



The Sexual Orientation Frontier

The second half of 2009 contained two very different days of the global struggle for LGBT equality. On 2 July 2009, the Delhi High Court, in its judgment in the *Naz Foundation* case, decriminalised homosexuality in India. On 14 October 2009, an absurd bill proposing to criminalise even the promotion of LGBT rights and the failure to report homosexuals to the police within 24 hours, was introduced in the parliament of Uganda. So, where are we heading: forward, towards a growing global recognition of the equal rights of LGBT persons, or backwards, towards greater discrimination against people on the basis of their sexual orientation, gender identity and gender expression?

According to the Yogyakarta Principles, sexual orientation is understood to refer to each person's capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender. Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

Few issues within international human rights can compete with LGBT rights for a record of controversy among states. Yet the good news is that LGBT rights can no longer be easily or legitimately extricated from universal human rights. On one hand, multiple discrimination, far from being an exception, is rather the rule in the phenomenology of inequalities. Discrimina-

tion on the basis of sexual orientation or gender identity very often intersects with other forms of discrimination, for example with discrimination on the basis of HIV/AIDS status, as shown by Wan Yanhai and others in this issue. On the other hand, cultural and religious justifications for persisting homophobic legislation increasingly meet with opposition from heterosexual rights advocates, on the basis of the universality of human rights and the ensuing need for comprehensiveness and consistency of equality legislation.

It is in this nexus between LGBT rights and the universal right to equality that The Equal Rights Trust situates its own efforts. As the Trust's focus is on the complex relationship between different types of discrimination, its strength is in approaching LGBT equality from a unified perspective and not allowing LGBT equality to be left out of an integrated equality agenda. In practical terms, this means that wherever our work takes us, be it to a round-table on draft anti-discrimination legislation in Nairobi or a training workshop for equality lawyers in Mumbai, we make a point – and if needed a fuss – about having LGBT representatives in the room and LGBT equality explicitly on the agenda.

The rights to equality and non-discrimination apply to all people regardless of their sexual orientation or gender identity. The Equal Rights Trust incorporates this understanding in all its projects, advocating that states should give effect to the principles of equality and non-discrimination on the basis of sexual orientation and gender identity in their national constitutions or other appropriate legislation, if not yet incorporated therein. "Giving effect" may be achieved through amendment of legislation or judicial interpretation. In its legal opinions, ERT

often seeks to derive, if possible, the protection of equal rights for LGBT persons from concepts, norms and doctrines already existing in national and international law. This approach of walking on a sometimes narrow and shaking bridge of legal continuity is complementary to the approach of ringing alarm-bells about the real-life rift between the capabilities of LGBT and non-LGBT persons to participate in society. In countries with illiberal blockages to the recognition of LGBT rights, both approaches are necessary.

ERT's unified framework on equality and non-discrimination is very empowering, as it allows to construct both legal continuity and political solidarity around LGBT rights. The usefulness of the unified framework on equality is demonstrated in the Special section of this issue, featuring an ERT legal submission on the infamous Ugandan Anti-homosexuality bill. ERT's analysis from the perspective of major concepts of equality law shows that the Bill breaches the equality provisions of the Constitution of Uganda itself. The ERT brief further demonstrates that discrimination on grounds of sexual orientation or gender identity is covered – and outlawed – by the major international human rights instruments, as interpreted by UN treaty bodies in recent years. The Declaration of Principles on Equality, which the Delhi High Court in *Naz* cited as the “current international understanding of the principles on equality”, contains the criteria, or tests, for incorporating personal characteristics into the class of “prohibited grounds of discrimination”; “sexual orientation” and “gender identity” clearly pass those tests.

Dr Sylvia Tamale, a Ugandan lawyer and member of the ERT Board of Directors, whose speech on the Anti-homosexuality bill is included in the Special section of this issue, also stresses the impossibility to isolate the rights of homosexuals from other rights, not only in legal terms but also from the point of view of enforcement. But

apart from the legal indivisibility characterising human rights, there is also the issue of human rights politics, an area governed by the stark division in political interests. Dr Tamale draws attention to the crucial question why homosexuality, a phenomenon that has always existed in African as well as non-African societies, is being politicised in her country at this particular moment, and what political purpose is being pursued, at this point in time, by the obsession with people's different ways of making love in the privacy of their bedrooms.

In an exciting current project, ERT is looking carefully into places that many would deem harsh or hopeless for LGBT rights, namely Islam and the sources of *shari'a* law. Islam does contain some strong commitments to equality and tolerance that have been eclipsed by recent cultural polarisations. There is no reason why equality advocates should make a gift to misogynist and homophobic interpreters of Islam by shying away from the vast universe of this religion, with its plurality of meanings and labyrinths of interpretation. This universe, after all, is the only cultural home to millions of people, including thousands of lesbians, gays, bisexuals and transgender persons.

The vigorous domestic and international backlash of condemnation of the Ugandan Anti-homosexuality Bill indicates that regressive homophobic moves anywhere in the world today have a limited chance to succeed. A cultural shift in attitudes towards sexual minorities is taking place in our time. In South Africa in the 1990s, laws criminalising homosexuality joined apartheid laws in the history museums. India has now followed suit. It is the joint effort of the LGBT and other equality movements that will send the criminalisation of homosexuality to the archives of history in a growing number of countries in the South, and open the road to realising equal rights for LGBT people.

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