

Sexual Orientation

I. Introduction

[1] Lesbian, gay, bisexual, transgender and intersex (LGBTI) people of all ages and in all regions of the world suffer from violations of their human rights. They are physically attacked, kidnapped, raped and murdered. In more than a third of the world's countries, people may be arrested and jailed (and in certain countries even executed) for engaging in private, consensual, same-sex relationships. While transgender people and intersex people are usually discussed under the heading of → gender identity and expression, men who are attracted to men (gay) and women who are attracted to women (lesbian) are often referred to as homosexuals. Together with persons who are attracted to both sexes (bisexual) they shall be treated in this section as LGB persons. Many states do not only discriminate them (→ Discrimination, Prohibition of) but even criminalize sexual relations between them and exclude them from many services and opportunities under the law. In addition, states often fail to adequately protect LGB persons from discriminatory treatment in the private sphere, including in the workplace, housing, education and healthcare. In particular, LGB children and adolescents often face bullying and discrimination in school and by their families (→ Convention on the Rights of the Child (CRC); → Violence against Women and Domestic Violence). This is also due to the lack of education regarding sexual orientation. LGB adolescents may be thrown out of their homes by their parents, forced into psychiatric institutions (to undergo so-called conversion therapies) or forced to marry based on their actual or perceived sexual orientation. This problem is exacerbated when LGB people belong to groups that are discriminated against because of their race or religion etc. (→ Intersectionality). In many societies they are totally excluded or stigmatized and face a high risk of → poverty, violence (→ Security of Person, Right to) and murder, especially in the form of → hate speech and hate crimes. This is for example the case of → Afro-descendants in the United States and of → women or → persons with disabilities more generally.

[2] Throughout history, different societies have dealt differently with LGB persons. While certain societies were totally indifferent or even considered this group as particularly interesting or blessed (for example, Greek mythology reveals greater acceptance of homosexuality in ancient Athens;

some tribes indigenous to the Americas have coined the term 'Two-Spirit'), others did not openly discuss issues related to them or ignored them. Nevertheless, over time certain societies have outlawed same-(sexual) relations and discriminated against LGB persons. This was particularly common when such a behaviour was based on specific religious beliefs, such as with regard to certain readings of the traditional religious texts in Christianity, Islam (→ Sharia) or Judaism – but also certain nature worships. Today specific problems remain when it comes to the specific rights of churches and religious institutions to discriminate against LGB persons due to their faith.

[3] Especially after 1968, the claims for a better protection of the human rights of LGB persons have become stronger. This movement is often associated with the so-called Stonewall Riots of 28 June to 3 July 1969 – an event often remembered in so-called Pride Parades worldwide (though such demonstrations remain forbidden in many countries and often attract violence from opponents). These claims have been taken up by → civil society and social movements, be it through specialized → NGOs (like the one that at the time of its creation in 1978 was called the International Lesbian and Gay Association (ILGA) or the European Commission on Sexual Orientation Law (ECSOL)) or through the normal political debate or → public interest litigation. Though this is certainly also due to a generally more liberal lifestyle in many societies, especially in Western countries, there have been backlashes (also in recent times), especially when right-wing populist parties are in power (as recently in the United States, Russia or Poland). While activists sometimes use the terminology of *LGBTI Rights*, *Gay Rights* or *Queer Rights*, the mainstream literature and governments normally speak of human rights of the specific groups, such as human rights of same-sex couples, or transgender individuals.

II. Legal framework

[4] Obviously, international human rights law establishes legal obligations on states to make sure that everyone, without distinction, can enjoy their human rights. A person's sexual orientation, gender identity and sex characteristics is a status, like race, sex, colour or religion. As the topic is taboo in many societies, an important number of governments refuse to even talk about it within the framework of the → United Nations (UN) and regional organizations. In a post-colonial context,

many political leaders keep claiming that LGB persons are a purely Western phenomenon and thus there is no consensus with regard to the need to guarantee the right to integrity of LGB persons (→ Universalism and (Cultural) Relativism). There is no specific treaty at the United Nations level or within any of the regional cooperation organizations addressing the rights of LGB persons.

[5] After several failed attempts, on 17 June 2011, South Africa led a resolution at the → UN Human Rights Council (HRC) requesting that the United Nations High Commissioner for Human Rights (→ Office of the High Commissioner for Human Rights (OHCHR)) draft a report ‘documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity’ (HRC, Res 17/19 [2011]) to follow up on the implementation of the → Vienna Declaration and Programme of Action of 1993. The resolution passed with 23 votes in favour to 19 against, with three abstentions. It was the first such resolution and was hailed as ‘historic’. In July 2014, the United Nations (as an employer) announced it would extend equal benefits to employees in same-sex unions that were entered into in jurisdictions where they are legal. In 2016, the HRC passed a resolution to appoint an → independent expert to find the causes of violence and discrimination against people due to their gender identity and sexual orientation and discuss with governments about how to protect those people.

[6] In the absence of sufficient support at the UN level, a group of experts gathered in 2006 for an informal meeting to outline a set of international principles relating to the applicability of existing human rights obligations to sexual orientation and gender identity. The results were the so-called *Yogyakarta Principles (YP)* (→ Soft Law): a universal guide to human rights which affirm binding international legal standards with which all states must comply. The *YP plus 10* was adopted on 10 November 2017 to supplement the existing principles. The principles emerged from the intersection of the developments in international human rights law with the emerging understanding of violations suffered by persons on grounds of sexual orientation and gender identity and the recognition of the distinct and intersectional grounds of gender expression and sex characteristics.

[7] Despite the difficult political situation at the United Nations, at the more technical level UN human rights experts have underlined that existing international law prohibits discrimination based on sexual orientation (see HRComm, *Extrajudicial,*

Summary or Arbitrary Executions: Report of the Special Rapporteur [1999] para 76) while initially such discrimination was still considered acceptable (see HRCtee, *Leo Hertzberg and Others v Finland* [1982]). The same has been confirmed by treaty organs and specific organs. A milestone in this regard was the decision in 1994 by the UN Human Rights Committee under the → International Covenant on Civil and Political Rights (ICCPR) in *Toonen v Australia*. The Committee found that adult consensual sexual activity in private is covered by the concept of ‘privacy’ and any actual or potential criminalization is unlawful (→ Private and Family Life, Right to Respect for). Later, in an important number of communications (also recently) violations of the → freedom of assembly, → freedom of opinion and expression and → freedom of association related to sexual orientation were found. In 2016, the UN Security Council condemned the Orlando (Florida, US) nightclub shooting (noting that individuals were ‘targeted as a result of their sexual orientation’); this statement marked the first time the UN Security Council used language recognizing violence targeting the LGB community. In the context of the → Universal Periodic Review (UPR), states and NGOs have additionally made submissions with regard to the rights of LGB persons under the → International Covenant on Economic, Social and Cultural Rights (ICESCR), such as Articles 10 (family), 12 (physical and mental health) (→ Health, Right to) and 15 (cultural life) (→ Cultural Life, Right to Participate in).

[8] At the regional level, the activities of the → European Court of Human Rights (ECtHR) when applying the → European Convention of Human Rights (ECHR) is particularly noteworthy. In the beginning, the ECtHR was rather slow to address this issue and to oblige the parties to accept the applicability of the Convention to cases relating to the sexual orientation of applicants. But finally, it was the decision in *Dudgeon v the United Kingdom* (1981) that paved the way for a more inclusive approach that increasingly accepted that there was a sufficient consensus in Europe that LGB persons were entitled to the sexual self-determination (→ Sexual Rights) and had a right to adult consensual sexual activity (Art 8 ECHR). In the following years, the Court also addressed the freedom of assembly, expression and association of LGB persons fighting for the respect of their rights, as well as discrimination of members of the armed forces, with regard to social security benefits or the age of consent in criminal law. When it comes to obliging member states to introduce some form of

registered partnership or to open marriage to all couples, the Court remains much more hesitant in view of remaining differences between regions in Europe, though in its judgment *Schalk and Kopf v Austria* (2010) the Court found under Article 12 that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex. From the judgment in *Orlandi and Others v Italy* (2017) one can derive that state parties must provide some protection for the family life of same-sex couples. The same is true with regard to the access of LGB persons to parenthood (adoption, medically assisted pregnancy, or surrogacy, see → Reproductive Rights). Without forcing states to be particularly open to so-called rainbow families, the Court increasingly used the argument that the authorities cannot discriminate based on the sexual orientation when specific activities are lawful for same-sex couples or heterosexual persons (adoption, donorship, medical assistance etc.). With regard to the rights of → refugees, who are threatened in their countries of origin due to their sexual orientation, the Court remains also cautious in view of the → margin of appreciation that states enjoy when fulfilling their obligations under Article 3, but has made it clear that a real threat due to an applicant's sexual orientation must be taken into account when examining an → asylum application in order not to violate Article 3 ECHR (prohibition of inhuman and degrading treatment, most recently in *B and C v Switzerland* [2020]; → Non-refoulement). The Court still has a certain tendency to avoid the topic of LGB discrimination when it is possible to find a violation of the Convention without addressing the issue of sexual orientation (for example, *Sozayev and Others v Russia* [2020]).

[9] While as a group the → European Union (EU) member states are among the most advanced countries when it comes to protection and non-discrimination of LGB persons, there remain huge differences among them. This is reflected in the limited competences of the EU in this field (for example, family law, education etc.). Even when the EU is competent to take concrete measures, they are normally subject to unanimity rules which makes progress slow. At the same time, the achievement of certain accepted goals with regard to other policies (internal market, security and asylum, staff regulations etc.) has made possible certain compromises between the member states that have improved the situation (sometimes only after a clarification through the case law of the → Court of Justice of the EU (CJEU)). In addition, despite the uneven acceptance within the EU, in its

foreign relations the EU (or at least certain actors, most importantly the European Parliament) is increasingly demanding a minimum threshold regarding the respect of human rights (also of LGBTI persons). This is particularly important for so-called candidate countries and in commercial relations with developing countries. The CJEU has used the existing instruments relating, for example, to the free movement of persons or the specific work-related non-discrimination tools in order to protect also LGB persons and couples. In November 2020, the European Commission has presented its first Strategy to also protect lesbian, gay, bisexual, trans, non-binary, intersex and queer (LGBTIQ) equality, proposing to extend the list of EU crimes to cover hate crimes and ensure that EU policymaking reflects LGBTIQ concerns. The draft 'Horizontal Anti-discrimination Directive' would forbid discrimination based on religion or belief, disability, age or sexual orientation in access to goods and services, education and access to social benefits in a wider area of fields while now the protection 'due to sexual orientation' is basically limited to the workplace. But due to the lack of support this project is currently not moving forward.

[10] For the states parties to the Inter-American Convention against all forms of Discrimination and Intolerance, the → Inter-American Court of Human Rights (IACtHR) has had less opportunities to develop the meaning of the Convention with regard to LGB persons. The leading case remains certainly the judgment in the case *Atala Riffo and Daughters v Chile* (2012) where the Court stated that a mother could not be denied the right of custody for her children simply based on her sexual orientation (Art 11(2) (right to privacy) ACHR, Art 24 (right to equality and non-discrimination) ACHR, in conjunction with Art 1(1) ACHR). The Court held that a right granted to all persons cannot be denied or restricted under any circumstances based on their sexual orientation. Quite surprisingly, the Court issued an *Advisory Opinion on State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples* on 24 November 2017 that held that pursuant to the right to the protection of private and family life (Art 11(2) ACHR), as well as the right to protection of the family (Art 17 ACHR), the → American Convention on Human Rights (ACHR) protects the family ties that may derive from a relationship between persons of the same sex. The Court also found that all the internationally recognized human rights, as well as the rights and obligations

recognized under the domestic law of each state that arise from the family ties of heterosexual couples derived from a family relationship between a same-sex couple must be protected, with no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination (Art 1(1) and 24 ACHR) (para 198). Things remain more difficult in the African context but in its *Advisory Opinion on the Compatibility of Vagrancy Laws with the African Charter on Human and Peoples* of 4 December 2020 the → African Court on Human and People's Rights (ACTHPR) included a section entitled 'Vagrancy laws and the right to non-discrimination and equality' where the court explicitly refers to gender non-conforming people and sex workers (para 70).

III. Current challenges

[11] More than 70 countries still have laws in effect that criminalize private, consensual same-sex relationships, and in at least five countries conviction may carry the → death penalty (namely Iran, Mauritania, Saudi Arabia, Yemen and parts of Nigeria). Here a more active fight against such practice is urgently needed.

[12] The right to marriage and family life must include LGB persons, ideally through opening marriage, adoption and medically assisted pregnancy to all persons in a non-discriminatory manner. This is particularly important also in the best interest of the children concerned.

[13] In addition to violating basic rights, discriminatory laws lead to and exacerbate hostile attitudes towards gay, lesbian, bisexual and transgender people, feeding violence and discrimination (hate crimes). They also hamper efforts to halt the spread of HIV by deterring people from coming forward for testing and treatment for fear of stigma, discrimination and abuse. Here more work is needed to prevent and punish violence and discrimination by private parties (including conversion therapies). Employers (in particular also multinational enterprises) can play a more active role in promoting diversity and inclusion (→ Global Compact; → Guiding Principles on Business and Human Rights). The United Nations Free and Equal Initiative tries to foster such activities. Where necessary this should be supported through targeted → positive discrimination and affirmative action.

IV. Trends

[14] While most of the discussion of sexual orientation takes place in the core areas of international

human rights protection (though still with much work to be done) one should mention at least two other areas where the debate is currently taking up:

[15] One is the role of diversity and inclusion of LGB persons in → sustainable development and → development cooperation such as increasingly advocated by the → Organisation of Economic Cooperation and Development (OECD), the → International Monetary Fund (IMF), and the → World Bank Group and other institutions active in this field when formulating best practices regarding the absence of discrimination against and a more inclusive approach to LGBT persons at work.

[16] Another field is the prevention and punishment of sexual crimes against men and boys (→ Child Soldiers) as an area of international humanitarian law (→ International Humanitarian Law and Human Rights) that is too often not discussed due to stigmatization and shame.

V. Conclusion

[17] While substantive progress has been made in the last 50 years, tremendous differences persist when it comes to the protection of human rights of LGB persons. Especially in Africa, the Middle East and South Asia the situation remains challenging. A recognition of these problems and an intensified discussion at global and regional level would be a first step into the right direction. The research of this specific field is still too limited and needs more support.

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