How is sexuality regulated in law?

Law regulates sexuality in numerous different ways. These include but are not limited to:

- Criminalisation or decriminalisation of particular sexual behaviours
- Granting or restricting autonomy, privacy and capacity of individuals to make decisions about sexual lives and behaviours
- Protections relating to equality and non-discrimination
- Rights protections and recognitions
- Marriage, family and partnership recognition and regulation
- Protection, or lack of protection, from violence, harassment and persecution by both state and private actors.

Different states have different approaches to the way in which sexuality is regulated in law. This means that while it is helpful to consider different legal approaches and create alliances across jurisdictions, it is important to keep in mind the varied operation of law in relation to sexuality.

1. How is sexuality understood in law?

In academic debates, there are a number of different approaches to the analysis of the law. This is significant as different approaches offer different tools to lawyers and activists seeking to bring about legal change. For example, ‘black letter’ or ‘doctrinal’ approaches to law focus on the study of already existing legal rules and systems. In contrast, a socio-legal approach focuses more broadly on the relationship between law and society. Both approaches can help to advance legal change and can be complementary rather than oppositional. The narrower and ‘black letter’ approaches offer a clear framework of rules and systems within which lawyers and activists can work, while the socio-legal focus offers a more contextualised view of the relationship between legal and social change.

1.1. ‘Black letter’ approaches
A good example of the way in which already existing frameworks can be used to call for changes to the law and sexuality is the Yogyakarta principles [2] (2006). This document outlines a set of international principles in relation to sexual orientation and gender identity. The Yogyakarta principles do not seek to create new rights, simply to show how existing rights protections – particularly those enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights - can apply to sexual minorities. For example, Yogyakarta Principle 4 is concerned with the right to life – a right which is widely protected in national and international documents. This principle outlines steps that states should take to ensure that sexual minorities can fully enjoy the right to life.

Click here to read Principle 4: The Right to Life

Everyone has the right to life. No one shall be arbitrarily deprived of life, including by reference to considerations of sexual orientation or gender identity. The death penalty shall not be imposed on any person on the basis of consensual sexual activity among persons who are over the age of consent or on the basis of sexual orientation or gender identity.

States shall:

1. Repeal all forms of crime that have the purpose or effect of prohibiting consensual sexual activity among persons of the same sex who are over the age of consent and, until such provisions are repealed, never impose the death penalty on any person convicted under them;
2. Remit sentences of death and release all those currently awaiting execution for crimes relating to consensual sexual activity among persons who are over the age of consent;
3. Cease any State-sponsored or State-condoned attacks on the lives of persons based on sexual orientation or gender identity, and ensure that all such attacks, whether by government officials or by any individual or group, are vigorously investigated, and that, where appropriate evidence is found, those responsible are prosecuted, tried and duly punished.

1.2. Socio-legal Approaches

Other legal and activist approaches have attempted to analyse the law and sexuality by looking at the social, historical and political framework in which the law operates. For example, analysis of current legal approaches to sexuality in post-colonial states might consider the particular history and impact of British colonial law on current legal approaches to sexuality (for example see Gupta)

One advantage of focusing on the broader historical and social context of the law is that it draws attention to the varied consequences of legal change. A narrow focus on changing the law or extending rights protections to a particular group can sometimes miss the multiple effects that legal change might have. For example, some researchers and campaigners have drawn attention to the potential for the increased visibility of sexuality and sexual legal gains in one country to lead to backlash in another (see Cowell, p139). It is notable that while countries in Europe (e.g. the Marriage (Same-Sex Couples) Act 2013 [3] in the UK) and the Americas (e.g. Argentina’s protection of transgender rights [4]) are seeing legislation that protects LGBT minorities, other countries have introduced legislation that strengthens criminal penalties for same sex behaviour (for example see Nigeria’s Same Sex Marriage (Prohibition) Act [5], recent legislation in Uganda [6] and Russia’s Prohibition of ‘Homosexual Propaganda’ [7]).

Similarly, Francoise Girard has drawn attention to the way in which campaigning around sexuality at the UN in the mid-2000s achieved some success and recognition, particularly in relation to a resolution recognising sexual orientation and gender identity rights that was adopted by the Human Rights Council in 2004. However, this recognition was also linked to the politicisation of issues that may have had some link to sexuality, but had previously been relatively uncontentious. For
example, in 2010, a resolution condemning extra judicial killings of minorities was amended by the General Assembly's Third Committee to remove specific reference to sexual minorities. The resolution, which has included a reference to sexual orientation since 2002, was voted on each year until 2010, when the specific reference to sexual orientation was removed.

These examples highlight the importance of understanding the complex way in which legal systems operate, particularly in a context of increasingly international conversations about sexuality and rights. Legal change can advance unevenly and can have unexpected effects: a change to the law may only be the first step in bringing about wider change and for lawyers and activists working in the area of sexuality and the law, it may be useful to consider the broader context in which the law operates.

2. How is law used to advance sexual rights?

2.1. Right to Privacy

There is an ongoing debate about the role of the state in regulating people's intimate lives. One way this has been approached is through the law on privacy. While privacy has been a useful concept for some sexual rights claims, some scholars have criticised the excessive focus on privacy as too narrow and restrictive.

Traditionally, states have been reluctant to interfere in matters concerning the private sphere — that is, the family and domestic life. A recent World Health Organisation study [9] has shown that 30% of women worldwide have experienced physical and/or sexual violence at the hands of an intimate partner. Yet progress on the issue of domestic violence or abuse committed in the private sphere has been inconsistent (WHO study [9]). The special rapporteur on violence against women, has noted that 'Even in societies where there is seemingly a high level of gender equality, violence occurring in the private sphere continues to be regarded as a matter undeserving of public policy attention.' (UN Docs – Special Rapporteur on 'Due Diligence Standard', p 14). The law is often slow to intervene in certain forms of coercive behaviour that can limit individuals’ control over their own sexuality (such as FGM, forced or early marriage and lack of access to reproductive health care). Many of these injustices are perpetuated wholly or in part by private individuals rather than state agents, and as a result, there is an ongoing debate about the extent of state responsibility to prevent harmful practices and to
investigate such practices when they do occur.

This is illustrated in the European Court of Human Rights (ECHR) case of MC v Bulgaria (2005) 40 EHRR 20, where the court found that Bulgarian authorities had not taken sufficient steps to investigate the rape of a 14 year old girl. Similarly, in the case of Opuz v Turkey (2010) 50 EHRR 28, the court found that Turkey had failed in its responsibility to protect Mrs Opuz and her mother from years of domestic abuse and violence. In these cases it was argued that although state actors (such as police or army officers) did not themselves commit either the rape or domestic violence, Bulgaria and Turkey respectively were still responsible for the violation of the rights of MC and Opuz. The Court held that states have a positive duty to ensure that individuals were able to enjoy rights to safety, security and autonomy – in all areas of their lives. This means that states must protect individuals from sexual and domestic violence and investigate when such violence takes place. Turkey and Bulgaria failed to do this and as a result were in violation of their European Convention obligations.

The relationship between privacy and violence in the domestic sphere has been at the forefront of much feminist campaigning and is linked to wider debates about privacy and the family. In some family law systems women have traditionally lost all legal rights on marriage – in essence, marriage rendered women invisible or as perpetual legal minors (for example see Phillips [14]). A lack of recognition as a fully independent individual, separate from her husband, made it very hard for women to demand rights and protections as full citizens, or to make claims for sexual independence. As the case law from Europe suggests, such traditional legal approaches to privacy and the family have often made it difficult to find redress for injustices that occur behind closed doors.

However, demands for change have gained some momentum and recognition - the UN has attempted to impose standards of ‘due diligence’ to protect, investigate, prevent and provide reparations for acts of violence that are perpetrated by private actors in the private sphere. Nevertheless, there is still a reluctance on the part of many states to address issues that are seen to be either a private matter or a matter pertaining to culture or religion ([full document [10]).

Privacy and non-normative sexual behaviours

There are some ‘private’ areas in which state intervention is still considered by some to be acceptable. In particular, many states regulate and sometimes criminalise private same-sex sexual activities and commercial sex work. Reproductive rights to abortion as well as rights to marriage and partnership are also subject to regulation and control. Examples of cases concerning these issues include the landmark case of Roe v Wade which extended a right to abortion on the basis of the right to privacy in the US, and the case of Toonen v Australia [11] in which the UN Human Rights Committee held that Tasmanian law criminalising same sex activity breached the privacy rights of the Tasmanian gay rights campaigner, Nicholas Toonen.

Although decriminalisation on the basis of a right to privacy can often be an important first step in relation to sexual rights, the wider issue here is concerned with the conceptual tools that are used to think about sexuality. Queer theorists such as Eve Sedgwick have noted that the metaphor of the closet and the freedom of ‘coming out’ have been part of the overarching structure through which gay oppression has been understood this century, particularly in the west. Implicit in the notion of the closet is the concept of privacy. Some scholars (Henderson, Johnson) have criticised this focus on privacy, suggesting that there are disadvantages to associating same sex behaviour with privacy in this way. First, such associations may reinforce the idea that same sex attraction or identity can only be expressed in private – any discussion or public expression of ‘other’ sexual identities will not necessarily be tolerated (commonly expressed along the lines of ‘I don’t care what they do in private, but I don’t want to see or hear about it’). Second, and relatedly, decriminalisation of same sex sexual activity in private, does not necessarily lead to public acceptance or state protection of expressions of same sex attraction in public. Indeed the case of Toonen saw some backlash against the LGBT community in Tasmania as it was felt by a number of Tasmanians that an external international body had been used to impose ‘non-Tasmanian’ behaviours and
laws. Third, a right to privacy assumes that individuals will have space in which to enjoy that privacy – which is not always the case. Thus tolerance of private behaviour does not necessarily secure wider public protections relating to equality, non-discrimination or protections from harassment or violence.

These debates are pertinent to both the questions of legal approach raised above and to the wider issue of activist approaches to the politics of rights. Scholars such as Martin F. Manalansan have suggested that an excessive focus on privacy works to domesticate and depoliticise sexual rights activism: ‘freedom’ is reinterpreted as ‘privacy, domesticity, and consumption’, closing down broader debates about challenging larger injustices.

2.2. Human Rights

Human rights have been a key means of advancing issues of sexuality, in both international and domestic legal arenas. LGBT rights and sexual rights are drawn from a broader human rights framework and offer both significant opportunities and potential challenges for lawyers and activists.

Rights are claims against the state and have increasingly been used by different groups to secure protections and freedom such as –

- Reproductive rights
- Sexual orientation rights
- Gender identity rights and recognition
- Children’s rights
- Women’s rights
- Sex worker rights
- Citizenship and civil rights (including rights such as freedom of expression and assembly).

Beyond specific legal victories, rights have to some extent become an aspirational language of belonging, recognition and citizenship.

However, some scholars have criticised the exclusive reliance as a vehicle for change, suggesting that it is too narrow and confining (for example see Robinson). The law is generally concerned with regulating behaviour (sexual activity, partnerships, reproduction etc.) but much of the campaigning that has sought to change the law has also made reference to identity (LGBT rights, women’s rights etc.). This creates a question of how we deal with the multiple different groups that are seeking rights recognition or redress in law. LGBT rights could encompass a broad umbrella of individuals, identities and behaviours – lesbians, gay men, transgender men and women, bisexual men and women as well as those who identify with place- or culture-specific identities – hijrain India ortakatapui in New Zealand. It might also refer to those who engage in same sex activity but do not adopt a particular identity – such as men who have sex with men (MSM). There is some criticism that the broad language of LGBT rights hides this diversity and foregrounds the experiences of some individuals (often white western gay men) at the expense of others (see section on the use of LGBT).

It has been argued that this can obscure the voices of those who are marginalised and fuels the argument that LGBT rights are a ‘western’ or imperial invention that are being imposed on unwilling states. As one African activist commented when asked why he used the language of LGBTI rights in his activist work –

> Well I am using it because it is the international language. I have been going to regional meetings and it is their language... [It] makes us part of the larger [international] group for the possibility of funding and support when we need it. But people, no, they don’t really use LGBTI...it takes sometime before they call themselves gay. (Seckinelgin, 2009 p.104)
This quote suggests that there is a danger that LGBT rights might become the only possible means of advancing the concerns of LGBT minorities, regardless of their appropriateness.

It has also been argued that the compartmentalisation of issues into 'LGBT rights' or 'sex-workers rights' or 'women's rights' may obscure the chance for alliances or even mean that gains for one group come at the expense of another. For example, in Ireland in 1993, the Criminal Justice Act was passed in the wake of the ECHR case of Norris v Ireland (1991) 13 EHRR 186, in which the criminalisation of same sex activity was held to be an unjustified interference with the right to privacy. The Criminal Justice Act decriminalised same sex activity, but at the same time, introduced tighter controls on sex work. In this case therefore, decriminalisation was part of a 'trade-off' with the more conservative elements of Irish society, which allowed the successful passage of the bill through parliament.

Thus while rights have undoubtedly been a powerful vehicle for advancing the protection of some sexual minorities, there is a question of whether the way they 'frame' issues of sexuality can prevent alliances or draw attention to the concerns of particular groups over the concerns of others.

2.3. Citizenship

Traditionally citizenship is associated with public life, political action and political rights. Recently, however, there has been some discussion of ‘sexual citizenship’, focusing on the relationship between public and private lives and challenging the assumption that all citizens will be ‘unsexed’ or at best, heterosexual. Early discussions of sexual citizenship linked it to ideas of:

‘the control (or not) over one's body, feelings, relationships: access (or not) to representations, relationships, public spaces, etc; and socially grounded choices (or not) about identities, gender, experiences’. (Weeks, 1998)

Thus, sexual citizenship, rights and law are intimately linked. Sexual citizenship is concerned with belonging in society, particularly with how those who might once have been excluded as ‘deviant’ or ‘other’ might claim to be part of a political community.

Sexuality, Citizenship and Nationalism

Citizenship is about the capacity to define insiders and outsiders within a state. Historically, sexual ‘others’ – queers, sex workers, non-gender conforming individuals - have been excluded or marginalised from claims to citizenship, and in many states this marginalisation continues. Often, political leaders will claim that a form of sexual identity or behaviour doesn’t exist or is not indigenous to a state or culture – such as when President Mugabe claimed that homosexuality was un-African and LGBT people were ‘worse than pigs and dogs’. In making such statements, Mugabe emphatically places the sexual ‘other’ outside of the Zimbabwean political and social community. In such circumstances, sexuality is often used for political purposes – to denote insider or outsider, to shore up approval ratings, or to discredit a political rival. In some cases, such as the prosecution of Anwar Ibrahim in Malaysia [12], the law may be used directly, but in others, the mere mention of sexual difference or impropriety, rather than specific engagement with legal mechanisms is sufficient (example [13])

Questions of nationalism, citizenship and belonging are not necessarily confined to discussions of homosexuality. In relation to nationalism in particular, questions of community cohesion and purity have long been linked to reproduction and to control of women’s sexuality, often couched in terms of morality or sexual purity.

Citizenship, Recognition and Regulation
While citizenship may be a useful tool for understanding dynamics of inclusion and exclusion, it also raises questions about state power. As citizenship rights are primarily granted by the state, the obtaining of citizenship can lead to more state regulation and less freedom to transgress and challenge state power. Once individuals or groups are brought ‘inside’ rather than ‘outside’ they may then face the ethical question of how to deal with and potentially compromise with official channels that seek to regulate, control and normalise their behaviour. For example, there may be pressure to conform to a notion of the ‘good gays’, recognised but also regulated by the state, rather than ‘unruly queers’, who might challenge larger oppressive regulatory structures. Terms such as ‘homonationalism’ and ‘pink washing’ are increasingly used to describe the way in which support for LGBT rights has become part of a larger political project. Homonationalism is a relatively new and widely debated concept that refers to the co-option of LGBT rights into nationalist projects. For example, tolerance for LGBT rights is increasingly used as a ‘marker’ of a ‘developed’, civilised state. Perceived antipathy to LGBT rights becomes a marker of intolerance and backwardness. Thus homonationalism can both shore up a sense of patriotic exceptionalism in those states that view themselves as ‘tolerant’, but can also become a justification for imperialist projects – interference in other states because they are ‘uncivilised’ and intolerant. Similarly pink washing is a PR technique by which a state (or an organisation) uses their ‘tolerance’ of homosexuality and condemnation of homophobia to attempt to draw attention away from other policies that may be harmful. In both cases therefore, inclusion of LGBT individuals within a citizen body may have both a regulating effect on individual LGBT citizens, but may also lead to the co-option of LGBT concerns into imperial or nationalist actions. The question therefore is how far does cooperation with a tolerant state risk that sexual minorities become complicit or implicated in that state’s less laudable actions (see Puar [14] for further discussion).

As shown by a number of scholars, this dynamic can play out in many different legal spheres. For example, Alice Miller has discussed her simultaneous pride and reservations in relation to her work on the recognition of rape as a war crime. Miller noted that in order to gain attention from the relevant international legal bodies, women’s activists were required to present those women who had suffered sexual violence as weak and in need of protection, rather than as strong survivors demanding legal change: ‘women make demands and ladies get protection’. Women’s rights activists were forced to ‘frame’ their concerns in a particular way that could be recognised by and integrated into an already existing framework of law. This is a key issue of law and sexuality - what compromises might have to be made in order to win particular legal concessions?

Discussion Points

- Do you think the state should be responsible for and able to protect us from injustices committed in private?
- How far should the law be able to interfere with ‘private’, ‘family’ or ‘cultural’ matters?
- How useful is the concept of privacy for protecting sexual minorities?
- What are some of the advantages of using rights and citizenship-based approaches to support the needs of sexual minorities?
- What are some of the disadvantages of using rights and citizenship-based approaches to support the needs of sexual minorities?
- How can lessons from previous legal battles in other jurisdictions be usefully adopted to your current work?
- Should the law focus on behaviour, identity or both in relation to sexuality?

Further Reading and Resources


Council of Europe Factsheets (http://www.echr.coe.int/Documents/FS_Childrens_ENG.pdf [15])

- Sexual Orientation Issues [16]
- Homosexuality: Criminal aspects [17]
- Gender Identity issues [18]
- Reproductive Rights [19]
- Parental rights [20]
- Children’s rights [15]
- Violence against women [21]


Links
[13] https://iglhrc.org/content/international-written-out-how-sexuality-used-attack-womens-organizing-updated