

Sexual Orientation and Human Rights; Applicable Laws of Sri Lanka and UK

MAN Chandratilaka^{1#} and P Mahanamahewa²

¹Legal Studies Unit, Faculty of Management Studies and Commerce, University of Sri Jayewardenepura, Nugegoda, Sri Lanka

²Faculty of Law, General Sir John Kotelawala Defence University, Ratmalana, Sri Lanka

#nihal177@yahoo.com

Abstract— All human beings are born free with equal rights and dignity despite sexual preferences. The Penal Code of Sri Lanka, made sex between men an offence. The Sri Lankan Penal Code was formulated by British as they then were. The existence of lesbianism was not even acknowledged by the Penal Code. With the amendments made to the Penal Code in 1995, women too now face anti-homosexual regulations. Though this law is rarely enforced in this country, its mere existence is enough for the police and anti-gay groups to brand gays and lesbians as perverts and law-breakers. The Buggery Act of 1533 made buggery a capital offence in England until 1861. The Wolfenden report led to the passage of the 1967 Sexual Offences Act, which legalized homosexual acts. Civil Partnership Act recognizes same-sex relationships from 2005. The Marriage (Same Sex Couples) Act 2013, allows same-sex marriage, was passed in 2013. Regionally India and Nepal also have taken steps to change their laws. Why does Sri Lanka still discriminate sexual minorities despite English and international development? In this article, we examine the applicable laws of Sri Lanka and UK of sexual minorities; whether we can be benefited from their developments. It also reviews how UK law gradually developed from death penalty to recognition of same sex marriages in 2013. For this purpose I would use the comparative research method to achieve the objectives. The main Objective is to explore the laws of UK and to measure the relevant human rights instruments. With the development of cyber laws and globalization international law influences individual countries. This area of law is quite capable of developing in Sri Lanka but unfortunately international laws around the world are ambiguous. This study opens up the opportunity for activists who are involved in working in the field of human rights/sexual orientation.

Keywords— Orientation, Human Rights, Discrimination

I. INTRODUCTION

Sexual orientation is an enduring emotional, romantic, sexual or affectional attraction to another person. It is different from *sexual behaviour* because it refers to feelings and self-concept. Persons may or may not express their sexual orientation in their behaviours.

Sexual orientation exists along a continuum that ranges from exclusive homosexuality to exclusive heterosexuality and includes various forms of bisexuality.

Sexual orientation is a relatively recent notion in human rights law and practice and one of the controversial ones in politics. Prejudices, negative stereotypes and discrimination are deeply imbedded in our value system and patterns of behaviour. For many public officials and policy-makers the expression of homophobic prejudice remains both legitimate and respectable. Many countries around the world have laws regulating sexual activity between adults of the same sex. These laws are used by the police to harass, intimidate, and arrest gay men, lesbians, bisexuals, and transgender persons.

Countries that maintain these so-called 'sodomy' laws violate the international standard. Many of these throughout the world are legacies of the British colonial period, when colonizers introduced penal codes mimicking those in England. Today, countries around the world must face the lingering impact of these laws. The original laws, which speak of 'unnatural sexual acts against the order of nature', unquestionably, find their moorings in Christian strands of morality.

Sri Lanka has had an unpleasant human rights situation. Since independence, the political situation in Sri Lanka has been characterised by the conflict between the Sinhalese majority and the Tamil minority. The conflict has claimed over 65,000 lives when it ended recently in 2009. Like most other Asian countries, Sri Lanka is still entertaining a sodomy law. Sections 365 and 365A of the Sri Lankan Penal Code prohibit homosexuality. Section 365 prohibits 'carnal intercourse against the order of the nature', while section 365A uses the phrase 'an act of gross indecency'

Throughout the world the lesbian and gay movement have accelerated in recent years. By integrating questions of gender and sexual orientation into international human rights law, these movements have laid the groundwork for addressing human rights violations against homosexuals. Sodomy laws have been repealed in

many jurisdictions. All the European countries, including the United Kingdom have decriminalised the homosexuality.

II. METHODOLOGY

“What knows he of England who only England knows?”

The sentiment of Rudyard Kipling’s famous question can be applied to justify the science of comparative law.

The comparative research method will be used in this research as cross-judicial study, analysis, identification and explanations of similarities and differences in order to achieve the objective of the research. Examination of the law in these selected jurisdictions is needed to explore whether there is a pattern for the development of the law and also to ascertain whether this pattern will be suitable for adoption in Sri Lanka. The application of a comparative method of analysis, allows us to observe how other societies at a similar stage of civilization face up to the same and corresponding problems. Therefore it is important to compare other legal systems to determine how these systems solve the problems encountered in the law of human rights and to consider how Sri Lanka can be benefited by the adoption of principles and solutions obtained in those systems.

There are numerous reasons that comparative research has been adopted in this research. Comparative research has become popular recently specially in social sciences research. Globalization has been a major factor, increasing the desire and possibility for educational exchanges and intellectual curiosity about other cultures. Information technology has enabled greater production of quantitative data for comparison, and international communications technology has facilitated this information to be easily spread.

This is also a library based research as it can be done in library situation in most of the time. Varies constitutions, statutes, case laws, international treatises, research articles, books, paper articles and internet articles will be used.

III. DISCUSSION

A. United Kingdom

The first civil injunction against sodomy in British history was the Buggery Act of 1533, which made the ‘detestable and abominable vice of buggery committed with mankind or beast’ a felony. The Act allowed the monarch to issue death sentences against those convicted and to appropriate their property. Thus sodomy shifted from being a sin against God to also being a crime against the state. Buggery remained a capital offence in England until

1861, when the Offences Against the Persons Act repealed the death penalty as the mandatory punishment for homosexuality. The Labouchere Amendment of 1885 outlawed ‘gross indecency’ between men, a category wide enough to encompass any type of sexual activity. This is the legal provision under which Oscar Wilde was famously convicted.

In the autumn of 1953 there was little public support for homosexuality to be decriminalised. After several scandalous court cases in which homosexuality had featured, on 24th. August, 1954, British Parliament appointed a Home Office departmental committee ‘to consider . . . the law and practice relating to homosexual offences and the treatment of persons convicted of such offences by the courts.’ This Committee was chaired by John Wolfenden. Result of their research was the *Report of the Departmental Committee on Homosexual Offences and Prostitution*, published in 1957 and popularly known as the Wolfenden Report. The final recommendation of this Committee was that “homosexual behaviour between consenting adults in private should no longer be a criminal offence.” The report led to the passage of the 1967 Sexual Offences Act .Its publication was a turning point in the legalization of homosexuality in European countries, all of which have now legalized homosexuality and homosexual acts.

As a result of the European Court of Human Right’s ruling in *Sutherland v UK* in 1997, UK made a reduction of the age of consent for homosexual acts from 18 to 16, making it equal to that for heterosexual acts, through Sexual Offences (Amendment) Act 2000 with effect from January 2001.

Through the enactment of Human Rights Act (HRA) 1998 , the UK has incorporated and enforced the rights guaranteed in the European Convention on Human Rights. This means that there is a domestic remedy in the UK now if discrimination occurs on grounds of sexual orientation, since Article 8 of the Convention gives a right to respect for private and family life, and Article 14 has been interpreted by the European Court of Human Rights to include ‘sexual orientation’ among the prohibited grounds of discrimination . In *Antonio Mendoza v Ahmad Raja Ghaidan* the Court of Appeal held that a gay couple should be treated in the same way as a heterosexual couple for the purposes of succession rights under the Rent Act 1977. Apart from the UK Human Rights Act, the European Union has been active recently in this area. This has been made possible by amending Article 13 of the EC Treaty, where ‘sexual orientation’ has been inserted among the prohibited grounds of discrimination

Turning to the UK Ministry of Defence policy excluding homosexuals from the armed forces, in the cases of *Lustig-Prean and Beckett v United Kingdom, Smith and Grady v United Kingdom* (1999) the European Court of Human Rights ruled that such a policy is a violation of the Convention rights. In order to comply with it, policy in the UK in relation to homosexuals in the armed forces has been relaxed significantly. *The Armed Forces Code of Social Conduct: Policy Statement* explains the new approach. Sexual orientation is acknowledged to be 'essentially a private matter for the individual.' The coming into force of the Human Rights Act 1998 extends protection against dismissal or detriment on the ground of sexual orientation to all individuals employed by public authorities.

Regarding transsexuals, following *P v S*, the Sex Discrimination Act 1975 in the United Kingdom was amended with effect from 1 May 1999 by the Sex Discrimination (Gender Reassignment) Regulations 1999. Under the new section 2A, the definition of discrimination was extended to include direct discrimination in relation to gender reassignment. In a further recognition of legal acceptance of homosexual couples in the UK, a Civil Partnership Act was passed in 2004.

Same sex marriages was legalised in England, Wales and Scotland in 2014, Today, LGBT citizens have most of the same legal rights as non-LGBT citizens and the UK provides one of the highest degrees of liberty in the world for its LGBT communities. the UK currently holds the record for having the most LGBTI people in parliament in the world with 27 LGBTI MPs elected at the 2015 election.

B. Sri Lanka

The Penal Code of Sri Lanka, which was enacted in 1883, made sex between men an offence. The Sri Lankan Penal Code is a carbon copy of the Indian Penal Code which was formulated by the British Parliament in the 19th century. Both Sri Lanka and India were colonies of Britain, so it is clear that Sri Lankan Code is also based on British criminal laws as they then were. The existence of lesbianism was not even acknowledged by the 1883 Penal Code. The Victorian laws introduced under British colonial rulers did not acknowledge that women could have sex with each other and therefore lesbians could not be prosecuted. However, with the amendments made to the Penal Code in 1995, substituting the word 'males' with the gender-neutral 'persons', women too now face anti-homosexual regulations. Though this law is rarely enforced in this country, its mere existence is enough for the police and anti-gay groups to brand gays and lesbians as perverts and law-breakers.

Sections 365 and 365A of the Sri Lankan Penal Code of 1883, as amended by Act No.22 of 1995, are the provisions that criminalize homosexuality. The term of imprisonment under section 365A being two years or less allows this offence to be prosecuted by the police in the Magistrates Court, unlike an offence which entails a prison term of three or more years which makes it an indictable offence that has to be prosecuted by the Attorney General. Moreover, it is a sad fact that those who are charged under this penal provision are made to undergo a great deal of harassment and humiliation at the hands of unsympathetic police officers. Not only are these individuals submitted to various forms of blackmail, there are many instances where demands of bribes were made from these helpless victims. Extreme humiliation, sexual harassment and sexual abuse at the hands of police officers too are known to take place on these instances. It is clear that in Sri Lanka people are discriminated because of their sexual orientation despite the fact that the Sri Lanka constitution of 1978 recognise non-discrimination or Sri Lanka is a party to the several United Nations Conventions which decriminalises homosexuality. Though Sri Lankan penal provisions based and imported from England yet Sri Lanka has failed even to reach some of their development like non-discrimination which England adopted as far as in 1967.

The equalisation process can be divided into three stages: First, decriminalisation; Secondly, non-discrimination; and Finally, provision of same-sex marriages having equal status to heterosexual ones.

These are the steps that can be taken as far as the law can do. While some countries like UK has even reached the peak, the third stage, Sri Lanka is still grappling with the threshold question of decriminalisation. Decriminalisation is, however, the only demand that the gay and lesbian activists are making. That is all the human rights the homosexual people need in Sri Lanka at present. They are not crying for social recognition, they only want legal indifference. Delete sections 365 and 365A from the Penal Code and they are happy. They do not want any more legal protection, like non-discrimination in employment or the likes, let alone provision for same-sex marriage.

When comparing the two countries fundamental rights chapter in 1978 constitution is not wider than the Human Rights Act in UK. Sri Lankan Constitution does not recognise right to life (however the court has accepted) right to privacy and right to health as fundamental rights. Asia or South Asia has no strong mechanism or

recognised institution like European Union. Public morality and attitudes are different. Country like Sri Lanka still strongly believes and promotes 'family' unlike the UK which promote 'individualism'. We cannot expect our parliament to appoint committees or amend the laws. Therefore Sri Lankan cannot expect to change their laws recently. But human rights are universal in nature. People with different sexual orientation are lived all over the world. Those sexual minorities live in Sri Lanka are also entitled to equal treatment and to live with respect and dignity. If they are denied human rights, treat as a second class people, commit suicide or seek asylum in UK where these laws were introduced, is a shame for a civilised country. Indian Delhi High Court decided in 2009 that penalising homosexuals violate the Indian Constitution. Nepalese Supreme Court decided in 2007 that penal code provision of criminalising sexual minorities are against the international standards that Nepal is a party and decriminalise homosexuality. Sri Lanka is also a party to all those international conventions.

IV.CONCLUSION

Sri Lanka is in the backwater of the global gay rights village requires no further explaining. Reflecting upon world opinion shows that a tolerant attitude towards deviant sexual orientation to be an inseparable part of all human rights. The opponents of a change in this particular law is mainly the religious fundamental groups. Beside, Sri Lanka being a pluralistic society must be tolerant of each others preferences and their views. Religious beliefs of a group of society cannot be used to justify the criminal penalty on homosexuality.

The Penal Code is the major statute which embodies the substantive criminal law of Sri Lanka. In Sri Lanka any change in the penal provisions is necessarily through legislative enactment. Therefore, it is of paramount importance for Parliament to be mindful of the sombre responsibility thrust on it to update the law in keeping with the contemporary global requirements.

The question mooted here is that is it reasonable for law to seek to penalize persons for their sexual preferences? Even if sexual orientation towards a person of the same sex is considered immoral, should law enforce morality? The Wolfendon Report made a very important distinction between the criminal law and private morality, "... unless a deliberate attempt is made by society, acting through the agency of the law to equate the sphere of crime with that of sin there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business". The reality is that there are many forms of morally unacceptable offences, like adultery and suicide which is not made to suffer the sanctions of

criminal law. The law should not and cannot seek to penalize persons for their sexual preferences. Reformation of the criminal law of this country is needed in order for the homosexuals to take their rightful place in the society. The penal law as it stands now endorses old-fashioned bigotry, justifies second class status of the homosexuals, and legitimises prejudice against all lesbians and gays. Allowing a law of this nature to remain in the statute books puts Sri Lanka totally out of line with most other countries it strives to emulate. It leaves the country in par with a category of countries whose human rights record is questionable and held in contempt by all international forums worthy of recognition.

Very few cases on this law have actually reached the upper courts level in all this time, but the law continues to be a potent tool of oppression. It provides the impunity to a venal police to extort money, blackmail, indulge in violence, and extract other favours, including sexual favours, by dangling this law on homosexual males and hijras, a traditional social group of transvestites and transsexual persons. It impedes sexual health promotion activities like HIV/AIDS interventions amongst same sex attracted males. It discourages reporting of male rape, and therefore encourages such rape, often by police. In sum, it disrupts the social existence of all same sex attracted persons, erodes their dignity and self respect, and reduces them to a sub-human level of existence. The greatest barrier to more effective safer sex education for homosexuals is the criminal law as it now stands.

Sherman de Rose, leader of Companions on a journey said that often Sri Lankan homosexuals committed suicide because they had no support from their families, from their community and from the state. The suicide is a shame for a society which claims to be civilised. Homosexuality was made criminal when it was not understood at all and was seen in the same way one might see smoking. Since the 1890s there has been a lot of change in science's approach towards homosexuality. Science is in agreement that being gay is irreversible. It cannot be cured. So what is the purpose of this law? You might as well pass a law outlawing tall people or fat people or people with curly hair. The law serves some purposes in Sri Lanka like blackmail. It allows unscrupulous elements in our society to prey off gay men. And from 1995 government made the situation worse. Lesbianism, which was not a criminal offence, has now been made one.

South Asian people often say that homosexuality is not a native thing, it is really an import from the West. But this is only preposterous. Same gender attraction is present in all cultures. 'Homosexuality is as native to the Indian

Subcontinent as heterosexuality, and cannot be dismissed as a western import.'. In fact the only thing that was imported was section 365 of the Penal Code, which was brought in and gifted to Sri Lankan people by the British. The British must have found homosexuality prevalent enough and with enough freedom and social sanction to have their Victorian morals shaken, and would therefore have wanted to put a stop to such 'vile native' practices by legislating appropriate laws. It is not homosexuality that is a western import, it is criminalisation.

The universality of Human rights demands that prevailing and dominant cultural and social norms cannot be invoked in a manner as to circumvent or restrain fundamental and constitutional rights. Many of the progressive legislations in Sri Lanka would never have been enacted if we were to give way to the arguments by cultural relativists.

Governments of the countries which still criminalizes homosexuality do so on the pretext of prevailing social attitude towards homosexuals. Should law enforce morality? Law should have better things to do than peeping through the bedroom windows and punish sex between consenting adults. "I don't care what other people are thinking because I'm gay. But I do have to care what the law says. And it's what the law says that counts for everybody. Social perceptions etc are all bogus. If the law says it's a crime, everybody will say it's a crime and raise their finger accusing that you're a criminal. If ever it's deleted from the crime books, no one would dare point to you. This was what a middle-aged gay person in Sri Lanka had to say.

The truth is, at the end of the day, that the possibility of changing the law in the near future is meagre. The main reason, it is submitted, is the fear of losing power. The only worry of the government is that if they legalise homosexuality it might anger the traditionalist citizen-voters who might in turn dethrone the government of the day in the next election. In conclusion it is urged that thought be given to the fact whether people should be allowed to live their lives in their own society with

respect, dignity and freedom: these are fundamentals of human rights. This should be the same for everyone everywhere, irrespective of race, religion or culture. Let the government and all the right thinking people in Sri Lankan society unite in this effort.

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