

Review of Prohibition of Discrimination due to Homosexuality in the information society

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Abstract

LGBT movements have been actively taking place since the late 20th century, 24 countries around the world have fully embraced same-sex marriage as a form of marriage, and implemented it into law. Therefore in this paper, arguments and discussion on prohibition of discrimination due to homosexuality are examined and reviewed under the Constitution of Korea, by looking at the discussion on homosexuality (sexual orientation), which is currently in progress in Korea. However, First, national consensus is deemed absolutely necessary to add a new prohibition ground. Second, specifying the grounds for prohibiting discrimination should take into account historical background and demands of the “oughtness.” Third, it should be noted that the grounds for prohibiting discrimination specified in the Constitution are not subject to moral judgment. Fourth, in the case where homosexuality and/ or sexual orientation are specified as grounds for prohibiting discrimination, the problems that may occur must be considered. the 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 1 defines the concept of “human right(s),” and also in Subparagraph 3, “sexual orientation” is enumerated as an example of “discriminatory act.” Therefore, 「National Human Rights Commission Act of Korea」 Article 2, Paragraph 3 must be deleted.

▶ Keyword: Homosexuality, Human Rights, The Grounds for Prohibiting Discrimination, Sexual Orientation, National Human Rights Commission Act of Korea

I. Introduction

Same-sex marriage refers to a marriage entered into in legal and social context, between two persons of the same sex or gender, biologically and socially. Marriage equality or equal marriage is a concept more comprehensive and inclusive than same-sex marriage.

LGBT movements have been actively taking place since the late 20th century, and beginning with Netherlands in 2001, 24 countries around the world have fully embraced same-sex marriage as a form of marriage, and implemented it into law, based on human rights and

civil/citizen rights, such as individual rights to equality and pursuit of happiness, and it is also being implemented in such countries as the UK (excluding Northern Ireland) and Mexico. Including the countries that have implemented a civil union system that legally protects same-sex partnerships as analogous to marriage (relationships), 35 countries around the world guarantee the legal status of same-sex couples.

Across all periods, places, and cultures, the history of homosexuality being tabooed or considered a sin is at

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• Received: 2019. 07. 16, Revised: 2019. 08. 08, Accepted: 2019. 08. 08.
• This paper was supported(in part) by Research Funds of Kwangju Women’s University in KWUI19-025.

thousands of years. The English word “sodomy,” denoting anal sex by homosexuals, especially the men, is said to have derived from the story of Sodom and Gomorrah in Genesis of the Bible.

Article 36, Paragraph 1 of the 「Constitution of Korea」 provides that “[m]arriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.” Further, While Article 2, Subparagraph 3 of the 「National Human Rights Commission Act of Korea」 specifies “sexual orientation” as one of the grounds for prohibition of discrimination, Article 92, Paragraph 6 of the 「Military Criminal Code of Korea」 provides rules for punishment for anal sex.

Therefore in this paper, arguments and discussion on prohibition of discrimination due to homosexuality are examined and reviewed under the Constitution of Korea, by looking at the discussion on homosexuality (sexual orientation), which is currently in progress in Korea.

II. Discussion of Homosexuality and Human Rights in Korea

1. Homosexuality and Human Rights

1.1 Human Rights in the Constitution of Republic of Korea

In Korea recently, the argument that “homosexuality is a human right” is often heard. In such background, the roles of the 「National Human Rights Commission of Korea Act」 Article 2, Subparagraph 1 and Subparagraph 3 are deemed to be large, because the 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 1 defines the concept of “human right(s),” and also in Subparagraph 3, “sexual orientation” is enumerated as an example of “discriminatory act.”

Human right in the Constitution is a “natural right,” as the right to be enjoyed by all humans only because they are human beings. Human rights are distinguished from other rights such as universality, morality, fundamentality, abstractness, and superiority. And human rights do not require that they be enumerated in the Constitution. However, the content of human rights are unclear, and it is difficult to achieve clarification. In order to redress the weakness of this viewpoint, demand was made for it to be

actually laid down in the national laws. In accordance with this demand, the human rights that were actually implemented through the Constitution are the basic, fundamental rights[1].

I think that “human rights” discussed in the Constitution does not include “homosexuality” or “freedom of marriage between homosexuals.” Moreover, Article 36, Paragraph 1 of the Constitution specifies that “[m]arriage and family life shall be entered into and sustained on the basis of individual dignity and equality of the sexes, and the State shall do everything in its power to achieve that goal.” If so, a review should be made as to whether “homosexuality” is included in the “human right” as provided in the 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 1.

1.2 The National Human Rights Commission Act of Korea, Article 2

Enacted on May 24, 2001 as Act No. 6481 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 1 provides that “[t]he term ‘human right’ means any of human dignity and worth, liberty and rights which are guaranteed by the Constitution of the Republic of Korea, and recognized by international human rights treaties that the Republic of Korea signs and ratifies and by international customary laws.”

Such human rights concept differs from the concept of Super-Positive-Law human rights, which is generally discussed. And this concept of human rights is deemed broader than that of “basic rights” in that it is not limited by the guarantee by the constitution but also includes the guarantee by law.

1.2.1 International Human Rights Treaties

Foremost, the 「Universal Declaration of Human Rights」 text confirms the belief as to “inalienable rights” and equal rights for the sexes, and Article 16 declares that adult “men and women” have the right to marry and form a family.

Further, the 「International Covenant on Civil and Political Rights (Covenant B)」 Article 23, Subparagraph 2 provides that “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.” Also, the 「International Covenant on Economic, Social and Cultural Rights (Covenant A)」 Article 10, Subparagraph 1 provides that “[m]arriage must be entered into with the free consent of the intending spouses,” and this is equal to the 「International

Covenant on Civil and Political Rights (Covenant B) Article 23, Subparagraph 3.

1.2.2 Sex and Gender as a Concept

The 「Universal Declaration of Human Rights」 Article 2 provides that “[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Here, the natural concept of “sex” is used instead of the concept in the social and “gender” context. This point is the same in the 「International Covenant on Civil and Political Rights (Covenant B)」 Articles 2, 3, 24, and 26 and the 「International Covenant on Civil and Political Rights (Covenant B)」 Articles 2 and 3.

2. “Sexual Orientation” as Illustrated or Exemplified in the Laws

2.1 Content of the National Human Rights Commission Act of Korea

The 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 1 defines “human right(s)” and Subparagraph 3 of the Article defines “discriminatory act violating the equal right” separately.

Also, from its May 24, 2001 enactment as Act No. 6481, the 「National Human Rights Commission Act of Korea」 provides the duties of the National Human Rights Commission in Article 19 of the Act and provides for “2. Investigation and remedy with respect to human rights violations; [and] 3. Investigation and remedy with respect to discriminatory acts.”

2.2 “Sexual Orientation” as an Example of Discriminatory Act

The 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 3 defines “discriminatory act violating the equal right” and lists “sexual orientation” as an example.

Sexual orientation refers to the opposite sex, same sex, or plurality of sex or gender that one is attracted to. Here, the attraction may be emotional, romantical, or sexual, or any combination thereof. A great number of psychological or psychiatric organizations concluded that sexual orientation is not a matter of choice. The terms “sexual preference” or “sexual inclination” is often used in the same sense, but strictly speaking, they have socially different meanings.

Sexual orientation is classified as heterosexuality, which means being attracted to the opposite sex, homosexuality, which means being attracted to the same sex, and bisexuality, which means being attracted to both sexes, or at times to one of the two sexes[2].

The meaning of “sexual orientation” as a legal term was first established through a case law (precedent). It is used mostly in the laws prohibiting discrimination against homosexuality, heterosexuality or bisexuality.

The American Psychological Association, the American Psychiatric Association, and the National Association of Social Workers confirmed that sexual orientation is “not merely a personal characteristic ... [r]ather, one’s sexual orientation defines the group of people in which one is likely to find the satisfying and fulfilling romantic relationships that are an essential component of personal identity for many people, and cannot be defined[3].”

In addition to campaigns through strategies such as litigation, lobby, and education of the public, homosexuality expansion movements is making effort to change people’s thinking frames, i.e., their views on the world as to homosexuality, and particularly under the premise that “language” controls thoughts, they seem to have succeeded in considerably changing the awareness as to homosexuality by strategically selecting and using terms related to homosexuality[4].

2.3 Sexual Orientation Prohibited in the Laws

However as aforementioned, in the case where “sexual orientation refers to the opposite sex, same sex, or plurality of sex or gender that one is attracted to,” such sexual orientation to the opposite sex may be an “incest” and in the case of “plurality of sexes,” it may include “bigamy.” In such sexual orientation contexts, “incestuous marriage (Article 809)” or “Bigamy (Article 810)” are clearly prohibited in the 「Civil Act」 of Korea.

III. Distinction of Human Rights Violation and Discriminatory Acts

1. “Homosexuality” as Sexual Orientation

1.1 prohibition of Discriminatory Act Without Reasonable Grounds

The 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 3 provides for “discriminatory

act violating the equal right" and does not prohibit all discriminatory acts but "discrimination without reasonable grounds" that falls under "any of the following." Prohibited by the legislation are discrimination in the contexts of "① employment, ② supply or use of goods, services, ... and ... facilities, ③ education and training, [and] ④ acts of sexual harassment" are prohibited by the Act. Thus, discriminatory acts "without reasonable grounds" as to "homosexuality" as "sexual orientation" should necessarily be prohibited in the domain illustrated and exemplified in the 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 3.

1.2 Abnormal Acts and Active Protective Measures

However, beyond remedial actions with respect to "discriminatory acts without reasonable grounds," active measures for protecting homosexuality as sexual orientation should not be allowed. This is because "homosexuality" is not human right that is specified in the 「National Human Rights Commission Act of Korea」 Article 2, Subparagraph 1.

Some seem to argue that "homosexuality is a human right recognized in international human rights treaties or international customary law." However, in international human rights treaties, "sexual orientation" is not defined as a human right[5]. It is only that according to international human rights organizations, there are increasing number of cases recognizing discriminatory acts based on sexual orientation as an interpretation of existing human rights treaties.

In any case, it seems evident that homosexuality or sexual orientation is not included as a "human right" in the context of the 「National Human Rights Commission Act of Korea」. Moreover, the Supreme Court of Korea, Decision 200822Do2222, decided on May, 29, 2008, states that "a sexual act by homosexuals is an abnormal sexual-satisfaction act, which objectively causes a sense of repugnance in an ordinary person and infringes on healthy lives and disciplines of the military community as a sexual-satisfaction act that goes against good moral notion."

In addition, the Constitutional Court of Korea, Decision 2012Heonba258, decided on July 28, 2016, also made it clear that "a sexual act between the same sex causes a sense of repugnance in an ordinary person and is against good moral notion." This decision was the third, following the Constitutional Court of Korea, Decision

2008Heonga21, decided on March 31, 2001 and Decision 2001Heonba70, decided on June 27, 2002.

2. Remedy for Discrimination of Sexual Orientation and the Role of the National Human Rights Commission of Korea

2.1 Acts in Violation of the Law(s)

However, after "sexual orientation" was adopted in the previous 「National Human Rights Commission Act of Korea」 (the version before being enacted on July 29, 2005 as Act No. 7651) Article 30, Paragraph 2 (the current 「National Human Rights Commission Act of Korea」 Article 3, Subparagraph 3), the National Human Rights Commission of Korea has deemed "opposition to sexual acts by homosexuals" beyond remedy for "discriminatory acts that violates the equal rights as provided in the law(s)," as a discriminatory act prohibited in legal context.

Accordingly, the National Human Rights Commission of Korea recommended deletion of "homosexuality," which was included as one of the review criteria for determining content harmful to adolescence in the 「Enforcement Decree of Adolescence Protection」 of March 31, 2003, as it infringed on homosexuals' equal rights and freedom of expression and also recommended the government on July 25, 2006 to enact law(s) to prohibit discrimination.

Furthermore, the National Human Rights Commission of Korea implemented "Rules for Human Rights News Report" jointly with the Journalists Association of Korea on September 23, 2011, and is said to have prohibited expressions containing opinions opposing sexual acts by homosexuals and news report as to the relations between homosexuality and such disease as AIDS.

If such action by National Human Rights Commission of Korea was made as part of the 「National Human Rights Commission Act of Korea」 Article 19, Subparagraph 6, which provides for "[p]resentation and recommendation of guidelines as to categories of and determination standards for human rights violations, and preventive measures therefor," it would be contrary to the 「National Human Rights Commission Act of Korea」 Article 19 which makes distinction between "human rights violation" and "discriminatory acts," and Article 2, Paragraph 3, which specifically lists "discriminatory acts without reasonable grounds."

2.2 Protection for Abnormal Acts and the State institution's Roles

Moreover, the Supreme Court of Korea, Decision 2008Do2222, decided on May 29, 2008, and the Constitutional Court of Korea, Decision 2012Heonba258, decided on July 28, 2016, states that “a sexual act between the same sex causes a sense of repugnance in an ordinary person and is against good moral notion.” As such, the State institution's playing the role of lending assistance to abnormal acts which cause a sense of repugnance in an ordinary person and are against good moral notion would shake the purpose and role of the State institution.

3. Problem of “Sexual Orientation” in the National Human Rights Commission Act of Korea, Article 2, Paragraph 3

3.1 Need for Deletion of “Sexual Orientation” as the Reason for an example of Discrimination

From a technical point of view for legislation, discrimination against homosexuality is a question of whether homosexuality or sexual orientation should be codified in the Constitution's equality clause for grounds for prohibiting discrimination.

Article 15, Paragraph 2 of the Constitutional Amendment proposed by the National Human Rights Commission of Korea states that “no person shall be subject to unjust discrimination in all areas for any reason, such as gender, religion, race, language, region of origin, disability, age, sexual orientation, education, ideology, political opinion,” and Article 10, Paragraph 2 of the Constitution Draft of the Daehwa Culture Academy of 2016 states that “every person shall be free from discrimination based on sex, religion, race, age, physical condition or mental disability, origin, sexual orientation or social status, etc., and shall not be discriminated against in all areas of political, economic, social and cultural life.”

Meanwhile, the Special Committee on Constitutional Amendment of the National Assembly of Korea in 2017, while agreeing to expand the grounds for prohibiting discrimination, has proposed disability, race, language, etc. as specific grounds to be added[6]. In this regard, it is necessary to review the following four points.

First, it is necessary to consider whether the grounds for prohibiting discrimination in the Constitution are restricted provisions (enumerated provisions) or exemplary provisions. Article 11, Paragraph 1, Clause 2

of the current Constitution provides that “gender, religion or social status” as the grounds for prohibiting discrimination, and the opinions are divided on whether these grounds are restrictive provisions (enumeration provisions) or exemplary provisions.

The majority opinions in the academia and the precedents in the Constitutional Court of Korea view them as exemplary provisions[7]. According to this view, even if they are not added in the codes, they may still be considered as grounds for prohibiting discrimination. This leads to the conclusion that there is really no need to add sexual orientation as a ground for prohibiting discrimination.

However, it should be noted that in the case of prohibition of discrimination as specified in the Constitution, it will receive greater protection than otherwise. In examining the unconstitutionality of discrimination, more stringent judging criteria are applied to the matters specified as grounds for prohibiting discrimination, resulting in greater protection. This is very important in the practice of constitutional litigation. For this reason, whether it is specified as a ground for prohibiting discrimination becomes important. On this point, even if it is exemplary, it is necessary to limit to the matters where in the national consensus can be confirmed, if grounds for prohibiting discrimination are to be additionally specified. This is because enforceive power of the grounds for prohibiting discrimination is recognized without much interpretation.

In the position of viewing the restrictive enumeration of the grounds for prohibiting discrimination, adding new grounds requires more national consensus. In this position, it does not limitedly enumerate the grounds and does not allow for the addition of grounds for prohibiting discrimination by virtue of interpretation in the expression “... etc.” or “... other reasons.”

In short, regardless of whether the grounds for discrimination are limitedly enumerated or exemplified, national consensus is deemed absolutely necessary to add a new prohibition ground. Thus, without a national consensus, it must be deemed that homosexuality or sexual orientation cannot be added as a ground for prohibiting discrimination.

Second, specifying the grounds for prohibiting discrimination should take into account historical background and demands of the “oughtness.” In the current Constitution, gender, religion and social status are

specially provided as grounds for prohibiting discrimination, because there is that necessary request for the oughtness based on historical background and social consensus[8]. Therefore, it would not be reasonable to specify such a lack of background and request as a ground for prohibiting discrimination.

Looking at Korea's situation, sexual orientation cannot be regarded as a criterion for discrimination that can be recognized as a ground for prohibiting discrimination. According to the National Human Rights Commission's 「2017 case report」, 342 complaints were filed for discrimination based on sexual orientation for 16 years from November 25, 2001 to December 31, 2017, the date the National Human Rights Commission was established. This is a mere 1.3 percent of 26,439 cases of total discrimination complaints brought on the grounds of gender, pregnancy, race, religion, etc.. As of 2017, there was not 1 case centered on denial and dismissal, and granted requests for investigation, mediation, recommendation, accusation, recommendation for discipline, and termination of settlement[9].

These statistical data clearly directly reflect that discrimination due to sexual orientation is not generalized in Korea. Thus, there is no justification for specifying sexual orientation as a ground for prohibiting discrimination.

Third, it should be noted that the grounds for prohibiting discrimination specified in the Constitution are not subject to moral judgment. In other words, it is morally irrelevant (e.g., amoral, nonmoral) like a gender or social status, or beyond moral like a religion. It is understood that the usual, conventional ground for prohibiting discrimination is very intimate to the identity of an individual so much so that it can be identified with the inner self or what is given in a state where an individual cannot choose. That is, it is a reason or ground that can not be attributed to the individual, or one that can not be demanded for another choice. Therefore, it may but be deemed unreasonable to discriminate on such grounds because it is beyond the scope of individual responsibility.

On the other hand, since moral judgment presupposes possibility of selecting a moral action, moral judgment can be made as to whether or not such action is selected. Sexual orientation may be a ground for prohibiting discrimination at any time, because unlike the conventional grounds for prohibiting discrimination, it is

subject to moral judgment. As the view today that homosexuality is incurable as a consequence of inevitable congenital postpartum loses its validity [10] discrimination due to homosexuality cannot be deemed unreasonable.

Fourth, in the case where homosexuality and/ or sexual orientation are specified as grounds for prohibiting discrimination, the problems that may occur must be considered. If homosexuality is specified as a ground for prohibiting discrimination, laws for prohibition on discrimination may be enacted. Accordingly, discriminatory statements or actions on sexual orientation, i.e., moral and legal judgments on certain sexual orientations, may be subject to regulation or punishment. The sexual minority may be protected therefrom, but there is also an aspect where freedom of expression, freedom of academia, and freedom of religion of the ordinary majority are infringed upon. Therefore, unless the discriminatory statements or actions are defamatory or insulting to the homosexual person, that is, unless they are illegal or criminal acts, ethical, legal, academic, and religious expression of homosexuality itself should be allowed. Carefully considering the foregoing discussions, it is deemed unreasonable to specify homosexuality or sexual orientation as a ground for prohibiting discrimination.

The National Human Rights Commission is taking active measures to protect "homosexuality (sexual orientation)" beyond remedial action as to "discriminatory acts without reasonable grounds." If the National Human Rights Commission wants to lead comprehensive prohibition on discrimination or legalization of homosexual marriage, beyond the legally enumerated prohibition of discrimination based on the above exemplified "sexual orientation," the term "sexual orientation" in the 「National Human Rights Commission Act of Korea」 Article 2, Paragraph 3 must be deleted.

3.2 Reexamination of the Role of the National Human Rights Commission of Korea

Established in 2001, the National Human Rights Commission of Korea has put forth effort to make a society in which human dignity is respected, i.e., an advanced democratic society without human rights violation and discrimination, by removing the negative international image of human rights violations and human rights situations under the past authoritarian regime and

by embodying a society in which human rights live together; the Commission's achievements are commendable.

However, now is the time to have serious consideration as to whether the National Human Rights Commission would continue to be needed in Korea's human rights situation. In particular, the overlapping functions of other State institutions such as the Anti-Corruption & Civil Rights Commission are issues to be resolved.

The National Human Rights Commission's human rights policies are fundamentally biased in views. Individual thoughts as to sexual orientation or homosexuality may differ and the associated expression and behavior have relations with ideology and expression, and freedom of conscience. To suppress even this based on repulsion and repugnance would be an anti-human-rights policy. The National Human Rights Commission stated that it would need to be more cautious and collect more opinions to make more balanced policies.

IV. Conclusion

After the term "sexual orientation" was first enacted into law, it began to exert tremendous power in Korea to suppress opposition to sexual acts or activities of the same sex in the name of legislation. In other words, a ground was provided for a dramatic change that turned in the opposite direction, the legal and moral value judgments of sexual acts of the same sex.

The present government thinks that a great number of people are approaching in a wrong, unacceptable direction, for the purpose of guaranteeing human rights for the few. In particular, the government's passing of the National Action Plan (NAP) for the National Human Rights Policies at the Cabinet meeting in August 2018 is in ignorance of the opinion of the great number of people against the legalization of homosexuality, which warned that it could lead to national confusion[11].

Due to the phrase "sexual orientation" in the National Human Rights Commission Act of Korea, one cannot help but be greatly concerned as not only are homosexuality and sexual acts of the same sex being advocated and promoted but attempts are also being continuously made to enact laws to prohibit opposition to homosexual acts. As the representative case, the legislation to prohibit

discrimination, of which 7 attempts were made for enactment until the last 19th National Assembly (of Korea), provided "sexual orientation" as a discriminatory act violating the equal right and viewed criticism and opposition to homosexuality and sexual acts between same sexes as discrimination and provided for civil and criminal liabilities including punitive damages. These have the legal principle of dictatorship as to homosexuality that basically forbids all actions that criticize homosexuality and deprives people of their freedom of conscience, religion, academics, and expression, and imposes acceptance and support of homosexuality.

Recently, there has been attempts under the present government to establish a constitutional institution, the National Human Rights Commission of Korea, which has been leading numerous activities advocating and promoting homosexuality based on the term "sexual orientation." There has even been attempts to amend the Constitution to include "sexual orientation" as the ground for prohibiting discrimination. Including "sexual orientation" as the grounds for prohibiting discrimination is not only the most representative law for advocating, promoting and legitimizing homosexuality, it has also been used as dictatorial law for homosexuality that forbids all opposition to sexual act of the same sex and forces support for homosexuality, but many people do not know of these at all.

As to the reasons where moral value judgments change and mutual, fierce conflict of values exist, legislation should not solely protect acts or activities that are supported by any specific values; acts to support other values should not be suppressed by law. If it does, it would violate the freedom of conscience, religion and expression guaranteed by the Constitution.

Therefore, the legal principle for prohibiting discrimination based on sexual orientation is to make sexual acts of the same sex, which is a representative issue in which people's views on moral value judgment may be divided, the reason for prohibiting discrimination. Accordingly, it should be deleted as a matter of course.

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