

Decriminalizing Homosexuality in India and Sri Lanka: A Comparative Analysis

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Abstract - Should homosexuality be recognized as acceptable in society? The answer hinges on the debate between public morality and constitutional morality. Sexual orientation is a determining aspect of a person's identity. It is also a matter of a person's individuality, privacy, and dignity. Above all, it is part of the right to life, and without it, other rights cannot be enjoyed by 'non-heteronormative' persons. Homosexuality as a sexual orientation is about one's sexual autonomy as well. Everyone should be treated equally as human beings irrespective of sexual orientation. However, most people disapprove of homosexuality as it is seen as practice that goes against public morality, tradition, and culture. This precisely points to the debate between the rights of the majority and the rights of the minority. The Supreme Court of India has declared that Section 377 of the Penal Code, which criminalizes consensual homosexuality amongst adults, is unconstitutional. Similarly, in Sri Lanka too, there is an identical provision which criminalizes homosexuality. A principled commitment is required to legalize homosexuality in order to address the issue of the rights of those who are marginalized/minoritized based on sexual orientation. In this context, this paper analyses the possibility of legalizing consensual homosexuality amongst adults in Sri Lanka with a comparative analysis of the legal framework relating to homosexuality in India.

Keywords - *Homosexuality, Sexual minorities, Fundamental rights, Public morality, Constitutional morality*

1. Introduction

Homosexuality is a natural and inherent biological phenomenon in an individual (Misra, 2009). An individual has sovereignty over his/her body. A person can surrender his/her autonomy wilfully to another individual, and their intimacy in privacy is a matter of their choice. Therefore, criminalization of consensual homosexuality between adults in private violates the right to privacy, individual dignity and autonomy, equality, and freedom of expression as guaranteed under the constitution (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016) (K.S Puttaswmy & Anr.

V Union of India & Ors 10 SCC 1, 2017). Public decency and morality, which represents the view of the majority, cannot be deemed an acceptable ground for restricting the fundamental rights of sexual minorities (Charles Kenny, 2017). As a result, the criminal law which penalizes any consensual sexual relationship between two adults cannot be regarded as constitutional.

1.1. Research Objective

The objective of this study is to decriminalize homosexuality amongst adults in private and to grant recognition to sexual minorities in society through the promotion of the rights guaranteed under the Constitution of Sri Lanka by comparing the situation with what is observed in India.

1.2. Research Questions

1. Should the rights of homosexual people be recognized? What are the justifications for it?
2. If so, how can they be recognized and regularized?

1.3. Methodology

This research is a qualitative study which critically analyzes the Constitution, legislative framework, and judicial decisions as per primary sources. It will also include a detailed discussion of secondary sources such as books and scholarly articles.

2. Homosexuality – What Does it Mean?

Homosexuality, which means ‘of the same sex’, is a sexual orientation characterized by sexual attraction (Reejonia, 2019), exclusively for people identified as being of the same sex, mainly males are known as ‘gay’, females are known as ‘lesbians’ (K. Indhumathi, 2018). Researchers suggest that homosexuality is largely genetic (Parasar, 2013), and it may be due to biological, social and psychological factors in which individuals with homosexual genes will feel less inclined to behave heterosexually and will thus reproduce less frequently (K. Indhumathi, 2018).

The same sexual activity crosses all age, gender, ethnic, cultural, and racial lines. It was witnessed in major ancient civilizations such as Egypt, Greece, and Rome (Roth, 1998). A historical examination of both Western and non-Western cultures reveals that across the planet, recognition and celebration of same-sex relations existed in harmony with heterosexual marriage as a societal norm (Roth, 1998). The literature drawn from Hindu, Buddhist, Muslim, and modern fiction also testifies to the presence of same-sex love in various forms (Siker, 2007).

Even the Catholic Church, which has been highly vocal in its opposition to homosexuality in general, approved same-sex marriages for over 1500 years, only ceasing to perform them in the nineteenth century (Siker, 2007). However, with the rise of urbanization and the nuclear family, it was outlawed in most of the cases (Reejonia, 2019).

In 1610, as an English colony, Virginia adopted the ‘sodomy laws’ of England, declaring sexual acts between two men a ‘capital crime’ (Reejonia, 2019). Due to the work done by activists, since 1974, homosexuality has ceased to be considered an abnormal behavior and was removed from the classification of mental disorders (Nfobin, 2014). Since then, homosexuality has been decriminalized in different countries, and further in the late 1990s and early 2000s, progress toward and bans on same-sex marriage created a topic of debate all over the world, including non-western countries (Nfobin, 2014).

3. Carnal Intercourse against the Order of Nature- What Does the Law Say?

Section 377 of the Indian penal code:

“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine.”

Explanation: Penetration is adequate to constitute the bodily intercourse important to the offense depicted in this section.

The section says that sexual movement against the order of nature coupled with penetration is the gist of the offence (K. Indhumathi, 2018). If a person, who has carnal intercourse with a man, woman, or animal against the order of nature, and the act was done voluntarily, he is regarded as guilty of an unnatural offence (Vibhute, 2009). However, the term ‘carnal intercourse against the order of nature’ is not defined in the penal code. Therefore, the Indian Judiciary broadly interprets ‘unnatural’ sexual acts as any (un)consensual penile-anal, penile-oral, and penile-animal penetration. This section criminalizes if two consenting grown-ups of the same-sex are associated with sexual activities (DP Minwalla v Emperor, 1935) (Krishan Lai v State of Rajasthan, 1998).

A similar provision has been inserted under Section 365 of the Penal Code of Sri Lanka. Further, Section 365A states that ‘*any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another*

person, shall be guilty of an offence'. Any person who commits gross indecency, in public or private, even with consent, is regarded as an offender. Earlier, only men were punished under this section. By inserting the word 'any person', a woman is also regarded as an offender. These two provisions under the penal code make homosexuality an offence in Sri Lanka (CONCERNED CITIZENS AGAINST 365 & 365A, n.d.). Since there is no expressed meaning in the penal code to the terms 'carnal intercourse against the order of nature', if Sri Lanka refers to the judgment of the Indian court, it is evident that consensual same sexual activities amongst adults are an offence.

4. Is There a Move to Legalize Homosexuality in Sri Lanka?

Homosexuality was widely known in the prevailing Hindu culture and Buddhism. It was neither criminalized nor marginalized during the pre-colonial times of the island (Dunne, 2007). It was not looked down upon until the 16th century. The missionaries from Europe, who promoted their religious values, forbade homosexuality and eventually imposed laws criminalizing homosexual acts under colonialism (Ammon, 2008). The ethnic conflict on the island is often cited as a primary reason why legal rights for sexual minorities did not progress with the same speed as in other countries (Cronin-Furman, 2015). Efforts to support sexual minorities increased in the 21st century (Flamer-Caldera, 2018). Rosanna, who has been active in the struggle for LGBTIQ rights, asks why Sri Lanka is still going ahead with colonial laws to marginalize the LGBTIQ people without ensuring equality for all parts of the community' (Fonseka, 2018).

As of now, people who are not heterosexual are not entitled to all the rights in the Constitution of Sri Lanka. *Prathiba Mahanamahewa* states that 'equal right is recognized under the Constitution, but members of LGBTIQ community are repeatedly discriminated against in police stations and public places, and there is a need to incorporate sexual orientation in a new Constitution'. European Union in signing the trade agreement with Sri Lanka requires the latter to remove laws which discriminate against LGBTQ people since they violate human rights and the dignity of the people (Staff, 2017). Further, in 2016, Sri Lanka voted against getting rid of the UN Independent Expert on Violence and Discrimination based on questions related to sexual orientation and gender identity at the United Nations General Assembly (Stewart, 2016). In the same year, the Supreme Court of Sri Lanka in deciding the appeal on section 365A acknowledged the 'contemporary thinking that consensual sex between adults should not be policed by the state and criminalizing and imposing custodial sentences would be

inappropriate in cases where the impugned acts were between consenting adults' (G.P.S Wimalasiri v OIC Maradana).

However, in January 2017, the cabinet rejected the chance to legalize homosexuality, which was included in the proposed National Human Rights Action Plan, due to the fear that it will lead to social problems. Rajitha Senaratne, former Health Minister, said during the above occasion that 'the government is against homosexuality, but we will not prosecute anyone for practicing it' (Voss, 2017). But in November 2017, at the third Universal Periodic Review (UPR) of Sri Lanka in Geneva, Nerin Pulle said that 'Sri Lanka is committed to reforming the penal code to ensure that all offences contained in the code comply with international human rights standard and no provision in the law would be applied to persons of the LGBTIQ community in a discriminatory manner' (Pulle, 2017). The US Department of the State Human Rights Report, Sri Lanka indicated that the police use criminalization of same-sex to assault, harass and monetarily extort them, including arbitrary detention and mistreatment (Trust, n.d.). Even though the government has shown significant interest in legalizing homosexuality, especially by voting against the anti-LGBTIQ proposal at the United Nations General Assembly, the cabinet rejected the proposal to legalize same-sex relations. Nevertheless, Nerin Pulle spoke optimistically at UPR regarding the government's commitment to decriminalizing it.

5. Rights Guaranteed for Sexual Minorities - Does the Constitution Have a Way to Decriminalize Homosexuality?

This part offers a comparative analysis of how the law in India has been declared unconstitutional by interpreting constitutional articles and the possible way forward to decriminalize consensual homosexuality amongst adults in private in Sri Lanka. Nelson Mandela states that denying people their human rights challenges their humanity. When sexual orientation or expression of choice is faced with an impediment, either by law or societal norm, the individual's right is injured (Misra, 2009). Voices against section 377 started with people's fundamental rights since criminalization makes them apprehensive about speaking openly about their sexual orientation, denies them state protection, and makes them a victim of violence and abuse (Vibhute, 2009). This voice of protest was reflected in *Navtej Singh Johar & Ors. V Union of India* where the Supreme Court of India held that a law which criminalizes consensual homosexual activities amongst adults (Suresh Kumar Koushal and another v Naz Foundation, 2014) (*Naz Foundation v Government of NCT of Delhi and others*, 2009) in

private is unconstitutional since it is a violation of Articles 14, 15, 19, and 21 of the constitution. The Supreme Court further noted that discrete and insular minorities face grave dangers of discrimination for the simple reason that their views, beliefs or ways of life do not accord with the mainstream. But in a democratic Constitution founded on the Rule of Law, it does not mean that their rights are less sacred than those conferred on other citizens (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016).

a) Constitutionalism, Transformative Constitutionalism, Constitutional Morality, and the Doctrine of Progressive Realization of Rights

Does the constitution have a way forward to legalize homosexuality? If so, how can it be legalized? The Constitution has already recognized the rights of each individual. It is time for us to interpret the rights of those people with a view to recognizing their individuality. The primary objective of having a constitutional democracy is to transform society progressively and inclusively (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016). The constitution as a dynamic and organic document urges progressive interpretations of the rights of each individual, including a marginalized or neglected person, following the contemporary needs and interests of the society (Saurabh Chaudri and others v Union of India, 2003).

It is presumed to be transformative in the sense that the interpretation of its provisions should not be limited to the mere literal meaning of its words; instead, they ought to be given a meaningful construction with the changing needs of the time. When interpretation is guided by transformative constitutionalism, society is dissuaded from indulging in any form of discrimination. This results in the country being guided towards betterment in the future (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016).

Further, constitutional morality urges the organs of the State to preserve the heterogeneous nature of society and to curb any attempt by the majority to usurp the rights and freedoms of a smaller section of the population (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016). The veil of social morality cannot be used to violate the fundamental rights of even a single individual. If the court is of the view that the law is inconsistent with constitutional morality, the law becomes unconstitutional for the simple reason that the courts exist to uphold the constitution. Also, the doctrine of progressive realization of rights demands that in the progressive and ever-improving society, there should not be any place for retreat and regression of

rights; but society has to march ahead (*Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.)*, 2016).

Nevertheless, the main reason for the criminalization of homosexuality is that it is against nature and morality. It is the majoritarian view, and the legal system is premised on this view. However, the meaning of nature and morality has changed with time. As per history, homosexuality was once accepted in society, though it was criminalized later because of religion and society. Section 377, which represents the voice of the majority, has nothing to do with the constitutional rights of minorities (*Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.)*, 2016). Because constitutionalism, transformative constitutionalism, constitutional morality, and the doctrine of progressive realization of rights strengthen the view that the majority's interests cannot always be a determinant factor in deciding the rights of minorities. The rights of each individual should be recognized irrespective of their sexual orientation. This is part of the progressive changes that are happening over time.

b) Right to Privacy and Human Dignity

Being a homosexual person is a natural identity. It is also about a person's privacy, sexual autonomy, and self –determination (*Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.)*, 2016). Self-determination includes both sexual orientation and declaration of sexual identity, which is irreplaceable and essential to one's being and should be respected (*Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.)*, 2016). Non-acceptance of it by societal norms or punishment by law based on some obsolete idea harms a person's individuality, tantamount to humiliating his/her intrinsic dignity and autonomy. In the end, it leads to the destruction of the right to privacy. In *K. S. Puttaswamy & Anr. v. Union of India & Ors*, it was held that sexual orientation is an essential attribute of privacy, and the right to privacy is a fundamental right under Article 21 of the Constitution of India. Whom one loves and marries is the privacy of sexual minorities, and no one, not even the state, has the right to decide it through processes of criminalization. Human Dignity is essential to enjoy the rights which constitute the essence of liberty and freedom (*Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.)*, 2016). Further, in *National Legal Services Authority (NLSA) v Union of India*, the court recognized the 'Yogyakarta principles' on the application of international law concerning issues

of sexual orientation and gender identity. It outlines the rights that sexual minorities enjoy as human persons under the protection of international law.

The Constitution of Sri Lanka does not expressly recognize the right to life as a fundamental right, which is implicitly recognized under Chapter III of the Constitution. In *Sriyani Silva v Iddamalgoda, OIC, Paiyagala*, the Supreme Court of Sri Lanka held that Article 13(4) provides that no person shall be punished with death or imprisonment except by order of a competent court. That is to say: a person has a right not to be put to death, except upon court order. Expressed positively, it means that a person has a right to life unless a court orders otherwise. Further, Article 11 guarantees freedom from torture and cruel and inhuman treatment or punishment. Unlawfully depriving a person of their life would undoubtedly be inhuman treatment, for life is an essential pre-condition for being human. Therefore, Article 11, read with Article 13(4), recognizes the right to life. It could be positively interpreted that the right to life includes the right to privacy.

The framers of the Constitution could have never intended that the protection of fundamental rights was only for the majority population (*Sriyani Silva v Idamalgoga*, 2000). Therefore, to allow the individual to behave and conduct themselves as they desire and allow them to express their sexuality, which is an essence of individual dignity and privacy, with the consent of the other, is a constitutional duty.

c) Equality, Non-discrimination, and Freedom

1. Equality and Non-discrimination

Everyone should be treated equally without discrimination is another strong argument made in support of the rights of sexual minorities (*M.Nagaraj and others v Union of India and Others*, 2006). Article 14 states that the state shall not deny any person equality before the law or the equal protection of the laws within the territory of India. There is no exception to the principles of equality. The basic principle underlying Article 14 is that the law must operate equally on all persons in any circumstances. This involves the eradication of systemic forms of discrimination based on race, gender, class, and other forms of inequality (Goldblatt, 1998). It also entails the development of opportunities that allow people to realize their full human potential within positive social relationships (Goldblatt, 1998).

As per Article 15, no person should be discriminated against on any grounds, including sex. Sex includes sexual orientation, meaning that non-

discrimination based on sex discrimination intends to avoid discrimination against the disadvantaged group (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016). Homosexuality as a sexual orientation is the individual identity of each individual in society. Gay/Lesbian people are also equal before the law and entitled to equal rights and treatment, but have been wrongfully identified as offenders.

Similarly, Article 12(1) of the constitution of Sri Lanka states that “all persons are equal before the law and entitled to the equal protection of the law”. Article 12(2) says that no citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth, or any one of such grounds. It indicates that the homosexual minority people in Sri Lanka should also be treated equally without discrimination.

2. Freedom of Expression

Freedom of expression constitutes one of the essential foundations of a democratic society. It applies not only to those that are favourably received but also to those that offend, shock, or disturb. Section 377 turns homosexuals into offenders for the simple reason that expression of their desires, sexual autonomy or way of life ultimately devalues and degrades them in the eye of society (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016). But they have the right to express their choices in terms of sexual inclination without the fear of persecution or criminal prosecution. Therefore, expression of individuality and choice concerning one’s homosexuality is part of their rights, such as freedom of speech, expression, assembly, and association; and those rights should be protected as per article 19(1) of the constitution.

Precisely, the Constitution of Sri Lanka also recognizes the freedoms of the citizens. Article 14(1) states that every citizen is entitled to a) the freedom of speech and expression, including publication; (b) the freedom of peaceful assembly; (c) the freedom of association. This suggests that an individual has the right to express his/her sexual preferences (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016).

Thus, the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15, 19, and 21 of the Constitution of India. Near identical rights have been recognized under the constitution of Sri Lanka, as discussed above. Therefore, this discrimination and unequal treatment experienced by the homosexual community as a separate class of citizens is unconstitutional, for it violates those articles of the constitution

(Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016).

d. Limitations upon Rights – Can a Right be Deemed Absolute?

In the *K. S. Puttaswamy case*, the court recognized that the right is not absolute subject to restriction where this was provided by law, corresponding to a legitimate aim of the State, and was proportionate to the objective it sought to achieve. Also, in *Meneka Gandhi v Union of India*, P.N. Bhagwati J. held that law and procedure authorizing interference with personal liberty must also be just and fair and not arbitrary, fanciful, or oppressive. Every interference provided by law should be reasonable. Reasonableness implies that every interference with privacy must be reasonable, which implies proportional to the end sought and necessary in any given case. Interference over sexual autonomy by section 377 cannot be reasonable.

Legislature is fully competent to enact laws that apply only to a particular class or group. Equality under Article 14 forbids class legislation, but it does not forbid reasonable classification (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016). However, for the classification to be valid, it must be founded on an intelligible differentia, and the differentia must have a rational nexus between the basis of classification and the object sought to be achieved by a particular provision of law (*Shayara Bano v Union of India*, 2017). But there is no reasonable nexus between the object and Section 377.

Further, freedom of expression can be restricted if it endangers community interest, and such restriction should be reasonable. Since being a homosexual falls within the private sphere, it has neither disturbed the public order nor is injurious to public decency or morality; therefore, an individual's choice cannot be restricted (Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.), 2016).

Article 15(7) of the Constitution of Sri Lanka declares that certain rights can be restricted in the interests of public order and protection of public health or morality or to secure due recognition and respect for the rights and freedoms of others, or to meet the just requirements of the general welfare of a democratic society. It expressly reveals that no one can freely exercise their rights if it violates morality or affects the rights of others. If so, the question is whether rights can be restricted arbitrarily. If we apply the *Puttaswamy case*, *Menaka Gandhi case*, *and Navtej Singh case*, it reveals that no law can restrict the rights of people

arbitrarily; and constitutional morality will prevail rather than public morality. Thus, there is no reasonable connection between section 365 and 365A and restriction over the rights.

Therefore, section 377 in India and sections 365 and 365A in Sri Lanka penalizing consensual homosexual activity is manifestly arbitrary, irrational, disproportionate, and indefensible (*Naz Foundation v Government of NCT of Delhi and others*, 2009). However, criminalization of any homosexual activity with an animal, children, or done between persons without consent is constitutional.

6. Comparison between Sri Lanka and India - Does the Constitution of Sri Lanka Allow Legalization of Homosexuality?

Consensual homosexual activities under Section 377 have been legalized in India since not doing so violates Articles 14, 15, 19, and 21 of the constitution of India. Similarly, Sri Lanka has also criminalized homosexual activities under section 365, 365A. Precisely the same rights have been recognized under Articles 12(1), 12(2), 19, and the right to life have been recognized under Article 11 and 13(4) of the constitution respectively. Similarly, both countries put limitations on the exercise of those rights. Therefore, it could be argued that a similar application of constitutional provisions of India in *the Navtej Singh case* paves the way for the probability of decriminalizing homosexuality in Sri Lanka.

However, the issue is whether the Supreme Court of Sri Lanka can question the constitutionality of the law. The answer is negative. Because Article 80(3) of the Constitution of Sri Lanka reveals that once the bill becomes law, no court can question the Act's validity *on any grounds*. The court can question the constitutionality of the bill, not the law, even if it is inconsistent with the fundamental rights. In contrast, Article 13(1) of the Constitution of India grants power to the court for the judicial review of the law (*Marbury v Madison*, 1803) by expressly stating that the law becomes void if it is inconsistent with the fundamental rights of the people; but the position is *vice versa* in Sri Lanka as guaranteed under Article 16(1) of the constitution. This proves that the Supreme Court of Sri Lanka has no power to question the constitutionality of Section 365 and 365A of the penal code of Sri Lanka. However, parliament can take steps to amend/repeal those sections to legalize consensual homosexual activities amongst adults in private in order to ensure the rights of a sexual minority group.

7. Other Countries - Do Other Countries Legalize Homosexuality?

Homosexuality has gradually become more permissive in western countries and non-western countries. However, many jurisdictions have retained their statutory prohibitions on homosexual marriages despite much criticism from groups who believe that the sodomy law is obsolete and should be repealed.

a. South Asian Countries

After the democratic movement of 2006, **Nepal** decriminalized homosexuality in 2007 in *Sunil Babu Pant v Nepal Government*, and the constitution of 2015 has enshrined the full and equal rights of sexual and gender minority groups. Although same-sex conduct is not specifically criminalized, Nepal's criminal code criminalizes unnatural sexual intercourse (International Commission of Jurists, 2008). In the *Sunil Babu Case*, the Supreme Court declared that the right to privacy is a fundamental right of an individual. Since sexual acts fall under the definition of privacy, homosexuality should be decriminalized (International Commission of Jurists, 2008). Further, the court emphasized that the government has the responsibility to enact a law for the safety of LGBTQ persons and ordered to guarantee non-discrimination based on sexual orientation and gender identity in the new constitution.

Since 2007, the age of consensual sex has been 16 for everyone, and anti-discrimination laws have been effective in employment, provisions of goods and services, service in the military, and the choice of the third gender option (Arestis, n.d.). Further, in the constitution of 2015, Article 12 states that a person can acquire citizenship with a preferred gender identity. Article 18(1) and (2) point out that everyone is equal before the law without discrimination. Article 18(3) also sets out the lists where sexual minorities are recognized amongst disadvantaged groups, especially in gender-neutral terms. Further, Article 42 explicitly states that gender and sexual minority groups shall have the right to employment in state structures based on the principle of inclusion.

Bhutan is the latest country in the world to decriminalize homosexuality. Decriminalization happened in Bhutan in 2021 (Happiness and Harmonization as Bhutan Decriminalizes Homosexuality, 2021). Like other countries, Bhutan maintained the colonial-era anti-sodomy laws to criminalize homosexuality and marginalized the LGBT community (Sharma, 2020). However, the movement in 2020 led to decriminalize it in alignment with the new Constitution which guaranteed Fundamental Rights.

Bangladesh is a Muslim-dominated country where same-sex activities are considered immoral and sinful. As a post-British colonial state, similar to India, section 377 of the penal code considers carnal intercourse against the order of nature an offence. This runs against minority sexualities (Shaon, 2016). However, *Hijras*, third-gender people, have been legally recognized. A recent survey in Bangladesh finds that there is an urgent need for psycho-social and legal support for many LGB individuals who are at high risk of abuse and harassment (Bangladesh, 2015). Therefore, the report suggests some recommendations, including mobilizing the young middle-class LGB community members to bring about social, legal, and political changes by organizing social awareness campaigns, working towards a cultural shift from the stress on heteronormative relationships and marriage, striving for legal reform by repealing the outdated law BPC section 377 and incorporating new laws that take diverse sexualities, genders, expressions and rights associated into account and incorporate sex-education in the curriculum (Bangladesh, 2015).

But, **Pakistan, Afghanistan, and the Maldives**, which are under the influence of Sharia law, still criminalize homosexuality (Yee, 2019)

A common feature of South Asia is that all countries are still under the significant influence of culture, spirituality, religion, family, marriage and reproduction, social norms and morality. Therefore, those who are against same-sex activity always stress that it is sinful and unnatural. They argue that it is suitable only for Western countries. They also claim that Western culture is not suitable for South Asian countries. They ignore rights of the sexual minorities who are also human beings. Although Bhutan, Nepal and India are both secular states with cultural, linguistic, and religious diversity, they support the rights of same-sex people. Nepal, a country where, like Sri Lanka, Hinduism and Buddhism are dominant religions, has recognized this community by adapting to contemporary cultural changes.

b. Western Perspective - Case Laws

In the **Unites States of America**, in *Lawrence v Texas*, the court observed that issues related to two adults who, with total and mutual consent of each other, engaged in sexual practices common to a homosexual lifestyle and right to liberty under the Due Process Clause gives them the full right to engage in their conduct without the intervention of the states. Further, in *Obergefell et al. v Hodges, Director, Ohio Department of Health, et al.*, the court held the liberty of persons to choose without being punished as criminals. In *Kimberly Hively v Ivy Tech Community College of Indiana*, the court held that discrimination based on sexual

orientation is also sex discrimination because it is associational discrimination based on sex.

In **Canada**, the court in *Delwin Vriend and others v Her Majesty the Queen in Right of Alberta and others* observed that potential harm to the dignity of gay and lesbian individuals constitutes a cruel form of discrimination. It is considered harmful to self-esteem. Further, in **South Africa**, in *National Coalition for Gay and Lesbian Equality v The Minister of Justice*, it was observed that sodomy offence builds insecurity and vulnerability into the daily lives of gay men, and punishment for sexual expression degrades and devalues gay men in the broader society. Moreover, homosexuality was decriminalized in Thailand, Japan and Hong Kong in 1880, 1956, and 1991 respectively (Arestis, n.d.).

8. Conclusion

Legal reform and changes in social norms associated with homosexuality facilitate the legalization of consensual same-sex conduct. It is expected that legal reform can be a way to improve social attitudes. Law recognizes homosexual people, but recognition by society, which still relies on the idea that same sex activity is immoral and indecent, continues to be a challenge. Even though legal reform relies on constitutional morality, transformative constitutionalism finally ends with social recognition that relies on public morality. This issue may be resolved, if everyone accepts that there are different sexualities and gender identities other than their own.

As compared above, Fundamental Rights guaranteed in the Constitution of Sri Lanka are similar to the ones found in the Constitution of India. Like India, Sri Lanka should take steps towards decriminalizing consensual homosexuality amongst adults in private. The penal code of Sri Lanka and Section 365 should be reformed in ways that recognize the rights of sexual minorities.

References

- Ammon, R. (2008) 'Buddhism and homosexuality', *Global gayz*, 1 January. Available at: <https://archive.globalgayz.com/asia/sri-lanka/buddhism-and-homosexuality-2/> (Accessed: 20 January 2022).
- International Commission of Jurists (ICJ) (2008) 'Sunil Babu Pant and others v Nepal government and others, Supreme Court of Nepal (21 December 2007).' Available at: <https://www.icj.org/sogicasebook/sunil-babu-pant-and-others-v-nepal-government-and-others-supreme-court-of-nepal-21-december-2007/> (Accessed: 25 January 2022).
- Salzburg Global Seminar (2021) 'Happiness and harmonization as Bhutan decriminalizes homosexuality', *Salzburg Global Seminar*, 21 January. Available at: <https://www.salzburgglobal.org/news/latest-news/article/happiness-andharmonization> (Accessed: 27 January 2022).

- Anon. (2012) *Concerned citizens against 365 & 365A*. Available at: <https://www.change.org/p/concerned-citizens-against-365-365a> (Accessed: 20 January 2022).
- Arestis, S. (2022) '10 most gay friendly countries in Asia', *Nomadic Boys*. Available at: <https://nomadicboys.com/most-gay-friendly-countries-in-asia/> (Accessed: 27 January 2022).
- NYU Faculty Digital Archive (2015) Bangladesh LGB needs assessment survey report. Available at: <http://www.boysofbangladesh.org/wp-content/uploads/2016/10/LGB-Survey-Report.pdf> (Accessed: 22 January 2022).
- Charles, K. and Dev, P. (2017) 'Norms and Reform: Legalizing Homosexuality Improves Attitudes', *Centre for Global Development*, October. Available at: <https://www.cgdev.org/sites/default/files/norms-and-reform-legalizing-homosexuality-improves-attitudes.pdf> (Accessed: 22 January 2022).
- Cronin-Furman, K. (2015) 'Sri Lanka's surprise political transition', *The Washington Post*, 12 January. Available at: <https://www.washingtonpost.com/news/monkey-cage/wp/2015/01/11/sri-lankas-surprise-political-transition/> (Accessed: 20 January 2022).
- DP Minwalla v Emperor AIR (1935)*; *DP Minwalla v. Emperor AIR [1935]*; *Kishan Lai v. State of Rajasthan [1998] Cri LJ 4508*; *Mihir v. State of Orissa [1992] Cri LJ 488*; *Mohan Ojha v. State of Bihar [2002] Cri LJ 3344 (Pat)*; *Fazal Rah Choudhary v. State of Bihar AIR [1998] SC 323* and *Kailash @ Kala v. State of Haryana [2004] Cri LJ 310*; *Lohana Vasntlal Devchand v. State [1968] Cri LJ 1277*.
- Dunne, B. (2007) 'Homosexuality, buddhism, and Sri Lankan society', *Groundviews*, 28 August. Available at: <https://groundviews.org/2007/08/28/homosexuality-buddhism-and-sri-lankan-society/> (Accessed: 20 January 2022).
- Flamer-Caldera, R. (2018) 'Long & hard battle of Sri Lankan activist for gay rights', *The Economic Times*, 8 September. Available at: <https://economictimes.indiatimes.com/news/politics-and-nation/a-long-hardbattle-of-a-sri-lankan-activist-for-gay-rights/articleshow/65736301.cms?from=mdr> (Accessed: 20 January 2022).
- Fonseka, P. (2018) 'Removing barriers for LGBT+ people in Sri Lanka', *Daily Mirror*, 6 July. Available at: <https://www.dailymirror.lk/print/news-features/Removing-barriers-for-LGBT-people-in-Sri-Lanka/131-152293> (Accessed: 20 January 2022).
- G.P.S Wimalasiri v OIC Maradana SC Appeal 32/11*.
- Albertyn, C. and Goldblatt, B. (1998) 'Facing the challenges of transformation: difficulties in the development of an indigenous jurisprudence of equality', *South African Journal on Human Rights*, 14(2), pp. 248-276.
- Indhumathi, K., and Kannappan, M. (2018) 'A study on unnatural offences and LGBT community: the present scenario', *International Journal of Pure and Applied Mathematics*, 119(7), pp. 1161.-1177.
- K.S Puttaswmy & Anr. V Union of India & Ors 10 SCC 1 (2017)*.
- Krishan Lai v State of Rajasthan (1998) Cri LJ 4508*.
- M.Nagaraj and others v Union of India and Others (2006) 8 SCC 212*.
- Marbury v Madison (1803) 5 U.S 137*.
- Misra, G. (2009) 'Decriminalising homosexuality in India', *Reproductive Health Matters*, 17(34), pp. 20-28.

- Navtej Singh Johar & Ors. v Union of India Secretary Ministry of Law and Justice W.P (Crl.)* (2016).
- Naz Foundation v Government of NCT of Delhi and others* (2009) 111 DRJ 1.
- Nfobin, E. N. (2014) 'Homosexuality in Cameroon', *International Journal on Minority Rights and Group Rights*, 21(1), pp.72-130.
- Penal Code of Sri Lanka No.2 of 1883 as amended in 1995.*
- Parasar, A. (2008) 'Homosexuality in India- the invisible conflict'. Available at: https://www.researchgate.net/publication/361792971_Homosexuality_In_India_-_The_Invisible_Conflict (Accessed: 20 January 2022).
- Pulle, N. (2017) 'Sri Lanka committed to non-discrimination based sexual orientation', *Daily Mirror*, 17 November. Available at: <https://www.dailymirror.lk/article/SL-committed-to-non-discrimination-based-on-sexual-orientation-Ner-in-Pulle-140616.html> (Accessed: 20 January 2022).
- Reejonina, M. (2019) 'Homosexuality a reality', *International Journal of Political Science and Development*, 7(5), p. 161.
- Roth, A. M. (1998) 'Sociological, political and legal context regarding the current debate on gay marriage', *Public Affairs Quarterly*, 12(3), pp. 347-361.
- Kathleen, M.S., (2007) 'Homosexuality, religion, and the law', in Siker, J. S. (ed.), *Homosexuality and religion*. Greenwood Press.
- Saurabh Chaudri and others v Union of India* (2003) 11 SCC 146.
- Shaon, A. I. (2016) 'Where does Bangladesh stand on LGBT issue?', *Dhaka Tribune*, 27 April. Available at: <https://archive.dhakatribune.com/bangladesh/2016/04/27/bangladesh-stand-lgbt-issue> (Accessed: 27 January 2022).
- Sharma, G. (2020) 'Bhutan parliament decriminalizes homosexuality, to delight of activists', *Reuters*, 11 December. Available at: <https://www.reuters.com/article/bhutan-bill-lgbt-idUSKBN28K1SK> (Accessed: 27 January 2022).
- Shayara Bano v Union of India* (2017) 9 SCC 1.
- Sriyani Silva v Idamal goga* (2000) SC No. 471/2000.
- Stewart, C. (2016) 'Anti-LGBTI push at U.N. falls short', *Erasing 76 crimes*, 21 November. Available at: <https://76crimes.com/2016/11/21/anti-lgbti-push-at-u-n-falls-short/> (Accessed: 22 January 2022).
- Suresh Kumar Koushal and another v Naz Foundation* (2014) 1 SCC 1.
- Human Dignity Trust, *Types of criminalisation*. Available at: <https://www.humandignitytrust.org/country-profile/sri-lanka/> (Accessed: 25 January 2022).
- Vibhute, K. I. (2009) 'Consensual homosexuality and the Indian penal code: some reflections on interplay of law and morality', *Journal of the Indian Law Institute*, 51(1), pp.3-31.
- Voss, B. (2017) *Proposed decriminalisation of LGBT+ rights in Sri Lanka*. Available at: <https://www.logotv.com/news/hoj55q/sri-lanka-decriminalizing-homosexuality> (Accessed: 20 January 2022).
- Yee, H. Y. (2019) 'LGBT Rights in South Asia: What Next?', *Salzburg Global Seminar*, 20 February. Available at: <https://www.salzburgglobal.org/news/latest-news/article/lgbt-rights-in-south-asia-what-next> (Accessed: 27 January 2022).