CHAPTER 3
PROTECTION AGAINST DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY UNDER REGIONAL HUMAN RIGHTS BODIES
Since the adoption of the European Convention on Human Rights, 1950, there was a movement for developing detailed regional standards for the protection of Human Rights. American Convention on Human Rights was adopted in the year 1967 and thereafter the African Charter on Human and Peoples’ Rights was adopted in the year 1981. Subsequently, other regional treaties also came into force for the protection of Human Rights including not only civil and political rights but also economic, social and cultural rights ¹⁵⁴.

3.1 European Convention on Human Rights

The European Convention on Human Rights is a regional mechanism for the protection of Human Rights and other basic freedoms. On Nov. 4, 1950, the convention was made open for the signatures and it finally came into force in the year 1953. The Convention is the first of its kind adopted to ensure the protection of the rights as mentioned in the Universal Declaration of Human Rights. Since its inception, the instrument has been amended many times and meanwhile, many other rights have been added to the same which were originally not there in the Convention.

The Convention ¹⁵⁵ does not explicitly includes sexual orientation and gender identity as one of the prohibitive grounds of discrimination. However, it has been established by the European Court of Human Rights in many cases that the discrimination and violence based on sexual orientation and gender identity is a serious violation of the right to life and also the law criminalizing consensual same-sex activities between adults was held to be violative of the right to private life as provided in the Article 8 ¹⁵⁶ of the ECHR ¹⁵⁷.

¹⁵⁵ Hereinafter referred to as ECHR.
In the year 1981, in a landmark case, Dudgeon v. The United Kingdom 158, the European Court of Human Rights held that the law criminalizing consensual homosexual acts and subjecting such consenting homosexuals to an investigation is a violation of Article 8 of ECHR and such restriction cannot be justified on the grounds of morals or for protecting the other rights and freedom. In the given case, the applicant belonging to a sexual minority complained that he had been subjected to investigation for certain same-sex acts and behaviour due to which the applicant was under the constant fear of being harassed or blackmailed. It was also submitted by the applicant that such interference with his right to private life also resulted in psychological stress. Accordingly, it was held by the European Court of Human Rights that there had been a violation of Article 8 of the ECHR.

In another case, Norris v. Ireland 159 (1988), it was observed by the European Court of Human Rights that the criminal laws criminalizing consensual homosexual acts between adults cannot be justified on the grounds of causing shock or offending the general public for whom such consensual same-sex acts are against morality. It was submitted by the applicant in this case that the then law of Ireland criminalizing consensual same-sex acts amounted to the interference with his right to respect for his private life which also includes sexuality and sexual relations. It was held by the Court that criminalization of consensual same-sex acts and behaviour between adults is a violation of Article 8 of the Convention.

158 European Court of Human Rights, Dudgeon v. The United Kingdom (Application no. 7525/76), http://hudoc.echr.coe.int/eng#{"itemid":"001-57473"}, (Last accessed on 15/10/16).
159 European Court of Human Rights, Norris v. Ireland (Application no. 10581/83), http://hudoc.echr.coe.int/eng#{"dmdocnumber":"695424"},{"itemid":"001-57547"}, (Last accessed on 15/10/16).
The same view was reiterated by the European Court of Human Rights in another landmark case, Modinos v. Cyprus\(^{160}\)(1993). In this case, it was observed by the Court that the law criminalizing consensual same-sex acts and behaviour between adults is a continuous interference with one’s private life. In the given case it was submitted by the applicant that due to the provisions of law prescribing punishment for the homosexual acts, he had suffered mental harassment and also was forced to live under a fear of prosecution for having a relationship with the member of same-sex. It was held by the Court that such interference with the right to respect for private life including sexual relations is a violation of Article 8 of ECHR.

The European Court of Human Rights has not only a substantial and extensive jurisprudence of matters related to sexual orientation but it is also the first International Human Rights body to hold that the law criminalizing consensual homosexual acts between adults is a grievous violation of human rights. The European Commission on Human Rights\(^ {161}\), before being abolished in the year 1998, also played a significant role in developing the Court’s jurisprudence in the matters relating to the sexual orientation issues. It was held by the Commission that the law prescribing higher age of consent for the homosexual acts than that prescribed for heterosexual acts is discriminatory and also violative of Article 14\(^ {162}\) which provides the right to protection against discrimination on the basis of various grounds\(^ {163}\).


\(^{161}\) Council of Europe: European Commission on Human Rights, http://www.refworld.org/publisher/COECOMMHR.html, (Last accessed on 15/10/16). European Commission on Human Rights was a part of European regional mechanism for the protection of Human Rights as a special tribunal. Individuals did not have a direct access to the European Court of Human Rights from the year 1954 till the Protocol 11 came into the force. For a complaint to be addressed by the Court, individuals had to apply to the Commission and if the case was found to be appropriate to be addressed by the Court, Commission would file a case on the behalf of the individual concerned. The Commission was abolished in the year 1998 when the Protocol 11 came into force and since then individuals have a direct access to the Court.

\(^{162}\) European Convention on Human Rights, Supra note 156. Article 14 of the Convention provides for the protection of human rights against discrimination. It ensures the protection of the individual’s enjoyment of the rights enumerated in the Convention without any discrimination on the grounds of national or ethnic origin, sex, caste, race, property, opinion, membership of any political association etc. or any other status.

In another case, A.D.T v. The United Kingdom\textsuperscript{164}, the applicant submitted that the authorities violated his right to respect for private life. The applicant was prosecuted and convicted for indulging into the consensual same-sex acts with more than one homosexual adult at his own house. The Court held that such prosecution and conviction for participating in consensual homosexual acts is a violation of the right to private life and therefore violative of the Article 8 of the ECHR. It was observed by the Court that consensual same-sex acts in question were private in nature and therefore the law criminalising the same cannot be justified.

The European Court of Human Rights also played a crucial role in ensuring the protection of the individuals against arbitrary acts and degrading treatment of the State authorities. In a recent case, Identoba and others v. Georgia\textsuperscript{165} (2015), the applicants argued that the Georgian authorities failed to protect them from violence based on discrimination. It was submitted by the applicants that a peaceful demonstration for the protection and defense of the rights of sexual minorities organized by an NGO on the occasion of the International Day against Homophobia in Tbilisi in May 2012 was agitated by the other demonstrators as a counter on the peaceful demonstration of the applicants. The number of counter-demonstrators was more than that of the defenders of the rights of sexual minorities. The applicants also argued that the State authorities also failed to investigate the case in order to find out the real discriminatory motive behind such attack.

It was held by the Court that in this case there was a violation of Article 3\textsuperscript{166} and 14 of the Convention. The Court also pointed out that according to the various reports related to the LGBT population there was a widespread homophobic attitude in some of the parts of Georgia which were also affirmed by a report of the Commissioner for Human Rights of the Council of Europe. The Court observed that the discriminatory motive behind the violent attacks on the applicants is clear in the light of the

\textsuperscript{164} European Court of Human Rights, A.D.T v. The United Kingdom (Application no. 35765/97), http://hudoc.echr.coe.int/eng-press#{"itemid":"003-68197-68665"}, (Last accessed on 16/10/16).
\textsuperscript{165} European Court of Human Rights, Identoba and others v. Georgia (Application no. 73235/12), http://hudoc.echr.coe.int/webservices/content/pdf/001-154400?TID=mmtaazzsab, (Last accessed on 16/10/16).
\textsuperscript{166} European Convention on Human Rights, Supra note 156. Article 3 of the Convention provides that all the individuals have the right to protection against torture, cruel, inhuman or ill-treatment. It implies that the States are under the obligation to protect individuals against such torture or ill-treatment.
mentioned reports. The Court also mentioned in its findings that such a violent attack and threats by the counter-demonstrators is a violation of inherent right to live with dignity as such acts would have caused fear, anxiety, and insecurity among the applicants. The Court also held that the Georgian authorities failed to protect the right of human rights defenders as in the given homophobic environment the authorities knew or should have known the sensitivity and risks surrounding such demonstration. The Court also issues directions to the authorities to investigate the case expeditiously as the criminal law of Georgia also includes discrimination on the basis of sexual orientation and gender identity as a provocation to the commission of an offence. The State authorities under the obligation to protect the right of the individuals to promote or defend human rights failed to investigate the given case involving the violent attack by the counter-demonstrators on the applicants 167.

In a similar case, M.C. and C.A. v. Romania 168(2016), the applicants argued that the State authorities failed to investigate violent homophobic attacks on them which amounted to the violation of their rights enshrined in the Convention. In the given case it was submitted by the applicants that on their way to home in the metro, they were attacked by a group consisting of six young men and a woman on the account of the participation of the applicants in the annual gay march held in Bucharest. During this attack, the applicants were not only physically assaulted but also verbally abused them in public by shouting derogatory remarks. It was further submitted by the applicants that the State authorities failed to investigate the case to the effect of finding the discriminatory homophobic motive of such an attack. The Court held that in the given case there was a serious violation of Article 3 and 14 of the Convention as the State authorities failed to investigate the case expeditiously as their investigation on the account of the complaint of the applicants did not take into account the discriminatory motives involved in the degrading and cruel treatment towards the applicants.

168 European Court of Human Rights, M.C. and C.A. v. Romania (Application no. 12060/12), http://hudoc.echr.coe.int/eng#{“itemid”:[“001-161982”]}, (Last accessed on 19/10/16).
The role of the Court in the protection of human rights of the homosexual prisoners is also noteworthy. In X. v. Turkey\footnote{European Court of Human Rights, X. v. Turkey (Application Number: 24626/09), Available at http://hudoc.echr.coe.int/eng-press#"itemid"{"003-4110556-4833050"}}, the Court observed that it is the obligation of the State authorities to protect the prisoners belonging to the sexual minorities from cruel, inhuman or degrading treatment. In the given case, a homosexual prisoner was placed in a solitary confinement followed by a complaint lodged by him against the inhuman, degrading acts and bullying by his fellow inmates on the basis of sexual orientation and gender identity. The solitary confinement of the homosexual prisoner continued for about 8 months. It was observed by the Court that such solitary confinement adversely affected the mental and physical health of the prisoner and also deprived him of his dignity which further amounts to the violation of the right to protection against torture and inhuman treatment as enshrined in Article 3 of the Convention. It was further observed by the Court that the main reason behind the solitary confinement of the homosexual prisoner was not his protection but his sexual orientation which amounts to the discrimination based on sexuality and hence also violates Article 14\footnote{See European Court of Human Rights, Factsheet – Sexual orientation issues, Supra note 167.}.

The European Court of Human Rights reaffirmed the rights of sexual minorities including the right to respect for private and family life in a number of cases. In E.B. v. France\footnote{European Court of Human Rights, E.B. v. France (Application no. 43546/02), Available at http://hudoc.echr.coe.int/eng-press#"itemid"{"003-2245258-2392886"}}, the applicant argued that she had to face discrimination based on her sexual orientation in the process of adoption. She also submitted that she had been subjected to a discriminatory treatment at each step of authorization for the adoption of a child. In this case, it was held by the Court that the denial of adoption of a child on the basis of sexual orientation is the violation of Article 14 and 8 of the Convention which respectively provides for the right to protection against discrimination and right to respect for private and family life.

The Court also observed that the French law allows even a single person to adopt a child, which implies that a single person is allowed to adopt a child irrespective of his
or her sexual orientation but in the given case the denial of adoption request was based on sexual orientation.

The European Court of Human Rights also held that the ban in military services on the basis of sexuality is the violation of the right to respect for private life as enshrined in the Article 8 of the Convention. In Lustig-Prean and Beckett v. the United Kingdom\footnote{European Court of Human Rights, Lustig-Prean and Beckett v. the United Kingdom (Application nos. 31417/96 and 32377/96), Available at http://hudoc.echr.coe.int/eng-press#{"itemid":"003-68190-68658"}}, the applicants who were all British armed forces personnel alleged that they had been removed from the military services on the basis of their sexual orientation. It was further submitted by the applicants that such discharge for the military services on the basis of their sexuality amounted to a gross violation of their right to respect for private and family life. It was unanimously held by the Court that in the given case there was a violation of Article 8 of the Convention\footnote{See European Court of Human Rights, Factsheet – Sexual orientation issues, Supra note 167.}.

In another case, Salgueiro da Silva Mouta v. Portugal\footnote{European Court of Human Rights, Salgueiro da Silva Mouta v. Portugal (Application no. 33290/96), http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Salgueiro%20Da%20Silva%20Mouta%20v%20Portugal%20_parental%20responsibility_.pdf, (Last accessed on 19/02/17).} it was held by the Court that the denial of the custody of one’s child on the basis of the sexual orientation of the father is a violation of the right to respect for family and private life as provided in the Article 8 ECHR. The Court also observed that the prohibitive grounds of discrimination as provided in the Article 14 of the Convention also includes sexual orientation and gender identity as one of the prohibitive grounds\footnote{See, Study Guide: Sexual orientation and Human Rights, Supra note 157.}. Nonetheless, the views of the Court are not applicable to private consensual sadomasochistic practices which can be prohibited on the grounds of public health and morals. As it was held in a case that such violent sexual acts although between consenting adults in their private premises can be prohibited on the grounds of public health.\footnote{Laskey, Jaggard, and Brown v. U.K , 24 Eur. H.R. Rep. 39 (1997).}

The Court’s substantial jurisprudence is not only limited to the sexual orientation issues but it also has an extensive jurisprudence on the matters relating to the transgendered individuals.
Rees v. the United Kingdom\textsuperscript{177} is one of the earliest cases related to the gender identity issues that came before the Court. In the given case it was submitted by a female to a male transgendered applicant that the law of the United Kingdom which did not confer legal status to him violated his right to respect for private and family life. However, it was held by the Court that there has been no violation of Article 8 of the Convention. The Court asserted that the changes demanded by the applicant would require the transformation of the entire system of maintaining the birth records and which would subsequently result in imposing an extra burden on the other population and also would have invited crucial administrative consequences. It was also pointed out by the Court that the State did perform its duties by referring to the fact that the cost of the medical treatment of the applicant was borne by the United Kingdom. Nonetheless, the Court expressed its concern regarding the unique issues related to the transgendered individuals of all ages and also commended that appropriate changes and measures in the light of societal and scientific development should be adopted to overcome the distress of the population.

In the same case, the Court also held that the applicant’s right to marry and family as provided under the Article 12 of the Convention was not violated. The Court pointed out that the State has an authority to regulate the right to marry and find a family in the light of the traditional concept of marriage which suggests that marriage is a bond between two persons of opposite anatomical sex\textsuperscript{178}.

The similar views were reiterated by the Court in Cossey v. the United Kingdom\textsuperscript{179} as the Court did not find any rationale on the basis of which the Court could depart from the previously decided matter. In the given case also it was held by the Court that there had been no violation of Article 8 of the Convention.

The Court pointed out that all the biological traits of the other sex were not acquired by the sex reassignment surgery. The Court also asserted, on the same lines of the previous case, that transformation or addition in the maintenance of birth record is no

\textsuperscript{177} European Court of Human Rights, Rees v. the United Kingdom (Application no. 9532/81), http://hudoc.echr.coe.int/eng#{"dmdocnumber":{"695441"},"itemid":{"001-57564"}}, (Last accessed on 19/02/17).


\textsuperscript{179} European Court of Human Rights, Cossey v. the United Kingdom (Application no. 10843/84), http://hudoc.echr.coe.int/eng#{"itemid":{"001-57641"}}, (Last accessed on 20/02/17).
practical solution. The Court in this case also held that there was no violation of the right to marry and family provided under Article 12 of the Convention as States have authority to regulate the norms of marriage, which presupposes that the marriage is consummated between two persons of opposite sex, The Court also observed that the criteria of opposite sex in marriage is based on reason 180.

The Court held, for the first time, in B. v. France 181 that the norms related to the recognition of transgendered individuals were violative of the right to respect for private and family life as provided in the Article 8 of the Convention. In the given case a male to a female transgendered applicant argued that the French authorities violated her right to respect for private and family life in refusing her request to amend her civil status in the register. The Court also pointed out the difference between the present case and the previously decided cases namely Rees v. the United Kingdom and Cossey v. the United Kingdom. The Court pointed out the difference between the civil status systems of the United Kingdom and France and asserted that for the United Kingdom there were major impediments in amending the birth certificates but it was not the case in France where the civil status of an individual was intended to be updated throughout the lifetime of the person concerned. The Court also observed, on the account of various official documents and payslips, that there were irregularities in the status of the applicant as regards to her legal and apparent sex. Accordingly, it was held by the Court that the French authorities violated the applicant’s right to respect for private life by denying her request to update her civil status 182.

Nonetheless, the Court also held that the norms related to the marriage and relationship of the transgendered individual are not violative of the right to respect for privacy and family life. And the Court also reaffirmed that only a biological male and not a female to a male transgendered individual could be recognized as a father 183.

180 European Court of Human Rights, Factsheet – Gender identity issues, Supra note 178.
181 European Court of Human Rights, B. v. France (Application no. 13343/87), http://hudoc.echr.coe.int/eng#{"itemid":"001-57770"}, (Last accessed on 20/02/17).
182 European Court of Human Rights, Factsheet – Gender identity issues, op cit.
183 European Court of Human Rights, X, Y and Z v. the United Kingdom, (Application no. 21830/93), http://hudoc.echr.coe.int/eng#{"itemid":"001-58032"}, (Last accessed on 20/02/17).
The Christine Goodwin case (2002)\textsuperscript{184} is the turning point in the development and protection of the rights of the transgendered individuals. The applicant, in this case, argued that there was a lack of recognition as to her changed gender and also alleged that she had to face discrimination in the sphere of employment and social security and also her rights related to pension and marriage were violated. It was held by the Court that there had been a violation of the right to respect for private and family life as provided under the Article 8 of the Convention. In the given case the Court relied on the contemporary International Human Rights law and the recent advancements towards the legal recognition of the transgendered individuals without any discrimination as to their gender identity. The Court also observed that the law denying the right to recognition of the transgendered individuals after the sex reassignment surgery cannot be justified on the account of public policy and morals and it is also a violation of the principle of fair balance inherent in the Convention\textsuperscript{185}. The Court also held that the denial of the right to marry on the grounds of one’s gender identity is a violation of the Article 12 which provides for the right to marry and family of the individuals without any discrimination. The Court further held that the States are under the obligation to determine the norms and conditions related to the marriage of transgendered individuals and also held that in the given case there were no grounds to justify the denial of the right of the transgendered individual to marry under any circumstances\textsuperscript{186}.

In another case decided on the same day, similar views were reiterated by the Court in the case of I. v. the United Kingdom\textsuperscript{187}. The Court held that there had been a violation of the right to respect for private and family life and right to marry as enshrined in the Article 8 and 12 of the Convention. On the basis of the above-mentioned judgments, the United Kingdom introduced a system for the transgendered individuals to apply for the legal recognition of the gender.

\textsuperscript{184} European Court of Human Rights, Christine Goodwin v. the United Kingdom, (Application no. 28957/95), Available at http://hudoc.echr.coe.int/eng-press#{"itemid":"003-585597-589247"}, (Last accessed on 20/02/17).

\textsuperscript{185} See, European Court of Human Rights, Factsheet – Gender identity issues, Supra note 178.

\textsuperscript{186} Id.

\textsuperscript{187} European Court of Human Rights, I. v. the United Kingdom (Application no. 25680/94), http://hudoc.echr.coe.int/eng#{"itemid":"003-585782-589432"}, (Last accessed on 20/02/17).
Other cases related to the rights of the transgendered individuals which came before the Court were concerned with the procedure of legal recognition of a transgendered individual married before the sex reassignment surgery\textsuperscript{188}.

In the case of Grant v. the United Kingdom\textsuperscript{189}, a 68-year-old male to female transgendered applicant argued that the denial to pay her a pension on retirement on the grounds of lack of legal recognition of her changed gender, which was otherwise applicable to the women on attaining the age of 60 years violated her right to respect for private and family life as provided under the Article 8 of the Convention. It was held by the Court that in the given case there had been a violation of the Article 8 of the Convention. The Court observed that the given case was similar to the Christine Goodwin’s case.

The Court recognized the obligation of the State authorities to provide for the norms and other conditions related to the legal recognition and marriage of the transgendered individuals and also held that the absence of such procedure cannot warrant the denial of the rights of the transgender community. Subsequently, after the Christine Goodwin’s judgment, it was upheld that the denial to recognize the gender of the transgendered individuals after the sex reassignment surgery cannot be justified on any ground. The applicant in the given case had no possibility to attain the recognition before the Gender Recognition Act, 2004, came into the force. But thereafter, she could obtain the recognition and hence she could only claim the breach of the said right for the period in which she couldn’t obtain the recognition from the authorities\textsuperscript{190}.

In the light of the cases decided by the European Court of Human Rights, it can be established that the prohibitive grounds of discrimination as mentioned in the Article 14 of the Convention also includes sexual orientation and gender identity as one of the prohibitive grounds of discrimination. However, it is not explicitly mentioned in the Convention but it is upheld in many cases that the expression ‘other status’ used as one of the prohibitive grounds of discrimination is used intentionally in order to leave

\begin{itemize}
  \item \textsuperscript{188} European Court of Human Rights, Factsheet – Gender identity issues, \textit{Supra note} 178.
  \item \textsuperscript{189} European Court of Human Rights, Grant v. the United Kingdom (Application no. 32570/03), http://hudoc.echr.coe.int/eng#{"itemid":"003-1674922-1755206"}, (Last accessed on 20/02/17).
  \item \textsuperscript{190} See, European Court of Human Rights, Factsheet – Gender identity issues, \textit{Supra note} 178.
\end{itemize}
it open for the inclusion of other ground of discrimination including sexual orientation and gender identity. The Court has protected various rights such as the right to marry, right against discrimination, right to respect for private and family life etc. concerning homosexuals, and transgendered individuals but the same has not been explicitly guaranteed in the Convention.

3.2 African Charter on Human and Peoples’ Rights

The African Charter on Human and Peoples' Rights is also known as the Banjul Charter. It is a Regional International Human Rights instrument established for the promotion and protection of the human rights and other inherent freedoms of the individuals in the African continent.\(^{191}\)

The Charter enumerates certain objectives based on the principles of the International Human Rights law and to achieve the mentioned objectives and goals, African Commission on Human and Peoples Rights was established in the year 1987. The Commission has its headquarter in Banjul, Gambia. In the year 1998, African Court on Human and Peoples' Rights was also created by a Protocol adopted in 1998.

The African Charter prohibits discrimination on the basis of various grounds such as national or ethnic origin, language, religion, sex, birth, colour, political or any other opinion etc. Like other International and Regional Conventions and Charters, the African Charter also included ‘other status’ while enumerating the prohibitive grounds of discrimination.\(^{192}\) The Charter does not include sexual orientation and gender identity explicitly as one of the enumerated prohibitive grounds. In fact, the African Court’s jurisprudence related to the matters concerning the right to protection against discrimination based on sexual orientation and gender identity under the African Regional mechanism is not as profound as the European Human Rights mechanism.


\(^{192}\) African (Banjul) Charter on Human and Peoples' Rights, http://www.achpr.org/instruments/achpr/, (Last accessed on 21/02/17). Article 2 of the Charter provides that the human rights and basic freedoms enumerated in the Charter are inherent in all the individuals and it further guarantees the enjoyment to rights and basic freedom recognized in the Charter without any discrimination on the basis of any ground such as national or ethnic origin, birth, colour, race, sex, religion, political or other opinion or any other status.
Homosexuality is prohibited and considered as a serious offence in most of the African Countries. As a matter of fact, the rights of the sexual minorities are very limited and also null in some parts of the Continent. However, South Africa remains an exception and discrimination on the basis of sexual orientation and gender identity is prohibited by the Constitution. Nonetheless, Africa remains as one of the most homophobic regions around the world with the law criminalising consensual same-sex acts between adults in more than 35 nations.\footnote{Africa Check, How many African states outlaw same-sex relations?, https://africacheck.org/reports/same-sex-relations-illegal-in-34-african-states-likely-35/, (Last accessed on 21/02/17)}

As an addition to the homophobic environment of the Continent, recently anti-homosexual legislations have been proposed or passed in Nigeria, Uganda, and the Gambia. The Same-sex Marriage (Prohibition) Act, 2013, prohibits same-sex marriages in Nigeria.\footnote{Same-Sex Marriage (Prohibition) Act 2013, NASS/CAN/115/VOL 31/24, 30 December 2013, http://www.aidsfreeworld.org/Newsroom/Press-Releases/2014/~/media/Files/Nigeria%20Same%20Sex%20Law%202014.pdf, (Last accessed on 21/02/17).} Not only this, the country also has certain discriminatory laws as a part of their legal system which outlaws homosexual clubs and other related homosexual organizations in Nigeria. Such prohibition in participating or having an access to various groups and organizations for the protection of the rights of the sexual minorities not only violates the right to peaceful assembly, association, and expression but also forces the individuals belonging to the sexual minorities to live without dignity.\footnote{A Rudman, The protection against discrimination based on sexual orientation under the African human rights system, 15 African Human Rights Law Journal (2015), p 1-27, http://dx.doi.org/10.17159/1996-2096/2015/v15n1a1, (Last accessed on 21/02/17).} Similarly, Anti-Homosexuality Act, 2014 and the Prohibition of the Promotion of Unnatural Sexual Practices Bill of 2014 of Uganda also reflects the same Homophobic attitude. As similar to the draconian homophobic law of Nigeria and Uganda, the Penal Code of Gambia has been recently amended for the inclusion of ‘aggravated homosexuality’ as a crime punishable with a life imprisonment.\footnote{Id.}

### 3.3 The Inter American Convention on Human Rights

Following the Universal Declaration of Human Rights, the process towards the formation of Inter-American Regional mechanism for the protection of Human Rights started in the year 1959 with the drafting of Inter-American treaty. Subsequently, in the year 1969, the American Convention on Human Rights came into existence. The
Convention is also popularly known as the Pact of San José, Costa Rica. It enumerates around twenty-six basic freedoms and rights.\(^{197}\)

The Convention provides that the State Parties are under the obligation to ensure the protection of human rights and basic freedoms enumerated in the Convention and inherent in all the individuals without any discrimination on the grounds of national or ethnic origin, birth, sex, colour, language, social or economic status, political or other opinion or any other social condition.\(^{198}\)

The Convention enumerates basic human rights such as the right to life;\(^{199}\) the right to protection against cruel, inhuman or degrading treatment;\(^{200}\) the right to personal liberty and security;\(^{201}\) and also the right to privacy.\(^{202}\) However, the Convention does not explicitly prohibits discrimination and violence based on sexual orientation and gender identity.


\(^{198}\) Inter-American Convention on Human Rights, American Convention on Human Rights, http://www.cidh.oas.org/basics/english/basic3.american%20convention.htm, (Last accessed on 21/02/17). Article 1 of the Convention recognizes the obligation of the State Parties to respect and protect the rights. The Convention states that the State Parties are under the obligation to ensure the protection of the human rights and freedoms enumerated in the Convention to all the individuals within their jurisdiction without any discrimination on the grounds of national or ethnic origin, birth, sex, colour, language, social or economic status, political or other opinion or any other social condition. The Convention also explains that the term ‘person’ strictly means human beings and does not include any other creature.

\(^{199}\) American Convention on Human Rights, Supra note 198. Article 4 of the Convention ensures the protection of the right to life to all the individuals. It provides that it is the obligation of the State Parties to protect the right to life of all the individuals within their jurisdiction. It further recommends for the abolition of death penalty and also provides that the individuals below 18 years of age and above 70 years of age and pregnant women should not be awarded death penalty. It further provides for the right to apply for amnesty, pardon or commutation of sentence.

\(^{200}\) Id. Article 5 of the Convention provides for the right to protection against cruel, inhuman or degrading treatment. It provides that the physical, mental and moral integrity of every individual should be respected and no person should be subjected to inhuman or degrading punishment or torture. It further commends that reformation and social re-adaptation should be the objective of the punishments depriving the liberty of individuals.

\(^{201}\) Id. Article 7 of the Convention deals with the right to personal liberty and social security. It provides that the State Parties are under the obligation to ensure the protection of personal liberty and security to all the individuals within their jurisdiction. It further provides that no person shall be deprived of his personal liberty except according to the procedure established by law. It further ensures the right to protection against arbitrary detention to all the individuals and also lays down various rights of the accused person such as the right to be informed the grounds of detention, the right to be produced before a judge or a judicial officer within reasonable time, and the right to justice.

\(^{202}\) Id. Article 11 of the Convention provides the right to respect for private life and family. The right to privacy also includes the right to protection against unlawful attacks or interference on the honour or reputation of the individuals.
In Atala case\(^{203}\), Inter-American Court held that the individuals belonging to the sexual minorities are entitled to the right to enjoy the human rights and basic freedoms in all aspects of their life without any discrimination based on their sexual orientation and gender identity\(^{204}\). In the given case question of law was whether the custody of children given to a homosexual parent (Mrs. Atala) would harm the moral values and security of such children. Mrs. Atala and her husband were married for 9 years and after their divorce, it was decided that their three daughters would live with the mother. After a year of divorce, Mrs. Atala moved to live with her new female partner along with her daughters and following that her husband filed a complaint against her in a local court. It was alleged by the ex-husband of Mrs. Atala that the morality and security of their children living with her would be harmed due to her homosexuality and her living with another homosexual partner. From the local courts, the case made its way to the Supreme Court where it was decided in majority that the daughters of Mrs. Atala were in a situation of risk as their home environment was unique as compared to their fellow classmates due to which the girls were also placed in a vulnerable position\(^{205}\). Nonetheless, Mrs. Atala filed a petition in the Inter-American Court where it was unanimously held that State authorities violated her right to equality and non-discrimination as enshrined in the Article 1 and 24 of the Convention.

It was observed by the Court that in the light of the provisions of the Inter-American Convention, the provisions of the Vienna Convention, and the standards set by the European Court and International Human Rights law, the discrimination on the basis of sexual orientation is prohibited and the homosexuals belong to a category which is protected under the Convention. Therefore it is an established human rights principle that any law or act which is discriminatory in nature towards homosexual shall be prohibited and also any law or act of the State authority cannot violate or discriminate any person on the basis of his or her sexual orientation. It was also observed that the


\(^{204}\) Inter-American Court of Human Rights, Case of Atala Riffo and Daughters v. Chile, Judgement of February 24, 2012, http://www.corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf; (Last accessed on 10/03/17).

\(^{205}\) Id. at para 57.
State authorities are under the obligation to protect the individuals against the discrimination and violence based on sexual orientation.

3.4 Asian Legal Framework for the Protection of Homosexual And Transgendered Individuals

As far as the recognition and protection of the rights of the homosexuals are concerned, Asian countries are way behind many other parts of the world. In almost all Asian countries the primary concern is the protection of homosexuals from the stigma, discrimination, physical and mental abuse and other forms of violence in the given legal and social environment. At present, there are many Asian Countries which penalize same-sex relationships such as Iran, Kuwait, Qatar, Saudi Arabia, United Arab Emirates, Yemen, Afghanistan, Bhutan, Bangladesh, India, Maldives, Pakistan, Sri Lanka etc. Not only this, in some societies homosexuals are considered as against morals or people suffering from some sort of mental or physical disorder. Homophobic attitude along with the lack of adequate legal protection against discrimination based on sexual orientation expose almost all homosexual individuals of all ages to the grievous violations of human rights in the form of killing, rape, verbal or physical assault, arbitrary detention, denial of right to assembly, speech and expression, discrimination in the sphere of education, health employment etc. on the basis of their actual or perceived sexual orientation. More so the present international and domestic human rights framework do not prevent discrimination and violence based on actual or perceived sexual orientation. And in the absence of effective Asia-wide regional mechanism or conventions to promote or protect human rights, homosexuals are further denied of their basic rights including the right to live with dignity. In the given legal and social environment of Asian countries, it is necessary to probe into the causes and effect of discrimination and violence based on actual or perceived sexual orientation.

3.4.1 Sexual Orientation Issues in Asia

As compared to the other parts of the world, the rights of sexual minorities are limited in Asia. As per the societal norms of most of the Asian countries, homosexuality and bisexuality fall under inappropriate sexual behaviours. Bisexuality does not attract
discrimination as compared to homosexual individuals because mostly bisexuals are not visible as bisexuals.

However, homosexuality is still addressed as ‘abnormal’ behaviour in many Asian societies. Despite scientific and other medical advancements homosexuality is still labeled as mental disorder or abnormality of some sort in many parts of the continent. The primary human rights concern in the continent is protection against discrimination and violence based on actual or perceived sexual orientation. Family and reproductive rights such as the right to marry, the right to procreate etc. still seems to be a distant goal in most of the Asian countries. LGBT individuals living in Asian countries are exposed to various unique issues such as family rejection, homelessness, social exclusion, bullying, health issues including AIDS, substance abuse, mental disorders etc., hate crimes, legal injustice etc. More so in some Asian countries, same-sex intercourse is punishable with death penalty. These issues along with lack of stringent laws for the protection of homosexual individuals against discrimination and violence makes it difficult for them to survive in many parts of the continent. Therefore it is the need of the hour to critically analyse Asian laws regarding same-sex intercourse and other ancillary matters thereto.

3.4.2 Law Relating to Same-Sex Sexual Activities in Asia

Consensual same-sex sexual acts between adults are prohibited in most of the parts of Asia. Furthermore, it is also considered as a criminal offence punishable with the death penalty in some of the countries in the continent such as Iran, Afghanistan, and Brunei etc. However, the penal code of Afghanistan\(^{207}\) does not explicitly criminalizes consensual same-sex sexual activity but the Constitution of Afghanistan permits recourse to Sharia law in certain situations, which considers the same-sex

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\(^{207}\) Penal Code 1976, Chapter Eight: Adultery, Pederasty, and Violations of Honour, http://aceproject.org/ero-en/regions/asia/AF/Penal%20Code%20Eng.pdf/view, (Last accessed on 17/07/17). Article 427 of the Penal Code provides for the punishment relating to the intercourse between males. It states that an individual who is convicted for the offence of adultery or pederasty shall be punished with an imprisonment that shall be for a long period. The mentioned provision of law also enumerates certain specifications when the commission of the mentioned offence is considered as aggravating conditions. Those specifications include the commission of the mentioned crime against an individual under the age of eighteen years or against a third degree relative; the commission of the same by a tutor, teacher or servant; the commission of the offence against a married woman or a maiden; when the offence is committed with the assistance of one or more persons; when due to the commission of such crime victim is affected by a genital disease or becomes pregnant.
sexual activity as against morality and hence punishable with a maximum of death penalty.  

The penal code of Iran also prescribes the death penalty for same-sex sexual activity. Articles 108-113 of Islamic Penal Code of the Islamic Republic of Iran prescribes Hadd punishment for sodomy. In the given code sodomy is defined as sexual intercourse between male individuals, whether it takes place as penetration or rubbing penis between thighs. It further prescribes 74 lashes as a penalty for consenting immature or minor men convicted of sodomy and death penalty for mature men. Same-sex sexual activities are also punishable in Bangladesh under the section 377 of the Penal Code. The said law prescribes a punishment which may extend to life imprisonment or imprisonment for a term of ten years or fine for the commission of the mentioned offence. Nonetheless, in 2013 Bangladesh legally recognized “Hijras” as belonging to a ‘third sex’ for the purposes of voting, travel, identification and other civil rights. In Bhutan also consensual homosexual activity between adults is prohibited by the law and also considered as against morality and against the order of nature.

In the present time where people are more concerned towards Human Rights, Burnei takes a step back towards the medieval form of punishment by prescribing death penalty by stoning for homosexual acts. Previously, before the enactment of Syariah Penal Code, the Penal Code in force prescribed a punishment of

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imprisonment for a term of 10 years for the commission of homosexual acts. The given enactment is a serious threat to the rights of LGBTs and their mainstreaming.

Similarly, Indian Penal Code also considers same-sex sexual activities as against the order of nature under the section 377. The old draconian law framed during the colonial period is still applicable in India. (The sexual orientation and gender identity issues concerning Indian legal framework have been dealt with in the next chapter.) Indonesia, on the other hand, does not have a sodomy law i.e., same-sex sexual relations between consenting adults are not prohibited according to the Indonesian Penal Code. However, the country fails to protect homosexuals and transgendered individuals from discrimination and hate crime. Recently two men were caned 83 times as a punishment for consensual same sex sexual intercourse in Aceh. A huge number of people witnessed the infliction of punishment on the accused. Not only this, recently Indonesian police detained dozens of men including several foreigners in a raid on a gay sauna which is another sign of growing hostility to homosexuality in the world's most populous Muslim nation.

In Iraq, same-sex sexual activity is not explicitly prohibited by the law but the country still remains unsafe for the individuals belonging to the sexual minorities. According to a report by Human Rights Watch, it was found that in the year 2009, Iraqi militia members launched a wide campaign targeting a sexual minority for punishing them as they are considered to be the sinners transgressing the moral values and religious norms. It was also found that the so-called campaign for the hunting of homosexual men or the ones who do not conform to the notion of masculinity involved executions, abduction, and torture of those belonging to sexual minorities. Furthermore, the state authorities of Iraq did not adopt any measure to check such heinous violation of human rights. It was reported that the killings began in the Baghdad, which is a stronghold of the Mahdi Army and late on the extrajudicial executions were carried

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214 Aengus Carrol, State Sponsored Homophobia 2016, Supra note 208.
on by the other members of militia groups in various other cities of Iraq. Also recently, an Iraqi actor named Karar Noshi was also murdered due to his perceived sexual orientation. He had been receiving death threats because of his appearance which was presumed to be transgressing the norms of masculinity. Sharia judges, who are the Non-State actors, are also known to order executions of men and women for indulging in consensual same-sex sexual behaviour and acts, despite the fact that the legal framework of Iraq makes no reference to same-sex sexual behaviour and also does not criminalize homosexuality.

In Kuwait also consensual sexual intercourse between men is punishable under the law and similar is the status of homosexuals in Lebanon. However, Lebanon is more tolerant to homosexuality as compared to other Arab countries like Saudi Arabia and the United Arab Emirates.

There is no codified penal law in Saudi Arabia but the country applies strict Islamic Sharia law as the criminal law of the land. Sura 7:80/81 describes homosexual acts as a misdemeanour and does not prescribe punishment for the same. More so, the same-sex acts and behaviour are not listed in Sharia law as one of the crimes punishable with death penalty such as murder, adultery, apostasy etc. but the same is punishable by death sentence in Saudi Arabia. In the year 2002, three homosexual

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219 The International Lesbian and Gay Human Rights Commission (ILGHRC), LGBT people in Iraq, “When Coming out Is a Death Sentence” and “We’re Here: Iraqi LGBT People’s Accounts of Violence and Rights Abuses”, http://iglhrc.org/content/exposing-persecution-lgbt-individuals-iraq, (Last accessed on 17/07/17).


222 Aengus Carrol, State Sponsored Homophobia 2016, Supra note 208.
men were executed by beheading in the country\textsuperscript{223}. In another case, in the year 2014, Saudi Arabia sentenced a man for three years imprisonment and 450 lashes for meeting men on Twitter\textsuperscript{224}. Not only this, Saudi Arabia also objected to a resolution of UN Human Rights Council which condemns the use of torture by law enforcement and reaffirms the human rights of LGBT people\textsuperscript{225}. So is the state of affairs in the United Arab Emirates and Yemen. In the United Arab Emirates all sexual acts outside heterosexual marriage are banned\textsuperscript{226}. Although the Federal Penal Code, 1987 does not explicitly deals with Homosexuality but same-sex sexual behaviour is punishable with death penalty in the country\textsuperscript{227}.

In Yemen also homosexual acts are considered as against the law in accordance with the Sharia law. Article 264 of the 1994 Penal Code prescribes the punishment for the same-sex behaviour. It states that a homosexual act committed by unmarried men is punishable with 100 lashes of the whip or one year imprisonment and the homosexual acts committed by married men is punishable with the death by stoning\textsuperscript{228}. Article 268 of the 1994 Penal Code defines homosexuality between women as sexual stimulation by rubbing. The Code prescribes that the commission of an intentional or consensual same-sex sexual activity is punishable with three years of imprisonment and in case of the commission of the same-sex sexual acts under duress, the perpetrator is punishable with seven years of imprisonment\textsuperscript{229}.

However, this may not be the case in Hong Kong, Israel, Japan, Nepal, Philippines, Taiwan, Thailand, Vietnam, and Cyprus. These countries are said to be the most open to the sexual minorities in Asia. The countries which have recognized and made


\textsuperscript{226} Aengus Carrol, State Sponsored Homophobia 2016, \textit{op cit}.


\textsuperscript{229} \textit{Id}.
efforts for the protection of the rights of the sexual minorities in Asia are Japan, Israel, Taiwan, and Nepal. More so, recently the judges of Taiwan have ruled in favour of gay marriage, which is a significant step towards becoming the first country in Asia to legalize marriage between homosexual individuals.  

The legal status of sexual minorities in the Eastern Asia is far better than that of in the Southern Asia, where the homosexual and transgendered individuals are the soft targets of hatred and violent acts. Such human rights violations and discriminatory act are not only derogatory but also adversely affect the mental and physical health of the victims who tend to conceal their sexual orientation and gender identity under the fear of being harassed. Criminalization of the consensual same-sex sexual activities between adults is not only violative of the right to respect for private and family life but also aggravates the homophobic attitude of people towards the members of the sexual minorities.

Criminalization of same-sex sexual activity is justified by the Asian countries on the following grounds:–

i. Some of the States support criminalization of same-sex sexual activity on the grounds of their HIV prevention strategy. However, this rationale has been constantly rejected by experts around the world. In the case of Toonen v. Australia (1994), the UN Human Rights Committee held that criminalization of the consensual same-sex sexual activity cannot be justified on the grounds of public health as no connection was established between the continued criminalization of the consensual homosexual acts and the effective control on the spread of HIV/AIDS virus. It was also observed that due to the criminalization of consensual homosexual acts between adults, a considerable number of homosexual individuals hide their sexual orientation and tend to avoid public health programmes.

ii. Some States find their justification to criminalize same-sex sexual activity in laws based on religion such as Sharia law or law based on Bible, which condemns homosexuality. In fact legal framework of most of the former European colonies in Asia which penalizes homosexuality is based on Penal

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231 Toonen v. Australia, Supra note 112.
Code of 1860 which is one of the most important parts of British legacy. However, some scholars allege that during the age of Bible the terms ‘homosexual’ or ‘homosexuality’ were not introduced. They further assert that references to same-sex sexual behaviour in Bible are related to violence, idolatry, and exploitation related to the behaviour which further indicates that what is condemned by God is violence and exploitation based on same-gender behaviour.  

In Asia, the taboo related to the sexual minorities still exist in most of the societies. Although the wide-spread misconception related to sexuality and transgenderism is eroding passively in the Continent but it is noteworthy that in the present time many Asian countries are considering the issue of the protection of sexual minorities from ongoing discrimination and decriminalization of homosexuality and same sex marriage thereof but the social inclusion of the homosexual and transgendered individuals still remains the biggest challenge for the Asian societies.

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