
RIGHTS AND FUNDAMENTAL FREEDOM OF LGBT COMMUNITY IN INTERNATIONAL LAW

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Introduction

The Rights and freedom of the sexual minorities, that is the LGBT community can be viewed within the larger perspective of human rights. Human rights are nothing but, rights which has been conferred by birth available to all individuals irrespective of their caste, creed, religion, nationality and most importantly gender and sexual orientation. Human rights are possessed by all human beings simply due to the very fact that they are human beings. Hence these rights are fundamental and inalienable in nature which are essential for life as human beings irrespective of the fact that they fall within the category of minority or not. Till date a specific definition or scope of rights has not been granted or enforced with respect to the LGBT community in any international statutes or legal provisions. But the extended scope of umpteen number of treaties, conventions and covenants on human rights have enabled to recognise and enforce the rights and freedom of LGBT community to a great extent. So let us examine the wide variety of the rights, international treaties, its scope, enforcement, prevailing common violations and safeguard methods.

International law and its relevance with respect to protecting and enforcing human rights of LGBT individuals

International law defines the legal responsibilities of states in their conduct with each other, and in their treatment of individuals within states jurisdiction. It encompasses a wide range of issues of international concern, including human rights. There are at least four sources of international law. But as far as human rights of LGBT community are concerned treaty laws is relevant. States are the subject of international human rights law, as it is they who take on obligations. Individual people are the object, as it is their human rights that are to be respected. Through ratification of international human rights treaties. Whenever the municipal legal proceedings fail to address human rights abuses then individual complaints or communications are available at the regional and international level so as to safeguard the rights and freedom of the LGBT community. At the international level these mechanisms include treaty bodies, dedicated expert committees established by treaty and tasked with monitoring implementation

of the varied treaties and special rapporteurs and other independent experts appointed by the United Nations Human Rights Council to investigate and report on pressing human rights challenges faced by LGBT community.

Sexual orientation and gender identity in International Human Rights law

The international law provisions rest upon two fundamental principles that underpin international human rights law: Equality and Non-discrimination. The opening phrase of the universal declaration on human rights (UDHR) are unequivocal that “All human beings are born free and equal in dignity and rights”. In the international perspective the United Nations organisation is an organisation of states. It is established for international peace and security. The charter of UN contains several provisions for the promotion and protection of human rights and fundamental freedoms. The charter by incorporating the provisions relating to promotion of human rights and fundamental freedoms opened a new dimension towards the progressive development of international law. The United Nations organisations is an organisation of states. It is established for international peace and security. The charter of UN contains several provisions for the promotion and protection of Human Rights and fundamental freedoms. A close reading of the preamble, Articles 1, 13(1), 55, 56, 62(2), 68 and 76(c) of the charter of united nations would show the desirability of the people of united Nations to promote and encourage respect for human rights and fundamental freedoms without distinction as to sexual orientation and gender identity. The charter by incorporating the provisions relating to promotion of human rights and fundamental freedoms opened a new dimension towards the progressive development of international law.

The general assembly and economic and social council (ECOSOC), two principal organs of UN, were given the task for the realisation of the promotion of human rights and fundamental freedoms. The ECOSOC, a principal organ of the UN, is most directly concerned with the question of human rights. Article 68 of the UN charter empowers the ECOSOC to set up commissions for the promotion of human rights. In 1946 a commission on Human Rights was appointed by the ECOSOC and the appointment was approved by the general assembly. The commission on human rights was directed to prepare recommendations and report on International Bill of Rights. The commission was empowered to appoint sub-commissions. The commission on Human Rights appointed a committee for preparation of the draft of an

international bill of Rights. It drafted the universal declaration of human rights which was adopted by the general assembly on December 10, 1948.

Treaty law

The treaties which deal about the wide variety of rights available to LGBT communities are mainly, those which contain commitments to uphold human rights. Each of which is heavily inspired from the UNs universal Declaration of Human Rights, 1948.

- 1.) The international covenant on civil and political Rights (ICCPR).
- 2.) The convention Against Torture (UNCAT).
- 3.) International Covenant on Economic, social and cultural rights.

At the regional level, there are various international treaties that impose obligations among neighbouring states.

- a.) The European convention on Human Rights (ECHR).
- b.) The American convention on Human Rights (American convention).
- c.) The African Charter on Human and people's Rights (African Charter).
- d.) The Revised Arab Charter on Human Rights (Arab Charter).

Scope of Rights and freedoms

- a.) Decriminalize Homosexuality: Laws that criminalise homosexuality give rise to a number of separate but interrelated or rather interconnected violations. At least 76 countries have laws in effect that are used to criminalize consensual sex between adults of the same sex.

The criminalization of private, consensual sex between adults of the same sex breaches a state's obligation under international law, including the obligations to protect individual privacy and to guarantee non-discrimination. This has been the consistent position of United nations human rights since 1994, when the human rights committee decided in the case *Toonen v. Australia* [1].

Namely, Articles 2, 7, 9 and 12 of the Universal Declaration of Human Rights (UDHR) deals with corresponding provisions which clearly mandates the fact that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation.

- Asylum claims

States also have a duty to provide safe refuge to individuals fleeing persecution on grounds of their sexual orientation and Gender identity. Article 33 of the convention relating to the status of refugees clearly elucidates this provision. Hence, effective systems should be established for recording and reporting hate motivated acts of violence. Asylum laws and policies should recognize that persecution on account of one's sexual orientation or gender identity may be a valid basis for an asylum claim.

b.) Prevention of torture cruelty, inhuman and degrading treatment of LGBT persons.

State has an obligation under international law to protect individuals from torture and other cruel, inhuman or degrading treatment. These rights are guaranteed by article 5 of the UDHR, article 7 of the ICCPR and article 2 of the convention against torture. States should provide a procedure whereby victims of such acts can seek remedies, including compensation. States are also under an obligation to take preventive measures, such as training of law enforcement officers and monitoring of places of detention.

C.) Prohibit Discrimination Based on Sexual Orientation and Gender Identity

The right is protected by article 2 of the universal declaration of human rights as well as the non-discrimination provisions of core international human rights treaties. Article 26 of the universal declaration provides that everyone is equal before the law and is entitled without discrimination to the equal protection of the law. In *young v. Australia* [2], decided in 2003 and *X v. Colombia* [3], decided in 2007, the committee concluded that differences in treatment in the award of pension benefits to a same sex were a violation of the right to be free from discrimination "on grounds of sex or sexual orientation." LGBT individuals experience discrimination in many different aspects of daily life.

Area of concerns with respect to the discrimination faced by LGBT people are mainly in expertise of Employment, health, education and recognitions of relationships.

Most common forms of Human Rights violation affecting LGBT Community

- 1.) Violent attacks, ranging from aggressive verbal abuse and psychological bullying to physical assault, beatings, torture, kidnapping and killings which are targeted. Asylum claims and other ancillary benefits must be granted to every individuals irrespective of their sex and gender.

- 2.) Discriminatory criminal laws, often used to harass and punish LGBT people, including laws criminalizing consensual same sex relationships. Which is a gross violation of Right to privacy. *Smith and Grady V. United Kingdom* [4]

The Strasbourg court held that, in principle, bias in discharging gay men and lesbian women from armed forces is a violation of Right to privacy.

- 3.) Discriminatory curbs on free speech and related restrictions on the exercise of rights to freedom of association and assembly, including laws dissemination of information on same sexuality under the guise of restricting the spread of LGBT “propaganda”.
- 4.) Discriminatory treatment, which can take place in a range of everyday settings, including workplaces, schools. Lack of legal recognition of same sex relationships or of persons gender identity can also have a discriminatory impact on many LGBT individuals.

Five core legal safeguards to protect LGBT Community at International level

- 1.) Protect people from homophobic and transphobic violence. Include sexual orientation and gender identity as protected characteristics in hate crime laws. Establish effective systems to record and report hate motivated acts of violence. It of core significance to ensure effective investigation and prosecution of perpetrators and redress for victims of such violence.
- 2.) Prevent the torture and cruel, inhuman and degrading treatment of LGBT persons in detention by prohibiting and punishing such acts and ensuring that victims are provided with redress. Investigate all acts of mistreatment by state agents and bring those responsible to justice. Provide apt training to law enforcement officers and ensure effective monitoring of places of detention.
- 3.) Repeal laws criminalizing homosexuality, including all laws that prohibit private sexual conduct between consenting adults of same sex. Ensure that individuals are not arrested or detained on the basis of their sexual orientation or gender identity. Criminalising homosexuality and various kinds of prejudice is still a major hurdle as far as rights of LGBT persons are concerned with.

- 4.) Prohibit discrimination on the basis of sexual orientation and gender identity. Enact legislations that prevents discrimination. Provide proper education to prevent discrimination and stigmatization of LGBT and intersex people.
- 5.) Safeguard freedom of expression, association and peaceful assembly for all LGBT people and ensure that any restrictions on these rights are removed such that no fetters are placed on any individual on the basis sexual orientation and gender identity. Promote a culture of equality and diversity that encompasses respect for the rights of LGBT people.

Conclusion

The United Nations general assembly, in a series of resolutions has called on states to ensure the protection of the rights and fundamental freedom of all persons belonging to the LGBT community. The United Nations have shown “grave concern” and has also stressed upon promptly investigating on matters where the individuals are denied their rights and freedom on the basis of sexual orientation and gender identity. Despite the fact that there exist various safeguards and protection for the LGBT people in the international legal perspective but still the efficacy with which it is enforced is still not up to the mark. This is mainly due to the fact that there still exist an inevitable Taboo associated with this so-called sexual minorities or the LGBT community. Proper education and empowerment can only uplift them to the main stream. Regarding the rights, the term “Rights” has never got a perfect definition till date, this is mainly due to the inconsistency with the moral correctness and legal entitlement that an individual has presumed from time immemorial. Rights are always highly subjective in nature. So naturally its of core importance to analyse the plight of rights and freedom of the minorities in the society. And one such class of the society is obviously the LGBT community.

End notes

[1] *Toonen v. Australia*, Communication No.488/1992, U.N. Doc CCPR/C/50/D/488/1992(1994).

[2] *Young v. Australia*, communication No. 941/2000, U.N Doc CCPR/C/78/D/941/2000(2003).

[3] *X v. Colombia*, Communication No. 1361/2005, U.N Doc. CCPR/C/89/D/1361/2005(2007).

[4] *Smith and Grady V. United Kingdom* 29 EHRR 493 1999.

Born free and equal: international human rights law.

<https://www.refworld.org/pdfid/4a783aed2.pdf> 2007

United Nations for LGBT Equality

<https://www.unfe.org/wp-content/uploads/2017/05/International-Human-Rights-Law.pdf>

Criminalising homosexuality and international human rights law

<https://www.humandignitytrust.org/wp-content/uploads/resources/6.-Criminalisation-International-Human-Rights-Law.pdf>

LGBT people Rights and perspective

<https://www.ohchr.org/documents/publications/bornfreeandequallowres.pdf>