



## Safeguarding identity with change: An analysis of the LGBT community

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### ABSTRACT

*The issues regarding the LGBT community has been debated for a long and it has a great significance in the contemporary world. These paper aims have an analysis of the LGBT community and the issues faced by them. The term LGBT comprises of Lesbian, Gay, Bisexual, and Transgender. Initially, this paper describes the composition of the LGBT community. A global perspective as well as an India perspective, and the analysis of the landmark judgment for decriminalizing Section 377 has been provided. The core of the paper lies with the connection of human rights with sexual orientation and gender identity.*

**Keywords**— LGBT, Gender identity, UDHR, ECHR

### 1. INTRODUCTION

*"I am what I am, so take me as I am"*

*-Johann Wolfgang Von Goethe*

Every human being is born with some inherent values. The emphasis on the unique being of an individual is the salt of his/her life. The constitution of India prides in its social, political, economic justice alongside the fraternity amongst its citizens and the integrity of the society. Nevertheless, the progressive laws, there still remain those invisible shackles of societal oppression upon the Lesbian, Gay, Bisexual, Trans-gender community, who have been an integral part of our nation and its culture. It is to understand that irrespective of what we are from inside or outside does, not matters, every human being from infancy to adulthood is entitled to dignity. As we all know that change is inevitable so the policies and laws should be designed to give the LGBT community a sense of belonging. With the making of the laws, cultural barriers need to be driven out of our society with the properly guided help through academicians, scholars and each family unit of the society.

### 2. DEFINITIONS

LGBT stands for Lesbian, Gay, Bisexual, and Transgender. The term lesbian is specifically for women who are attracted to women. Gay is a person who is attracted primarily to the members of the same sex, Gay can refer both to a person of the male or female gender. Transgender is a term frequently used for people who do not identify themselves with their assigned gender at birth or the binary gender group commonly include under the term transgender are transsexual individuals. A transsexual is a person who has correct his/her gender discrepancy through gender reassignment meaning that the transsexual is medically corrected to his/her real gender identity. [1]

Gender identity and sexual orientation is defined under Yogyakarta Principles [2] as; " Gender identity refers to a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the person's sense of body(which may involve ,if freely choose ,modification of bodily appearance or function by medical ,surgical or other means)and other expressions of gender, including dress ,speech and mannerisms. Sexual Orientation refers to each person's capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender".

### 3. GLOBAL PERSPECTIVE

As the world is more globalized and frontiers are constantly more diffused. It seems to be observed in the levels of social exclusion and rejection that the members of the LGBT communities receive. Individual and institutional homophobia is presented as a key element for the justification of hate that might lead to a homicide. The need for psychology to develop ethical standards for the interventions in these communities is too made in a better way.

Many countries have decriminalised same-sex orientation and behaviour. Several liberal and progressive nations LGBT rights to include human, civil and political rights. The countries like Brazil, Canada, England, France, South Africa, Spain, and Sweden and

in other states in the USA have legally recognised same-sex civil partnerships and marriages. They also include anti-bullying legislation, anti-discrimination student, employment and housing laws, immigration equality, equal age of consent law and hate crime laws providing enhanced criminal penalties for prejudiced motivated violence against LGBT people [3] Recently Tokyo's municipal government passed a bill that prohibits discrimination against LGBT people. In doing so the city aims to demonstrate its commitment to equal rights for all as well as making the 2020 Tokyo Summer Olympic Games a springboard for human rights in Japan and beyond. Japan twice voted for UN's resolutions to end violence and discrimination against LGBT people, this law took its inspiration from the Olympic charter. The aim of the new law is to not to unduly discriminate on the basis of the gender identity or sexual orientation. In December 2014, as part of its "Olympic Agenda 2020", the International Olympic Committee confirmed that all future host city contracts would include a requirement specifically banning discrimination on the basis of sexual orientation.

In 2017, the International Lesbian, Gay, Bisexual, Trans and Intersex Association noted in its annual State-sponsored Homophobia Report that 124 countries no longer penalise homosexuality. The change in laws in these countries was given effect to, either through a legislative amendment to the statutory enactments by way of the court judgements. Relationships between same-sex couples have been increasingly accorded protection by states across the world. As per the aforesaid Report, a total of 24 countries now allow same-sex couples to marry, while 28 countries legally recognise partnerships between same-sex couples. Several countries have enacted enabling legislation which protect LGBT people from discrimination and allow them to adopt children.

The British PM Theresa May in her speech at the Common Wealth Joint Forum urged Common Wealth Nations to overhaul "outdated anti-gay laws, and expressed regret regarding Britain's role in introducing such laws, across the world, discriminatory laws were made many years ago continue to affect the lives of many people, criminalising, same-sex relations and failing to protect women and girls".

Article 7 of the UDHR declared equal protection against any discrimination in the violation, Article 12 of UDHR upholds human dignity and autonomy which is again backed by Article 16 which declares that in order to ensure very human beings lives a dignified life the subsisting laws of a nation must be altered so inclusive of the family law which is applicable to families that makes the basic unit of a society.

#### **4. INDIAN PERSPECTIVE**

When we walk through the ancient India Shikandi of the Mahabharata was a transgender. Even in Kamasutra and Veda's, third gender was mentioned (Tritiya Prakriti). It is mentioned in Arthashastra and Manusmriti homosexuality is a very minor offence. "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution". With these words, Justice Indu Malhotra held that section 377 of IPC was unconstitutional in September 2018. The landmark judgement *Navtej Singh Johar v. Union of India* [4], which paved the way to the new era of LGBT communities in India. Gross out and contempt have been there since the inception of section 377. When Lord Macaulay drafted the penal code, he called the homosexuals as "odious" and it was modelled on the basis of Buggery Act of 1533. The term 'buggery' refers to an "unnatural sex act against God's will" and criminalises anal penetration, bestiality, and homosexuality. In 2003 the government of India said that decriminalising homosexuality would "open the floodgates of delinquent behaviour". In 2009, the Delhi High Court in *Naz Foundation v. NCT of Delhi* [5] found section and other legal prohibitions against private, adult, consensual, and non-commercial same-sex conduct to be in direct violation of fundamental rights in 2013 the Supreme Court ruling on an earlier challenge to 377, held that LGBT people constituted a "minuscule minority" who bore only 'so-called rights'.

As the saying "Never judge a person by their appearance", advanced studies have proved that an individual's gender is cannot be determined by the appearance. Adhering to the scientific studies our honourable judges upheld that sexual orientation is an innate quality since his foetal stage and this would have to be accepted to be natural and not something that a man can alter or create.

The court unanimously ruled that section 377 is unconstitutional as it infringed on the fundamental rights of autonomy, intimacy and identity, thus legalising homosexuality in India and the court overturned its 2013 judgement. Furthermore, it ruled that any discrimination on the basis of sexual orientation is a violation of the Indian constitution. Sexual orientation is one of the many biological phenomena which is natural and inherent in an individual and is controlled by neurological and biological factors. The science of sexuality has theorized that an individual exerts little or no control over who she/he gets attracted to. Any discrimination on the basis of one's sexual orientation would entail a violation of the fundamental right [6].

##### **4.1 An analysis of 17 years of battle**

- **February 15, 2001:** Naz Foundation filed PIL challenging the validity of Section 377
- **July 2, 2009-HC:** decriminalises the consensual acts among adults in private.
- **December 11, 2014:** Apex court recriminalizes gay sex saying the only parliament had the power to change a law.
- **January 29, 2014:** Top court dismisses review petition filed by the Naz Foundation.
- **April 23, 2014:** SC assures that the curative petition filed by it would be heard.
- **February 2, 2016:** SC says that the issue is important and bench will hear it.
- **August 24, 2017:** SC rule sexual orientation is an essential attribute of privacy and core of fundamental rights.
- **July 6, 2018:** SC says constitution bench will hear the case from July 10.
- **September 6, 2018:** Constitutional bench decriminalise consensual, homosexual acts between adults; partially scraps section 377.

##### **4.2 An overview of Navtej Singh Johar v. Union of India**

FACTS- The petitioner in the instant case, Navtej Singh Johar, a dancer, filed a writ petition in the Supreme Court in 2016 seeking recognition of the right to sexuality, right to sexual autonomy and right to choice of a sexual partner to be part of the right to

life guaranteed by Article 21 of the Indian Constitution. Furthermore, he argued that section 377 of IPC was unconstitutional. Section 377 was titled 'Unnatural Offences' and stated that "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine".

The petitioner argued that Section 377 was violative of Article 14 of the Indian Constitution, Right to Equality before the law because it was vague in the sense that it did not find "carnal intercourse against the order of nature". There was no intelligible differentia or reasonable classification between natural and unnatural consensual sex. The further arguments are as follows;

- (a) Section 377 was violative of Article 15 of the Indian Constitution, Protection from Discrimination. Since it discriminates on the basis of a person's sexual partner
- (b) Section 377 violates Article 19, Freedom of Expression. Since it retained the right to express one's sexual identity through speech and choice of the romantic/sexual partner
- (c) Violation of A Right to Privacy as it subjected LGBT people to the fear that they would be humiliated because of "a certain choice or manner of living".

The Union of India submitted that it left the question of the constitutional validity of Section 377 to the "wisdom of the court". Some interveners argued against the petitioner, submitting that the right to privacy was not unbridled, that such acts were derogatory to the constitutional concept of dignity, that such acts would increase the prevalence of HIV/AIDS in society and the institution of marriage and that it may violate Article 25 of the constitution (Freedom of conscience and propagation of Religion)

**Judgement-** The five-judge bench of the Indian Supreme Court unanimously held that Section 377 of the Indian Penal Code, 1860, insofar as it applied to consensual sexual conduct between adults in private, was unconstitutional. Section 377 criminalises consensual sexual acts of the adults, the persons above the age of 18 years who are competent to consent in private is the violation of Articles 14, 15, 19 and 21 of the Constitution. However such consent may be free consent, which is completely voluntarily in nature, and devoid of any duress or coercion. The provisions of Section 377 will constitute to govern non-consensual sexual acts against adults, all the acts of carnal intercourse against minors and the acts of bestiality.

## **5. SEXUAL ORIENTATION AND GENDER IDENTITY IN CONNECTION WITH HUMAN RIGHTS**

The human rights of our time are often described as universal and equal for all individuals. To guarantee the human rights of all individuals, the Universal Declaration of Human Rights (UDHR) was drafted in 1948. UDHR expresses the concept of universality in its preamble in words of "...in recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognition that these rights derive from the inherent dignity of the human person..."

The philosophical view on universality is often pure and absolute universalism of human rights, resulting in total equality between humans. Human rights are obtained by the fact that one is human. There is no other requirement that being born as a human for obtaining human rights. The equality of all human beings should reflect in all individuals' right to protection against discrimination. The LGBT individuals must be seen as equal to any other human being considering the statement that human rights are universal. During history, LGBT individuals have often been subjected to non-sanctioned discrimination and violence. This behaviour can be seen as a dominant social group targeting a group which they consider "less human". The discrimination against homosexual individuals is very often characterized by the opinion that homosexuality is unnatural or against nature and therefore considered immoral. The enjoyment of human right is not depending on the behaviour of the human, meaning that even if homosexuality is considered living a moral life. Therefore, discrimination of an individual's human rights based on their sexual orientation or gender identity results in those individuals being seen as "less human" "by the rest of the society".

Article 2 of UDHR specifically declares that the rights set in the declaration are "without distinction of any kind, such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status". While Article 26 of the International Convention on Civil and Political Rights (ICCPR) sets out that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or another opinion, national or social origin, property, birth or another status. "Sexual orientation is not expressed as a special distinction in this article. The case of *Toonen v. Australia* of 1994, the case concerned discrimination based on sexual orientation the HRC has to examine whether sexual orientation was a protected distinction within the meaning of Article 26. The committee found that sexual orientation is to be included as a distinction under sex.

Article 14 of the European Convention on Human Rights, ECHR consist of a similar explicit declaration of prohibited discrimination distinction as the UDHR. Article 14 declares as "The enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or another opinion, national or social origin, association with the national minority, property, birth or other status". Sexual orientation is not mentioned as a specific distinction in the article but in the cases, *Frette v. France* and *Karner v. Austria* have shown that sexual orientation is protected under Article 14 of ECHR.

## **6. RIGHTS WHICH ARE STILL DENIED FOR LGBT'S IN INDIA**

- **Right to marriage:** India does not recognise civil unions because our country does not possess a unified marriage law. None of the marriage laws in India does recognises marriage between the same-sex couples. Due to the lack of such unified marriage laws, these communities have been violated with the right to equality, the right to privacy as to choose their family. A single case of marriage between the same-sex couples was granted by the Punjab and Haryana HC in 2011

- **Adoption:** The existing laws in India curtail the freedom of gay couples to adopt children. Many Indian LGBT couples have adopted children as a single parent, but their partners have no legal right over the child.
- **Health care:** Due to the lack of LGBT friendly hospitals many people from these communities are denied proper health care from the hospitals. Most of the health systems struggle to function outside the binary framework health personnel and untrained to provide appropriate services on HIV prevention, treatment and or information on sexual and reproductive health care.
- **The Bill:** A draft bill advocating for the rights of the third gender rights was introduced by Tiruchi Siva, a DMK minister subsequently after the NALSA judgement. This was debated in the Rajya Sabha but never saw a promising future in the Lok Sabha. Considerable revisions have been made to the bill and is in queue for an acceptance that would bring a wholesome and progressive change in the lives of the third gender community.

Investigations using psychological tests could not differentiate heterosexual from homosexual orientation. Research also demonstrated that the people with homosexual orientation did not have any objective psychological dysfunction or impairments in judgement, stability and vocational capabilities. Much of the distress faced by people in LGBT communities is due to the difficulties they face living in our predominated heterosexual world.

## 7. CONCLUSION

The makers of the Indian Constitution who envisioned a progressive India had left room for expanding or curtailing the law in part as a whole such that it can be tailor-made to suit the ever-growing society and its dynamic culture. And the key to this article is Article 253 which provides the Parliament with the power to make any law for the whole or any part of the territory of India so as to implement any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or any other body. Hence, the pestering issues of the LGBT communities is not a mission impossible that cannot find a light at the end of the tunnel rather it can be curbed through combined efforts for the leaders of our nation and law making bodies as well as the NGO's, activists and academicians. Being a democratic developing and progressive country India has to look forward to progressiveness. This responsibility lies on the common people as well as on the civil society as well as it is necessary to minister the aspirations of all sectors of the society whether it is a majority or minority. Let's take an initiative for the enhancement of the LGBT communities for giving the true essence of the democracy.

## 8. REFERENCES

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