society. Until and unless the social changes happens, the measures and steps taken by the legislative and judiciary remain unchanged and ineffective.

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