

# Sex, Sexuality, and the Constitution

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## Introduction

This book examines the legal status of sexual autonomy in Japan. More specifically, it discusses sexual freedom – the right to decide one’s own sexual or gender identity and whether to have sex or not to have sex. Everyone should possess these rights. The legal status of choice in connection with childbirth – the right to have a child or not to have one – will also be explored. The right to give birth should be untrammelled, as should the right to refuse to give birth to a child.

In what follows, I suggest that these issues must be examined in light of the Constitution of Japan and should not be regarded solely as matters of legislative policy. Moreover, I advance “sexual autonomy” as a foundational right or coordinating principle to contextualize them. Every aspect of sex and childbirth is only part of the foundational right of sexual autonomy. My aim is to draw the right to this autonomy from the Constitution and to critically examine all the issues outlined above as interrelated aspects of it.

Although this book discusses issues in Europe and North America, it focuses largely on Japan and will, therefore, trace its history of government regulation of sex and childbirth. It critically examines the current legal status of sexual freedom and the right of choice on childbirth, based on the constitutional protection of sexual autonomy. This discussion is particularly relevant in Japan, since sex and childbirth have traditionally

been seen as community matters and were not left to personal choice. There is definitely a need to revisit these issues as individual rights and also as parts of the principle of sexual autonomy. Such an examination is vital for the final topic of this book: whether and how much government population policies can limit sexual autonomy. In Japan, the population is aging, the birthrate shrinking, and population numbers are declining overall. As a result, the government has generated various policies to encourage marriage and childbirth. The investigation of the right to sexual autonomy is vital in determining their legitimacy and limits.

### **Aims of the Book**

This book has two primary aims. One is to provide a detailed analysis of Japan's current predicament as regards sex and childbirth, a situation that is perhaps more fraught than in any other country. Very little research has dealt with this topic, which means that *Sex, Sexuality, and the Constitution* will break new ground.

The other primary aim is to draw important lessons from the Japanese predicament. Since many developed countries are now struggling with the same kinds of serious social issues, Japan's experience will prove educational for them. Perhaps the most important lesson here is the need to place sexual autonomy as *the* foundational constitutional mandate and to re-examine all restrictions on sex and childbirth before determining how to cope with the diminishing birthrate and shrinking population. The population policy of the government needs to be squarely examined in light of the constitutional command of sexual autonomy (a constitutional obligation in the form of a mandate, beyond a simple endorsement or request for respect, which obliges the government not to unreasonably restrict it).

### **Sexual Freedom**

In most countries, including Japan, the government has traditionally assumed that sex is predetermined biologically at the time of birth and that all individuals are either male or female. As a result, there was no serious argument that an individual has a right to decide or change sexual or gender identity. In many countries, sex is seen as a freedom that people can enjoy. After all, it is a natural part of love, and it is essential to the

survival of the human species. However, no country leaves it completely unregulated. Aside from the criminalization of sexual assault, various laws proscribe certain behaviours, including seemingly consensual acts, such as sex with a child, incest, adultery, and sodomy, or other atypical or so-called deviant sex, necrophilia, and bestiality. Most of these bans are rooted in the assumption that people will naturally choose heterosexual sex and that “normal” relations between husband and wife in the bedroom are the only legitimate and proper version. In other words, sexual orientation and sexual preferences have not been much respected, and sex is seen as a social matter to be controlled. In some countries, prostitution is also criminalized. In the past, this ban was rarely subject to constitutional scrutiny, probably because there was no consensus on whether sex should be constitutionally protected or because no one doubted the government’s power to regulate it. Public discussions of sex were largely taboo, with the result that many people were hesitant to debate openly on whether such prohibitions could be justified.

On the other hand, the freedom not to be forced to have sex has generally been respected. As a result, forcible sex without consent is banned as rape or sexual assault in most countries, but the relevant legislation varies considerably from one country to the next. Some countries impose extraordinary and almost insurmountable hurdles for the criminal punishment of sex offenders, thus preventing their conviction. In other countries, even though punishment is possible, many barriers impede conviction, and it is not easy for victims to obtain justice. In those countries, it could be argued that the freedom from sexual coercion is not sufficiently protected, raising the question of whether the laws need revision. However, almost all discussions of rape or sexual assault have been framed as matters of criminal policy, not as constitutional issues.

### **Freedom of Choice on Childbirth**

In most parts of the world, giving birth is among the freedoms that individuals can enjoy, and few attempt to limit it through bans or restrictions. In some instances, however, the government has implemented mandatory castration for violent sex offenders or sterilization for persons with mental disabilities; in others, it has limited the number of offspring a couple can legally have. Nevertheless, there has been little discussion

on whether such measures or regulations can be justified. Moreover, with the significant increase in infertility, growing numbers of people have turned to assisted reproductive technology (ART) or medically assisted reproduction (MAR) to have children. Sexual intercourse is no longer the only means of producing a child. It is therefore important to allow access to ART/MAR to achieve the freedom to procreate. In most countries, however, discussions of ART/MAR have tended to focus on its regulation to ensure that it is both safe and ethical. Little attention has been paid to whether the denial of access to ART/MAR could be constitutionally justified. Moreover, the law of parentage, the law to decide who should be regarded as parent of a child, might present a challenge for a couple who want to become parents. However, there has been no examination of the law of parentage from the constitutional perspective of the right to have a child.

Furthermore, freedom of choice on childbirth also needs to include the right not to be forced to have a child. This includes the right to use contraceptives to prevent or delay pregnancy, as well as the right to abortion. However, some countries limit the use of contraceptives and many ban or restrict abortion. The appropriateness of such measures has been highly controversial in many countries. However, contraception and abortion have been debated as matters of constitutional law in only a few, such as the United States, Canada, and Germany. Elsewhere, they have been debated only as criminal policy issues for the legislature.

### **The Need for Constitutional Discussion**

Of course, most of these topics, such as prostitution, rape, ART/MAR, or abortion, have been thoroughly discussed in the past. On the whole, however, such discussions are deeply inadequate, a fact that prompted me to write this book.

First, almost all these subjects have typically been approached as matters of legislative policy. It is obviously simply wrong to view them solely as freedoms that can be regulated and restricted by legislation. Indeed, sex and childbirth have become increasingly personal and deeply felt individual choices that people can and should make for themselves. Moreover, they are an important aspect of family and are foundational to society, necessary in sustaining a democratic country. Given this, it is

imperative that questions regarding sex and childbirth be examined as constitutional matters, not just as legislative or government policy issues.

When these freedoms are accepted as constitutional rights, then, any law that unreasonably bans or restricts them needs to be abolished or revised in the name of the Constitution. In other words, enshrining these freedoms in the Constitution limits legislatures as to what kind of policies they can implement and how they can be implemented.

In addition, whereas courts have the power to review the constitutionality of legislation, judges can review any statute that prohibits or limits these freedoms. Since in most countries, policies on sex and childbirth are debated in the legislative process, constitutionalization would allow for the judicialization of these issues and would therefore create another arena for debate. Moreover, it would structure these debates in terms of the justification as a matter of the Constitution, not only as a matter of policy, completely changing the framework and structure of discussion.

### **Integrating Issues under Sexual Autonomy**

Second, discussions of sex and childbirth have tended to focus on each individual topic separately, without attempting to connect them or to integrate them into a coherent framework. It is a tragic failure to lose sight of the very strong ties among these issues: all are closely linked to the sexuality of individuals. Instead of concentrating narrowly on discrete topics, such as prostitution, rape, ART/MAR, or abortion, we need to draw a coherent foundational framework of principles to connect them.

Therefore, this book will consider them in light of the constitutional command of “sexual autonomy.” Instead of addressing each one as a separate and distinct subject, the book aims to apply the common framework and subject them to uniform analysis because all are interrelated and connected. This is the most important aspect of my research.

The focus on sexual autonomy will reveal that earlier discussions of the individual topics are deeply inadequate since they fail to see the close connections among them and the necessary implications to each other. All these issues on sex and childbirth are parts of the foundational principle of sexual autonomy, which lies at the heart of this book and will be elaborated in the following chapters. Briefly, it refers to the right of individuals to determine their sexuality and make sexual decisions

as they choose. It includes sexual freedom – the right to decide one’s sexual identity and the freedom of sex (including the right to have sex and the right not to be forced to have sex). It also includes the right of choice on childbirth (including the right to have a child and the right not to be forced to have a child). This foundational right should inform all discussions of sex and childbirth under the Constitution. Although few countries have adopted it, accepting and confirming it as a guiding right or guiding principle is now imperative.

### **Vital Reconsiderations**

This examination is vital in facing the most daunting question this book will address: the legitimacy and limits of government population policies. Since both birthrates and population numbers are declining in many countries, governments must now grapple with the challenge of maintaining economic growth and sustaining the tax revenues that fund pensions, health care, and senior care. Many will be forced to adopt some kind of measures to cope.

As will be closely examined in this book, the most likely of these are attempting to increase childbirth and taking in more immigrants. The latter, however, involves various challenges, and thus governments might be tempted to concentrate on the former. This would raise the complicated issues of sex and childbirth. If deciding whether to engage in sex and have a child is truly an individual freedom, how would it be possible for a government to promote childbirth? Are there any limits on what it can do?

### **Why Japan?**

This book focuses on Japan. One reason for this is because Japan has traditionally lacked a strong commitment to individual freedom when it comes to sexuality. The government has never officially accepted sexual freedom and freedom of choice as individual rights. It sees sexual identity as determined at birth, with no room for change. Although it has made some rare exceptions for certain transgender persons, the exceptions were very narrow. However, this fact prompted no serious discussion. Government restrictions on the freedom to have sex have generally remained unopposed, and virtually no constitutional arguments have



been raised against any criminalization of that freedom. There has been no discussion as to whether the rape and sexual assault laws sufficiently protect against coercion to have sex or of whether the current ban can be justified as appropriate. Furthermore, with respect to freedom of choice in childbirth, virtually no arguments have been based on the right to bear a child or to be a parent. The same is true in connection with the right not to be forced to have a child (the right to abortion). In the past, Japanese society almost universally accepted that the government should have the power to regulate sex and childbirth from the standpoint of morality and population policy. Sex and childbirth have always been seen as social matters, not as matters of individual rights.

Indeed, for many centuries in Japan's long history, they were not viewed as personal. During the third or fourth centuries BCE, people began to live and work together in farming communities.<sup>1</sup> The primary focus of their labour was the production of rice, a key food staple. Since growing this crop necessitates a group effort in planting, weeding, and harvesting, communities were naturally closely bound by family and work. For many centuries, Japanese society was largely agrarian, focused on rice production. During the Tokugawa period, or so-called Edo Period, from 1600 to 1867, Japan was ruled by a military elite of samurai warriors.<sup>2</sup> Rice remained the main food, and indeed taxes to the government were paid in the form of rice. Therefore, most farmers maintained the traditional group orientation, and people had no strong perception of individualism. Local communities, families, and society played a more important role for them. There was no notion of individual freedoms or rights until the government launched a sweeping modernization program. Indeed, during the Edo Period, the family had been jointly liable for criminal wrongdoing by a relative: an entire family would be punished if one member committed a crime.<sup>3</sup> All family members were legally obliged to report any offence by a relative, and failure to do so could make them liable too. Everyone was expected to keep an eye on the behaviour of everyone else.<sup>4</sup> Moreover, the family and the village were jointly responsible for collecting and submitting taxes. If an individual or a village failed to submit the allocated amount of rice, family members or the village itself were required to make up the shortfall.<sup>5</sup> In such a society, there was no room to create and foster individualistic freedom or liability.<sup>6</sup>

The Meiji Restoration of 1868 ended the Tokugawa shogunate and restored power to the emperor.<sup>7</sup> Created under his authority, the Meiji government wished to fend off Western colonization, feeling the need to modernize and to build an economically robust country with a strong military. It also replaced the traditional legal system with elements imported from the various Western examples. The modernization campaign extended to architecture, fashion, culture, and lifestyle, as people were urged to follow Western precedents.<sup>8</sup> The Meiji Constitution of 1889, the first in Japan, was, however, strongly conservative, granting sovereign authority to the emperor and vesting all government power in him.<sup>9</sup> It did declare that the people possessed certain constitutional rights. However, even after modernization, the government placed society, the interests of the community, and public commitment to the emperor above any individual. Indeed, the people were regarded as “subjects” of the Emperor, and they were granted these rights based only on the benevolent grace of their master, the Emperor.<sup>10</sup> Furthermore, the constitutional protection of their rights and freedoms existed only “within the limits of law.”<sup>11</sup> Therefore, if the Imperial Diet, the newly created legislative body, together with the Emperor passed a statute restricting such rights and freedoms, there was no room to claim infringement. Individuals had never had any personal freedom regarding sex or childbirth. The government promoted the birth of healthy boys to sustain the military.

Family relationships were decidedly hierarchical, structured around the *ie* (the house), which was headed by a housemaster.<sup>12</sup> They were also highly patriarchal since the housemaster was typically a father and husband. Under the Meiji family law system, members of an extended family belonged to a house, whose housemaster exercised strong authority over them. He could admit new members, decide where they would live, and grant his permission for younger members to marry. The estate also belonged to the house and was supposed to be inherited by the first-born son of the housemaster. In this system, women could not manage property, choose a husband, or make their own decisions on virtually any important matter, such as whether to pursue an education or to work. Many married the man whom the housemaster or their parents

had selected, entered his house, took its name, and were expected to bear sons. As we will see more fully, they were prohibited from having extra-marital sex, though this ban did not apply to married men wanting to have sex with unmarried women. A wife could not refuse her husband exercising his conjugal rights, and if she failed to bear a son, she could be evicted from the house. Women did not have the right to abort a child.

After the Second World War, Japan was placed under Allied occupation, and the new Constitution of Japan was enacted in 1946.<sup>13</sup> It was totally new, profoundly different from the Meiji Constitution.<sup>14</sup> Built on the principle of popular sovereignty, it declared that the people were sovereign.<sup>15</sup> Now merely a symbol of the state and the people, the Emperor had no political power.<sup>16</sup> The Constitution established a liberal democracy, enshrining many rights for citizens. It declared that the people “shall not be prevented from enjoying any of the fundamental human rights. These fundamental human rights guaranteed to the people by this Constitution shall be conferred upon the people of this and future generations as eternal and inviolate rights.”<sup>17</sup> Moreover, it baldly proclaimed that “all of the people shall be respected as individuals.”<sup>18</sup> It also stated that “all of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.”<sup>19</sup> In a radical denial of the family law system that existed under the Meiji Constitution, it specifically provided that “marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis” and that “with regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.”<sup>20</sup> Finally, it asserted that “the fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate.”<sup>21</sup>

As a result of this development, the entire legal system of Japan was overhauled. The family law and inheritance law sections of the Civil Code were rewritten, and the Criminal Code was revised in several important

ways. Especially, there was no longer a house headed by a housemaster. As we will see in the following chapters, individuals could now choose a marriage partner, and husband and wife were granted equal rights, even with respect to matters on family. Under its new Constitution, Japan placed a stronger emphasis on the individual than on society. Indeed, individualism lay at the core of the document.

However, these fundamental human rights are protected only so long as they do not interfere with public welfare. This is made clear in article 12 of the Constitution: “The freedoms and rights guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, who shall refrain from any abuse of these freedoms and rights and shall always be responsible for utilizing them for the public welfare.” Article 13 also states that the “right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.”

Moreover, even though society and the Constitution were greatly changed after the Second World War, a strong group orientation still persists in Japan, which has not embraced the highly individualistic ideal of the Constitution.<sup>22</sup> Although sex and childbirth have been significantly liberalized, they are not viewed as purely personal matters. As a result, their regulation has been discussed without constitutional scrutiny. Although this might also be the case in other countries, a critical examination of these issues in the context of Japan is especially useful due to its strong society and group orientation.

The focus on Japan is also particularly relevant because the country has the highest old-age dependency ratio in the world, as well as one of the lowest total fertility rates. Indeed, its population is rapidly aging. As of October 1, 2020, the population of Japan was 125,710,000, and the number of adults sixty-five years of age or older was 36,190,000, representing 28.8 percent of the population.<sup>23</sup> The number of seniors is projected to increase, expected to reach 33.3 percent of the population in 2036, meaning that one in three residents of Japan will be sixty-five or older.<sup>24</sup> With its significant population decline, Japan has the highest dependency ratio of seniors (aged sixty-five and older) to working-aged individuals (aged twenty to sixty-four).<sup>25</sup>

At the same time, its birthrate is rapidly declining. In 2006, 1,093,000 children were born in Japan, a number that decreased to only 902,000 in 2020.<sup>26</sup> It is estimated that the birthrate will drop to 782,000 in 2035 and to 557,000 in 2065.<sup>27</sup> In terms of total fertility, Japan ranks among the lowest countries.<sup>28</sup> There is no doubt that its population is shrinking. It is estimated to reach less than 120,000,000 in 2029, close to 99,240,000 in 2053, and approximately 88,080,000 in 2065.<sup>29</sup>

These numbers are especially concerning for Japan because, if left unaddressed, they will have serious social and economic impacts. As increasing numbers of seniors retire and fewer babies are born, the proportion of the working-age population is shrinking. In 1950, there were 12.1 working people for every senior, but this ratio significantly decreased to 2.3 to 1 in 2015. It is estimated that in 2065, it will be 1.3 to 1.<sup>30</sup> This number is entirely unsustainable. Therefore, the Japanese government is now faced with one of the most daunting tasks: increasing the rate of childbirth.

As we will see in the following chapters, the government has implemented a number of measures to encourage marriage and childbirth, all of which will have a significant impact on sexual autonomy. Specifically, they will inevitably place a great deal of pressure on women. It is important that, in light of the right to sexual autonomy, these measures do not place undue burdens on women. Women should still have the option to remain childless. However, for those who wish to have children, we must determine whether the government initiatives actually do facilitate childbirth. It is essential to discuss the measures that are available to the government and what limitations the Constitution places on it.

### **Roadmap of the Book**

**Chapter 1** of this book starts with the examination of sexual autonomy, elucidating the relevant issues and trying to extrapolate the fundamental principles to be applied. It initially looks at various American Supreme Court cases to determine whether this privacy jurisprudence can supply comprehensive and coherent fundamental principles. It closes by switching the focus to the Constitution of Japan, attempting to discover whether it protects the right to sexual autonomy.

**Chapter 2** explores sexual freedom, showing both how it was treated in the past and the need to protect it under the Constitution of Japan.

The chapter concentrates on the right to decide one's sexual or gender identity and to have sex, inquiring whether current and possible restrictions on these rights can be justified. It picks up sex with children and prostitution as the most controversial issues to be discussed in terms of sexual freedom.

In [Chapter 3](#), we will turn to the right not to be forced to have sex, which is a corollary to the right to have sex. Indeed, in most countries, including Japan, rape is a criminal offence. This chapter focuses on how the crime of rape is punished in Japan and on some of the impediments to that punishment, revealing that the rape law has many serious defects.

[Chapter 4](#) discusses the right to have children. Japan has no legal restrictions on the right to reproduce, though it did sterilize the mentally ill in the past, and some countries still do. Moreover, some countries castrate sex offenders, and some limit the number of children a couple can have. We will see whether such measures can be justified. The chapter also examines ART/MAR. Although Japan places very few legal restrictions on its use, obtaining it can be very difficult. We will consider whether this can be constitutionally justified.

In [Chapter 5](#), we will examine the right not to be forced to have a child, which encompasses the right to use contraceptives and to access abortion. Although these topics are highly controversial all over the world, the situation is complicated and nuanced in Japan. There is no legal ban on the use of contraceptives, but acquiring them is not always easy, thus resulting in unwanted pregnancies. The Criminal Code flatly bans abortion, but a different statute, which refers to it as “artificial termination of pregnancy (ATP),” permits it under certain circumstances. However, regardless of what the statutes may say, abortion in the early stage of pregnancy is freely available in practice. As a result, it is not a particularly controversial topic in Japan. However, it does not mean that there is no abortion issue in Japan.

Finally, [Chapter 6](#) considers the most daunting challenge for the government: how to increase the birthrate. In an attempt to reach this goal, it has instigated many measures, none of which have proven especially effective. Raising the numbers of immigrants could potentially solve the problem, but this is unlikely to be popular in Japan, so finding successful ways of amplifying the birthrate appears to be the only viable

approach at the moment. Whatever population policies the government may generate, the right to sexual autonomy must always be a starting point, and the government should not have a free hand in its efforts to promote childbirth.

### **Lessons for the Future**

Examining the predicament and challenges of Japan can provide some very important lessons. The most vital of these is that viewing sex and childbirth solely as legislative policy choices is inappropriate. Legislatures should not be allowed to decide on these issues merely on policy grounds. They need to be viewed as constitutional rights, and any government attempt to restrict them must be constitutionally justified. This would prompt a radical reconsideration of various government limitations on sexual autonomy. The second-most important lesson is that the issues of sex and childbirth need to be seen only as parts of the most foundational constitutional right of “sexual autonomy.” In other words, the right to sexual autonomy needs to be accepted as the grounding principle to guide our analysis. It is imperative for the government to realize that this right must be respected whenever it attempts to influence, let alone regulate, sex and childbirth in the service of a population policy. These are the major arguments of this book.

Japan is not alone in experiencing a declining fertility rate coupled with an aging population. Some countries are doing better at coping with the problem, but others are doing much worse. Some have attempted to bump up their population figures by accepting huge numbers of immigrants, and though this alternative may solve the immediate crisis, it also creates many new issues. Moreover, as in Japan, it may not be universally popular in every country, which means that working to increase the birthrate will be the only available course. For such countries, the lessons provided in this book will be especially relevant. The necessity of using the constitutional mandate of sexual autonomy as a baseline and then examining possible countermeasures to the declining birthrate is most vividly shown in Japan, but it needs to be accepted in other countries as well.

# Sexual Autonomy: Sex, Childbirth, and the Constitution

# 1

Although no clause in the Constitution of Japan protects sexual freedom, Japanese society perceives it as one of the numerous freedoms an individual can enjoy. However, it has also been subject to many limitations in both the past and the present. Historically, Japan has assumed that sex and gender are established at birth.<sup>1</sup> Every person will be born either male or female, the sex or gender of newborns were to be registered, and no individual could subsequently change that identification. Throughout the years, Japanese law imposed several bans on sexual freedoms, and though some were later removed, others remain in place today, including sex with children, rape and sexual assault, and prostitution. Many countries prohibit other kinds of sexual activities. Across Europe and North America, the Christian belief that sex is a sin was the foundation for various legal bans, including on sodomy and homosexuality.<sup>2</sup> Japan's two leading religions, Shintoism and Buddhism, do not condemn sex in the same way. Therefore, the religious censure of certain sexual activities is not as strong in Japan as in Christian countries. Nevertheless, moral condemnation and social prejudice could work to curb some sexual behaviour and could fuel statutory restrictions. Moreover, the family system – especially the marriage system – limits sexual freedom on a practical level. For example, bigamy is illegal in Japan. Even if a marriage has totally broken down, the spouses cannot remarry without



first obtaining a divorce. The marriage system also accepts heterosexual relationships only and does not allow same-sex marriage. Furthermore, husband and wife are mandated to carry the same surname. These regimes necessarily exclude certain people from legal marriage. Without its blessing, an individual's sexual freedom could be hugely curtailed. We therefore need to examine whether these bans and restrictions can be justified.

A corollary of the right to sexual freedom is the right not to be coerced to have sex. In Japan, this right is protected by the rape and sexual assault provisions in the Criminal Code, which impose punishment for forcible sexual intercourse or obscene (indecent) sexual conduct with assault or intimidation. These provisions are, however, quite controversial. Many argue that they are too restrictive and that they fail to protect victims. It is imperative to determine whether the laws are adequate.

The right to have sex also encompasses the right to have a child. At the time of writing, Japan had practically no restrictions on the right to procreate, though it once imposed the mandatory sterilization of patients with mental disabilities. Other countries have castrated sex offenders or limited the number of children a family can have. We need to ask whether such measures could ever be justified in Japan. Moreover, the use of assisted reproductive technology (ART) and medically assisted reproduction (MAR) is not illegal, but access is seriously limited. Furthermore, the law of parentage, which developed long before the rise of ART/MAR, is out of touch with modern conceptions of family. We need to explore these practical barriers to exercising the right to have children.

Finally, the right to have a child gives rise to the right not to be forced to have one. Contraception and abortion should be accepted as means to prevent pregnancy and childbirth. Contraceptives are not banned in Japan, but the lack of access creates a huge practical barrier. Although abortion per se is illegal, it is widely practised. This ease of access despite the legal ban is troublesome. We need to inquire whether this position can be justified.

The right to have sex or to refuse sex and the right to have children or not to have them are important social issues in many countries. Japan needs to squarely face these hard issues too. They tend to be addressed as legislative or policy issues in many countries, but they need

to be treated as constitutional issues instead. The Constitution is the foundational law of the country. It sets out the basic rules for government. We need to consider sex and childbirth as constitutional issues because they are fundamental to the most intimate part of life and play a vital role in human and social survival. Moreover, it is imperative to see them as interrelated. They are not stand-alone issues that can be assessed independently of each other. This book, therefore, sets out to examine them as interconnected constitutional issues to be approached as a matter of sexual autonomy.

### **The Reason for Focusing on Sexual Autonomy**

#### *The Need for an Integrated Framework*

One may ask why the issues of sex and childbirth would be best analyzed as a matter of sexual autonomy. The term “sexual autonomy” is used to signify both sexual freedom and freedom of choice in childbirth. Sexual freedom includes the right to decide or change one’s sex or gender, the right to have sex, and the right not to be forced to have sex. It represents the idea that sex should be consensual and that all consensual sex should be respected. Freedom of choice in childbirth includes the right to have a child (or to become a parent), as well as the right not to have one, via the use of contraceptives and access to abortion. In the United States, some of these issues have been discussed as privacy rights, furnishing important lessons for everyone.

#### *A Lesson from the United States*

The Supreme Court of the United States (SCOTUS) has interpreted the right to privacy under the Constitution as including various freedoms of the individual under the due process clause of the Fourteenth Amendment, which stipulates that “no State shall deprive any person of life, liberty, or property, without due process of law.”<sup>3</sup> The SCOTUS thus accepts procreation as a fundamental right that is protected under the Constitution.<sup>4</sup> It also recognizes the right to use contraceptives as a constitutionally protected privacy right in *Griswold v Connecticut*.<sup>5</sup> It also used to recognize the right to an abortion as a constitutionally protected privacy right as well, in *Roe v Wade*.<sup>6</sup> The exact scope of the right

to privacy is still unclear. It probably would have included the right to make deeply personal sexual and reproductive decisions, such as whether to have a child or an abortion.

In the past, however, there were doubts over whether the right to privacy could also include the right to sexual activity itself, especially non-reproductive sex. In *Bowers v Hardwick*, for example, the SCOTUS declined to recognize a right to homosexual sex under the Constitution, opting to uphold a Georgia statute that criminalized sodomy.<sup>7</sup> In *Lawrence v Texas*, however, the SCOTUS struck down a statute that criminalized homosexual sodomy and clarified that the right to privacy included the right to engage in private, consensual sexual activities.<sup>8</sup>

Moreover, in *Obergefell v Hodges*, the SCOTUS invoked the Constitution in striking down the exclusion of same-sex marriage.<sup>9</sup> The SCOTUS held that “under the Due Process Clause of the Fourteenth Amendment, no State shall ‘deprive any person of life, liberty, or property, without due process of law.’” The fundamental liberties protected by this clause “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>10</sup> In holding that the right to marry is indeed protected by the Constitution, and that it should also be extended to same-sex couples, the SCOTUS stated that “like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”<sup>11</sup>

It therefore appeared that the SCOTUS was ready to define the right to privacy as including autonomous decisions on personal matters such as family relationships, reproduction, and childbearing. Nevertheless, these judgments are filled with ambiguity, and their reach remains unclear. For instance, the SCOTUS in *Lawrence* criticized *Bowers* by quoting the key part of its opinion:

“The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.” *Id.*, at 190. That statement, we now conclude, discloses the Court’s own failure

to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. The laws involved in *Bowers* and here are, to be sure, statutes that purport to do no more than prohibit a particular sexual act. Their penalties and purposes, though, have more far-reaching consequences, touching on the most private human conduct, sexual behaviour, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.<sup>12</sup>

According to this, the liberty at stake encompasses more than simply having sex with a partner of the same gender. Instead, it extends to a much more fundamental freedom: the right to define a personal relationship and to set its boundaries.

Again, in summarizing recent SCOTUS decisions on the right to privacy, it confirmed in *Obergefell* that the rulings had protected

personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to

the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>13</sup>

*Sexual Autonomy: The Better Alternative*

Therefore, the SCOTUS has already developed the right to privacy doctrine to analyze these matters. It might be argued that other countries, including Japan, could use this approach. However, the SCOTUS understanding of the underlying right to privacy is too broad and could potentially include all personal rights that an individual can enjoy under the Constitution. The boundaries of this right are too vague.

It is important to point out that the SCOTUS in *Lawrence* believed that homosexual sodomy was sexual conduct, though it was not traditional sexual intercourse. The SCOTUS stated that its other recent judgments “show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to *sex*.”<sup>14</sup> Apparently, the SCOTUS has now accepted that homosexual acts between two male adults do constitute “sex.” It reiterated that *Lawrence*

does involve two adults who, with full and mutual consent from each other, engaged in *sexual practices* common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private *sexual conduct* a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.<sup>15</sup>

This statement is another indication that the SCOTUS has expanded the traditional understanding of sex to include much broader sex-related activities, including between a gay couple. However, the SCOTUS has not provided a definition of sex.

Moreover, in distinguishing consensual homosexual activities from other sexual activities that have been subject to statutory bans, the

SCOTUS explicitly made the following reservation: *Lawrence* “does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”<sup>16</sup> This suggests that sex involving minors, coercion, or a person who is in an unequal relationship, or that takes place in public or with a prostitute may not be constitutionally protected. However, the SCOTUS has not indicated how to distinguish which sexual activities fall outside the protection of the Constitution.

Moreover, in totally reversing this trend of expanding the right to privacy and, in overturning *Roe*, which started this revolutionary change, and *Planned Parenthood v Casey*,<sup>17</sup> which confirmed *Roe* on *stare decisis* grounds, the SCOTUS in *Dobbs v Jackson Women’s Health Organization*,<sup>18</sup> cast a serious doubt on the validity of these precedents. The SCOTUS declares that

Even though the Constitution makes no mention of abortion, the Court held that it confers a broad right to obtain one. It did not claim that American law or the common law had ever recognized such a right, and its survey of history ranged from the constitutionally irrelevant ... to the plainly incorrect ... After cataloging a wealth of other information having no bearing on the meaning of the Constitution, the opinion concluded with a numbered set of rules much like those that might be found in a statute enacted by a legislature.<sup>19</sup>

It thus concluded that “[w]e hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely – the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.” The right to abortion does not fall within this category.<sup>20</sup> In the end, it was held, that

*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division. It is time to heed the Constitution and return the issue of abortion to the people's elected representatives. "The permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting" ... That is what the Constitution and the rule of law demand.<sup>21</sup>

The SCOTUS now made clear that "[c]onstitutional analysis must begin with 'the language of the instrument,' which offers a 'fixed standard' for ascertaining what our founding document means ... The Constitution makes no express reference to a right to obtain an abortion, and therefore those who claim that it protects such a right must show that the right is somehow implicit in the constitutional text."<sup>22</sup> It concedes that the Due Process Clause of the Fourteenth Amendment protects two categories of rights. The first one consists of rights guaranteed by the first eight Amendments. The second category comprises a "select list of fundamental rights that are not mentioned anywhere in the Constitution." "In deciding whether a right falls into either of these categories," the SCOTUS declares, "the Court has long asked whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.' ... And in conducting this inquiry, we have engaged in a careful analysis of the history of the right at issue."<sup>23</sup> "Historical inquiries of this nature are essential," the SCOTUS continues, "whenever we are asked to recognize a new component of the 'liberty' protected by the Due Process Clause because the term 'liberty' alone provides little guidance. 'Liberty' is a capacious term."<sup>24</sup> In interpreting what is meant by the Fourteenth Amendment's reference to liberty, it admonishes,

we must guard against the natural human tendency to confuse what that Amendment protects with our own ardent views about the liberty that Americans should enjoy. That is why the Court has long been

“reluctant” to recognize rights that are not mentioned in the Constitution ... Substantive due process has at times been a treacherous field for this Court ... and it has sometimes led the Court to usurp authority that the Constitution entrusts to the people’s elected representatives ... As the Court cautioned ... “[w]e must ... exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.” The Court must not fall prey to such an unprincipled approach. Instead, guided by the history and tradition that map the essential components of our Nation’s concept of ordered liberty, we must ask what the Fourteenth Amendment means by the term “liberty.” When we engage in that inquiry in the present case, the clear answer is that the Fourteenth Amendment does not protect the right to an abortion.<sup>25</sup>

Shrugging off the argument based on *stare decisis* to keep the *Roe* holding,<sup>26</sup> the SCOTUS explicitly overruled it.

The *Dobbs* holding triggered the suspicion that the SCOTUS might totally rewrite the whole privacy jurisprudence.<sup>27</sup> The Justice Alito’s majority opinion carefully emphasized the uniqueness of abortion<sup>28</sup> and explicitly reject any such suspicion.<sup>29</sup> Thus, although the right to an abortion was now rejected by the SCOTUS, the rest of the cases still remains valid law.

The *Dobbs* holding is in one sense inevitable. The right to privacy, which the SCOTUS has relied on in these cases, is so amorphous and so undefined. It does not have any clear definition and any boundaries.<sup>30</sup> The right to create and maintain an intimate personal relationship adopted by the *Lawrence* and *Obergefell* is apparently too unprincipled.

In light of these ambiguities and the difficulty in generating a precise definition of the right to privacy, as well as the fact that the SCOTUS has now concluded that the right to an abortion was not included in the definition of the right to privacy, analyzing issues of sex and childbirth in terms of sexual autonomy, rather than privacy, would be the best course. All these issues are part of a single right to sexual autonomy, which deserves to be constitutionally protected. Whereas the SCOTUS focuses on the broader right to define a personal relationship and to set



its boundaries, it is better to focus specifically on sexual autonomy – that is, sexual freedom and the freedom of choice regarding childbirth.<sup>31</sup>

Moreover, it is best to accept that sexual autonomy encompasses all kinds of decisions on sex and childbirth. We can then examine whether bans and restrictions can be justified on the assumption that all these decisions, at least at face value, fall within the definition of sexual autonomy.

## **Sexual Autonomy and the Constitution**

### *Constitutional Protection*

The starting point of my analysis is whether sexual autonomy should be constitutionally protected. Sexual autonomy is deeply personal. It is an essential part of love, integral to individual development, and vital for the reproduction of children. Securing it is also vital for people as both individuals and citizens. In a liberal democratic country, sex, childbirth, and raising children are essential in furthering that system into the future. Obviously, therefore, sexual autonomy needs to be constitutionally protected.

### *Sexual Autonomy and the Constitution of Japan*

The Constitution of Japan has no provisions that explicitly protect sexual autonomy.<sup>32</sup> Although many Japanese people see sex and childbirth as individual freedoms, there is no clear consensus regarding whether they are constitutionally protected.

If sexual autonomy were a protected right under the Constitution, the government could not unreasonably interfere with it. Japan's national legislature, the Diet, wields legislative power.<sup>33</sup> It enacted the Criminal Code, the Civil Code, and other statutes. Both of these codes have a significant impact on the sexual autonomy of individuals. The judiciary exercises judicial power.<sup>34</sup> Furthermore, the Constitution stipulates that the Supreme Court of Japan (SCOJ) has ultimate authority over all constitutional questions.<sup>35</sup> All courts can review the constitutionality of legislative decisions, but the SCOJ, as the highest court, has the final say.

Thus, if sexual autonomy were constitutionally protected, the judiciary would need to determine whether any legislative restrictions on sexual autonomy could be justified. To examine various issues related to the

right to sexual autonomy, we must define precisely what is meant by “sex” and must determine what should be included in the definition of sexual autonomy. Furthermore, it is important to consider how the right to sexual autonomy should be safeguarded by the judiciary, what kinds of interests the government can invoke in regulating it, and to what extent such government interference can be justified. These examinations will lead to important constraints on the government.<sup>36</sup>

How should we infer the right to sexual autonomy from the Constitution? The most natural approach is to follow the lead of the SCOTUS and accept sexual autonomy as a “privacy right” that is protected under the due process clause.<sup>37</sup> In Japan, however, article 13 of the Constitution declares that “all of the people shall be respected as individuals.” In this, it mandates the adoption of individualism and prioritizes individuals ahead of the state or society, stipulating also that their “right to life, liberty, and the pursuit of happiness” shall be the “supreme consideration in legislation and in other governmental affairs.”<sup>38</sup> Most academics agree that article 13 should include unenumerated fundamental human rights, one of which should be some kind of right to autonomy.<sup>39</sup> This should encompass family affairs, including the right to marry, divorce, have children, and cohabit.<sup>40</sup> This constitutes an acceptance of the right to privacy, as developed by the SCOTUS in the United States. Therefore, it is a natural step to enshrine the right to sexual autonomy in article 13, rather than relying on the due process clause.

On the other hand, article 24 of the Constitution makes a special provision on family matters and family law:

Marriage shall be based only on the mutual consent of both sexes and it shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis. With regard to choice of spouse, property rights, inheritance, choice of domicile, divorce and other matters pertaining to marriage and the family, laws shall be enacted from the standpoint of individual dignity and the essential equality of the sexes.<sup>41</sup>

Article 14 already provides that “all of the people are equal under the law and there shall be no discrimination in political, economic or

social relations because of race, creed, sex, social status or family origin.” Article 24 has thus been viewed as a special equality provision on family matters and family law.

Although article 24 has not been interpreted as a substantive right provision, it explicitly mandates the government to enact family laws based on “individual dignity and the essential equality of the sexes.” Thus, it could and should be construed in a way that grants individuals the right to autonomy in family affairs as a substantive right.<sup>42</sup> Since article 24 is a specific provision on family matters and family law, it could be seen as superior to article 13 in protecting sexual autonomy as a substantive right.

Either way, there is ample textual support for granting constitutional protection to the right to autonomy in family affairs. But given that the original intent of article 24 was to reject the family law system of the Meiji government, it is apparent that it is better designed than article 13 to secure individual dignity and the essential equality of sexes in all aspects of law relevant to family affairs.

The SCOTUS, in rejecting the right to an abortion and casting doubt on why it should be constitutionally protected, now focuses on the text and history. If we exclusively focus on the history, the right to sexual autonomy would likely not be justified. Unlike the right to privacy, which the SCOTUS had relied on to justify these decisions, however, the right to sexual autonomy is much defined and principled. It can be considered an integral part of individuals’ lives, and it constitutes the very essence of one’s personhood. Moreover, if liberal democratic society is to survive, the right to sexual autonomy is indispensable. Without sexual autonomy, no one can create a family and participate in democratic process. Thus, although history may not be on the side of sexual autonomy, there are ample reasons to grant constitutional protection to such a right. Moreover, unlike in the US, there is an ample textual support for sexual autonomy in Japan.

Article 24 does not define “marriage and the family.” Apparently, however, it guarantees the autonomy right with respect to all aspects of family, including whether to have an intimate relationship with someone, whether and where to cohabit, whether a couple attempt to have a child, whether they welcome it, and what kind of relationship they want to

have with it. It should also entail an individual's decision on what kind of relationship to have with parents, siblings, and other relatives. In this sense, the guaranteed right to autonomy in family affairs should be broad enough to include sexual autonomy, which should be a primary part of autonomy on family affairs. It must also be noted that the right to have sex should be protected regardless of whether sex occurs within a legal marriage. Sex can be part of marriage, but it is not necessarily exclusive to marriage. Rather, it is an essential aspect of life, often a manifestation of love, and integral in creating human life. Therefore, the right to have sex should be seen as an aspect of sexual autonomy and should be protected under article 24, but this protection should extend to sexual freedom in general without regard to marriage and family.

The right to sexual autonomy should thus be broad enough to encompass all personal decisions on sexual matters. It should include the right to decide or change one's sexual or gender identity and the right to decide whether to have sex, with whom, when, where, and how.<sup>43</sup> Additionally, sexual autonomy should mean that anyone can refuse sex, giving rise to a right not to be forced to have it.<sup>44</sup> Sex must be voluntary and consensual. Any forced sex without consent is a violation of this right.

Sexual autonomy should also include the right to have a child or to become a parent. Of course, as sex was once the only means of reproduction, this right was a natural corollary to the right to have sex. But as we will see later, women can now become pregnant using technological assistance, and therefore the right to become a parent should be independent of the right to have sex. Additionally, it should include the right to access ART/MAR. It should also include the right to be treated as parents under the law.

Also, the right to become a parent includes the right not to do so. This means that an individual should have the right to use contraceptives and to terminate a pregnancy. As discussed later on, the right to abortion should therefore be recognized as a part of sexual autonomy protected under the Constitution.

### *The Standard of Review*

In countries where courts are empowered to review the constitutionality of legislation or other government actions, citizens can use them to

challenge government restrictions of sexual autonomy. However, the way in which courts review and scrutinize such bans or restrictions differs from country to country.

In the United States, the SCOTUS initially closely scrutinized any restriction on the right to abortion. This principle originated in *Roe*, a landmark 1973 case in which the SCOTUS held that the right to abortion was included in the privacy rights under the due process clause of the Fourteenth Amendment and that it was a “fundamental” right.<sup>45</sup> Although it is not an absolute right, as was claimed, any restriction was subject to strict scrutiny: only a compelling and specific government interest can justify a restriction. Any overbroad or underinclusive restrictions would be deemed impermissible. Therefore, the SCOTUS struck down a Texas statute that prohibited abortion except to save the life of the mother, finding it overbroad.

This adoption of strict scrutiny has significant implications for other right-to-privacy cases. If it is applied in other cases, there is very little room for government restriction. In cases involving economic liberty, the SCOTUS usually applies a rationality review: it will uphold economic regulation so long as it serves a legitimate rational goal, and its means have a rational connection to that goal. If legislative judgments on the necessity of regulation and on the choice of means are susceptible to objection, courts generally defer to the judgments of the legislature. Under this very lenient standard of review, almost any restriction can be justified. It is therefore unsurprising that the SCOTUS, which had used strict scrutiny on restrictions on liberty of contract in the early twentieth century, came to apply this lenient standard and upheld all economic regulations dating from 1938 following the fierce criticism against its judicial activism.

As a result, when a restriction on sex or childbirth is challenged in the United States, the argument is usually framed as an infringement of the right to privacy, as this calls for the court to apply strict scrutiny and increases the likelihood that it will strike down the restriction. Although the SCOTUS later applied a somewhat more lenient standard of scrutiny in abortion cases,<sup>46</sup> many lawyers still expect courts to apply strict scrutiny in cases involving the right to privacy. Although the *Dobbs* judgment used such a lenient standard of review to examine the

rationality of an abortion ban, since the SCOTUS found no ground to protect the right to an abortion,<sup>47</sup> all other cases still remain valid, which applies heightened scrutiny to the infringement of other privacy rights.

In Canada and many European countries, the courts are not mandated to apply such strict scrutiny. Instead, they usually apply a single standard in all cases: the proportionality review.<sup>48</sup> According to the Supreme Court of Canada (SCOC), if a restriction on individual rights is to be justifiable, it must serve a “pressing and substantial” government interest, and its means must be proportionate: a rational connection must exist between the means and the aim, impairment must be minimal, and the overall balance must be preserved.<sup>49</sup> The review standard does not differ depending on the right involved. However, the SCOC emphasizes that courts need to consider contextual factors in applying it. This means that it is sometimes easy to satisfy but sometimes difficult.<sup>50</sup> It has much in common with the proportionality review adopted by the Federal Constitutional Court of Germany (FCCG). It is highly *ad hoc* and extremely unpredictable.

Japan has not accepted either the dichotomy adopted by the SCOTUS or the proportionality review of the SCOC.<sup>51</sup> As a result, the SCOTUS framework of analysis is unclear and unpredictable. Moreover, the SCOTUS has never squarely faced the constitutional questions raised in this book.

Although scholars who study constitutional matters agree that the right to sexual autonomy should be constitutionally protected, there is little discussion over what kind of judicial standard should be applied in reviewing the constitutionality of restrictions on sexual autonomy. If we follow the lead of the SCOTUS and take the strict scrutiny approach, the government will probably have difficulty in justifying limitations. On the other hand, if we adopt the more lenient review, as applied by the SCOTUS to economic liberties, courts will probably uphold all sorts of restrictions. If we follow the proportionality review of the SCOC or the FCCG, the results will be highly unpredictable.

Of course, the adoption of a review standard may not be as critical as is often assumed. For instance, in the United States, the SCOTUS has struck down legislation even under the lenient rationality standard. Specifically, when a case involves discrimination against homosexuals, it has indicated that homophobia can never be acceptable, and the SCOTUS

uses the baseline rationality review to determine if this restriction can be justified for reasons other than mere prejudice.<sup>52</sup> Therefore, even under the lenient rationality standard, some kinds of restrictions could be struck down as unreasonable.

Nevertheless, the choice of review standard is still important as it affects judicial scrutiny and the way in which courts reach their decisions. From this perspective, strict scrutiny is very demanding and could have a huge impact on sexual autonomy cases. Since sexual autonomy is so essential in a liberal democracy, adoption of strict scrutiny in cases involving it would be justified. Moreover, many sexual autonomy cases involve sexual minorities whose values and views on sexual relationships may not to be shared by the mainstream. Therefore, these cases appear to involve “isolated and insular” minorities,<sup>53</sup> leading to an expectation that the political process is not available for redress. The judiciary, politically independent, is their only avenue to seek redress. Therefore, the strict scrutiny approach is best for sexual autonomy cases.

#### *Government Restrictions on Sexual Autonomy*

Even if the right to sexual autonomy is constitutionally protected, this does not mean that the government cannot regulate or limit it. Certain constraints can be justified, and sexual autonomy has been subjected to all kinds of limits in the past. By reviewing them, we can identify government interests that could be invoked to justify such restrictions. We can clearly see the legitimacy and limits of government justification in cases involving sexual freedom.

First, in aid of facilitating its various programs, the government might have a legitimate interest in collecting information on the sex or gender of individuals. This might restrict an individual’s right to identify his or her sex or gender, at least until that person might choose to change it, but it should be allowed for the accomplishment of compelling interests.

Second, the government has a legitimate interest in protecting the freedom of everyone not to be coerced into sex. The punishment for rape and sexual assault can thus be justified as a means to protect the sexual autonomy of others. Banning sex with someone who is incapable of giving consent is also justifiable. For instance, a person who is unconscious or semi-conscious, or who is extremely intoxicated, is not

capable of understanding the situation and agreeing to sex. Therefore, sex with that person is defined as forced.

The corollary to this principle is the necessity to protect those who have a diminished capacity to consent. Some examples here include children, persons with mental disabilities, and those who are at a disadvantage in a relationship where power is unbalanced. These individuals are vulnerable to exploitation, and many consider them to be in need of protection. As a result, a ban or other kind of restriction could sometimes be called for to shield them from unwanted sex.

Though intended to be beneficial, such measures are paternalistic, in that they remove the freedom to give consent. Generally, they cannot be applied to adults who are not categorized as vulnerable. Most adults are assumed to have the capacity to understand and to give or refuse consent, and they therefore do not need such protection. Thus, any paternalistic restrictions need to be carefully justified, based on the degree of vulnerability, the extent of the protection, and whether the need for it outweighs the freedom that such individuals should have.

Sexual freedom could be restricted for other compelling reasons. Everyone has a right to engage in sex, but everyone should also have a right not be disturbed by sex in public places. No one should be forced to watch someone having sex in public. The government would have a legitimate interest in protecting the rights and interests of others in this regard.

Furthermore, it has a legitimate and compelling interest in securing public safety and public health. Bans or restrictions on private activities, including sex, should be allowed if they are necessary to secure safety or health.

On the other hand, governments have regulated sex for moral reasons, which still sometimes occurs. For instance, the prohibition on having sex in public was at least partially justified in the name of defending morality. Group sex might be forbidden for the same reason. The ban on sex with an unmarried person was justified on the assumption that sex was reserved solely for married couples. The ban on adultery was intended to protect family order and monogamous sexual relationships – being unfaithful to a partner was seen as immoral. In Europe and North America, prohibitions on various kinds of “deviant” and “atypical” sex,<sup>54</sup>



such as sodomy, were grounded in Christian beliefs. However, this resort to morality was eventually viewed as indefensible. In *Lawrence*, the SCOTUS made clear that restrictions on sexual activities cannot be justified simply because mainstream society does not perceive them as moral or even because it condemns them as immoral. Sexual autonomy, if it means anything, must mean that people can make their own decisions about their sexuality so long as this does not restrict the rights and interests of others. Various sexual activities should not be banned simply because they are deemed immoral or because they disturb the moral sense of a community.

In *R. v Labaye*, a case involving a brothel in which indecent acts were committed, the SCOC stated that

historically, the legal concepts of indecency ... as applied to conduct ... have been *inspired and informed by the moral views of the community*. But over time, courts increasingly came to recognize that *morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices*. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval.<sup>55</sup>

The SCOC held that only “conduct which society formally recognizes as incompatible with its proper functioning” could be subject to criminal punishment.<sup>56</sup> It elaborated:

Two general requirements emerge from this description of the harm required for criminal indecency. First, the words “formally recognize” suggest that the harm must be grounded in norms which our society has recognized in its Constitution or similar fundamental laws. This means that the inquiry is not based on individual notions of harm, nor on the teachings of a particular ideology, but on what society, through its laws and institutions, has recognized as essential to its proper functioning. Second, the harm must be to a serious degree. It must not only detract from proper societal functioning but must be *incompatible* with it.<sup>57</sup>

The SCOC explained different types of the relevant harms:

Three types of harm have thus far emerged from the jurisprudence as being capable of supporting a finding of indecency: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct; (2) harm to society by predisposing others to anti-social conduct; and (3) harm to individuals participating in the conduct. Each of these types of harm is grounded in values recognized by our Constitution and similar fundamental laws. The list is not closed; other types of harm may be shown in the future to meet the standards of criminality ... But thus far, these are the types of harm recognized by the cases.<sup>58</sup>

The SCOC went on to declare that

reference to the fundamental values of our Constitution and similar fundamental laws also eliminates types of conduct that do not constitute harm in the required sense. Bad taste does not suffice ... *Moral views, even if strongly held, do not suffice. Similarly, the fact that most members of the community might disapprove of the conduct does not suffice* ... In each case, more is required to establish the necessary harm for criminal indecency.<sup>59</sup>

This holding is remarkable because it explicitly rules out the possibility of invoking morality as a justification for regulating sex. Any such infringement on sexual activity needs to be justified by specific harms that the government has a legitimate interest to prohibit.<sup>60</sup>

This reasoning should be applicable to all sexual autonomy cases. We should follow the SCOTUS and the SCOC and deny morality as a justification for regulating sexual autonomy. All individuals have different opinions and attitudes toward sexual autonomy, which cannot be restricted merely because mainstream society sees certain conduct as immoral, indecent, or unethical. To determine whether a restriction is acceptable, we need to assess the objective harms to people or to a community. When we examine each instance in which sexual autonomy is regulated, we need to carefully sort out what interests the government can invoke to justify the ban or restriction, and whether they are legitimate and sufficient.

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