Analysis of LGBT rights in India

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ABSTRACT

This topic “Analysis of LGBT rights in India” has been a debate for many years. Before going over to LGBT rights, there should be an introduction as to who LGBT are and who comprises this community. The word ‘LGBT’ stands for Lesbian, Gay, Bisexual, and Transgender. Earlier, these LGBT were referred as Gay community but later to include other types of homosexual people also, this was changed to LGBT. The research paper starts with a brief introduction as to what is LGBT and who are they. This is followed by the composition of them and their difficulties nowadays. The main issue then comes as to how did this issue become a concern in India along with 2009, 2013 and 2016 judgment given by Delhi High Court and Supreme Court and their analysis.

Keywords: LGBT, Homophobia, Rights in India.

1. ANALYSIS OF LGBT RIGHTS IN INDIA

Meaning of LGBT:

LGBT is the code word for Lesbian, Gay, Bisexual, and Transgender. Initially, this community was called Gay Community. But it was not sufficient to include the ones who are different from normal human beings altogether in the gay community as it refers only to men. So, the abbreviation LGBT was introduced in the mid-1980s. These people have different sexual orientation than a normal person where sexual orientation generally includes sexual fantasies, sexual attraction, sexual behavior, social and lifestyle preferences and self-identification.

The term “Gay” traditionally was used to refer to the people attracted to people of the same gender and be in a relationship with same gender people. But the lesbians, transgenders, and bisexuals are not included in the gay community.

A lesbian generally refers to women who are sexually attracted to women only. They are like gay people only but only men are included in gay whereas only such women are called lesbians. They are not at all attracted to opposite genders.

A bisexual person is one who is sexual, romantically and emotionally attracted to both the sexes. They are not only attracted to one but finds a connection in both the genders.

Transgender is an umbrella term used to portray those whose gender identity ‘differs from that usually associated with their birth sex. Not everyone whose appearance or behavior is gender-atypical will identify as a transgender person. Many transgender people live part-time or full-time in another gender. Transgender people can identify as transsexual, transvestite or another gender identity.’

The initialism has become conventional as self-designation and many of the English-speaking countries have adopted this initialism to identify the sexuality and gender-identity based community centers and emphasizes gender-based culture and diversity of sexuality. It indicates anyone who is non-heterosexual. Sometimes LGBTIQ or LGBT+ is used by some people meaning LGBTIQ as intersex people questioning their sexual identity and LGBT+ embracing spectrums of gender and sexuality.

2. DIFFICULTIES FACED BY LGBT IN TODAY’S SOCIETY

The LGBT face innumerable difficulties in the society where the only accepted orientation is heterosexuality and homosexuality is regarded as abnormal. Abuse is their daily routine and faced by them almost every day. They are more likely to experience intolerance, discrimination, harassment, and threat of violence due to their sexual orientation than those that identify themselves as heterosexual. It is mainly due to homophobia. They face inequality and violence at every place around the world. They face torture from people who mock at them and make them realize that they are different from others. It’s just because of who they are and how they look. In many countries, the rights enjoyed by opposite-sex couples are not enjoyed by the same-sex couples. They are prohibited from those rights. As a result, they face discrimination and cannot enjoy social protection schemes like health care and
The LGBT people even hide their gender and do not disclose it due to fear of losing their job. The young LGBT people face ragging and harassment in schools, colleges, and university which in many cases lead to depression, school drop-out and homelessness. They gradually develop low self-esteem and low self-confidence and become isolated from friends and family. The parents of normal children don’t allow them to mix with the LGBT children acting completely out of care and concern without realizing that this leads to isolation for the other one. Lack of communication between LGBT child and the parents often leads to conflict in the family. Much LGBT youths are placed in foster care or end up in juvenile detention or on the streets, because of family conflict related to their LGBT identity. LGBT teens have a very high risk of health and mental problems when they become adults because they are rejected by their parents and caregivers.

According to a study, around 30 percent of LGBT in the U.S have been abused by the members of their family for their different sexual orientation. Also, a survey revealed that about 40 percent of the homeless people constituted of LGBT. ‘Studies done by the Gay, Lesbian and Straight Education Network [GLSEN] report that nearby 9 out of 10 LGBT students face harassment. The 2007 National School Climate Survey found not only that LGBT students were harassed but 31.7% of LGBT students missed a class and 32.7% missed a day of school because of feeling unsafe.’

Additionally, lesbian, gay, bisexual and transgender people face poverty and racism daily. They suffer from social and economic inequalities due to continuous discrimination in the workplace. These people mostly get addicted to drugs, alcohol, and tobacco to get themselves relieved of stress and rejection and discrimination. LGBT elders also face several problems. They cannot avail of the opportunities which are received by other senior citizens. Most of them isolate themselves from everyone. Very less is known about them because of widespread failure of governmental and academic researchers to include questions about sexual orientation and gender identity in their studies of the aged. They also become victims of hate crimes. In some countries, homosexuality is regarded as a crime. It is illegal and is often met by imprisonment and fines. For example, in Muslim law, homosexuality is regarded as a sin and is unlawful.

‘The exclusion and discrimination have more impact on the lives of LGBT persons. This has resulted in the following-

- Dropping out of school earlier
- Leaving home and family
- Being ignored in the community
- Lacking family support
- Attempt suicide’

3. WHY DID LGBT COME UP AS AN ISSUE?

In recent years, the issues regarding lesbian, gay, bisexual and transgender have become a source of estranging among the nations. The earliest organizations supporting LGBT rights can be traced to the 19th century.

During the 18th and 19th century, homosexual behavior was not socially accepted and was regarded as crimes. The social attitude towards homosexuality became bitter in the late Victorian Era. Around the 1800s, social reformers started defending the homosexuals but due to adversities, they kept their identities secret. A British secret society also campaigned for the legalisation of homosexuality in the society. A book called “Sexual Inversion” by sexologist Havelock Ellis faced a lot of controversies and a bookseller was also charged for selling such a book. A movement was started by a Social Reformer in Germany against a law which stated that having sex with the same gender is illegal.

The first bold step was taken by USSR when it decriminalized homosexuality in around 1920s. It was at that time when society was conservative and was also socially backward regarding the matters of sexuality. But this victory was short lived as during the rule of Stalin, homosexuality was re-criminalized again. Immediately after World War II, a lot of homosexual groups came to the forefront and emphasized love over sex. A movement called Homophile movement was started in some European countries in 1945 and continued up to around 1970. A new movement called Gay Liberation Movement started in 1970 and continued for four years. Homosexual groups like Gay Liberation Front [GLF] and Gay Activists’ Alliance [GAA] were formed.

Till then, only gays and lesbians were in the limelight. Bisexuals started gaining prominence in LGBT movements in the 1970s. National Bisexual Liberation Group was formed in New York representing the bisexuals. The advocated of the Gay and Lesbian Rights argued that one’s sexual orientation has nothing to do with gender identity. Homosexual was considered as an illness across the world. But in 1979, Sweden became the first country in the world to remove homosexuality as an illness.

In modern India, Shakuntala Devi was the first to publish a study on homosexuality in 1977. Section 377 of Indian Penal Code talks about unnatural offenses stating homosexuality is illegal in India. The movement to repeal Section 377 was initiated by AIDS Bhedbhav Virodhi Andolan in 1991. They published an article regarding Section 377 and wanted its annulment. In 2001, it again gained a momentum when a Public Interest Litigation was filed by NAZ Foundation in Delhi High Court. It is continuing till date. De-criminalising homosexuality is still a myth in India.

4. NAZ FOUNDATION v. GOVERNMENT OF NCT DELHI

The case was instituted by a non-governmental organization based in Delhi, Naz Foundation, which is devoted to the working of the issues of HIV/AIDS. They filed a writ petition arguing that Section 377 of Indian Penal Code was unconstitutional.

Section 377 - Unnatural Offences – 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 Naz Foundation submitted that Section 377 violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21 of the Constitution of India. It brought the action in the public interest claiming its work on combating the spread of HIV/AIDS was being hampered by discrimination experienced by the gay community because of Section 377. This discrimination, the petitioners submitted, resulted in the denial of fundamental human rights, abuse, harassment and assault by public authorities, thus driving the gay community underground and subjecting them to greater vulnerability in violation of their fundamental rights’.

Arguments by Appellant

The Gay and Transgender community is experiencing continuous harassment and discrimination due to the existence of Section 377. It affects the right to Life and Liberty enshrined in Article 21 of Constitution. they submitted that the right to non-discrimination on the ground of sex in Article 15 should not be read restrictively but should include “sexual orientation”.

Arguments by Respondent

The Ministry of Health and Family Welfare and Ministry of Home Affairs submitted their legal opinions. They argued that Section 377 is provided for execution of individuals for sexually abusing children. It also fills a gap in rape laws. They further added that Indian society does not accept such sexual behavior and laws comply with the on-going customs in the society. They also argued that removal of Section 377 would ‘make many people in high-risk categories in relation to HIV/AIDS reluctant to come forward for treatment due to a fear of law enforcement agencies and that in driving homosexuality underground it increases risky behavior such as unprotected sex’.

Judgment

The Landmark judgment given by Delhi High Court in 2009 stated that Section 377 violates Article 14, 15, and 21. The Court analyzed Article 14 that distinction or classification should be on an intelligible differentia which has a rational relation to the objective sought. It concluded that “Section 377 does not distinguish between public and private acts, or between consensual and non-consensual acts, therefore does not consider relevant factors such as age, consent, and nature of the act or absence of harm. Thus, such criminalization in the absence of evidence of harm seemed arbitrary and unreasonable”. Discrimination on the ground of sexual orientation is impermissible even on the horizontal application of the right enshrined under Article 15.

The judgment was restricted to adults. Section 377 applied to minors. Section 377 had permitted the harassment of LGBT people. With de-criminalization of homosexuality, the discrimination would not go away immediately. But this would violate the law. “It will take time for the judgment to bed-in”.

5. SURESH KUMAR KOUSHAL v. NAZ FOUNDATION

The decision given by Delhi High Court about decriminalization of homosexuality attracted many appeals in the Supreme Court challenging the judgment of High Court in the Naz Foundation case.

Arguments of Appellant

Section 377 is gender neutral and includes the acts of carnal intercourse which are committed voluntarily irrespective of gender. It does not violate Right to Privacy under Article 21 and right to privacy does not include right to commit any offense under Section 377. The judgment of High Court affects the social structure of India and the system of marriage would be adversely affected. The young people would be inclined towards homosexual activities. Moreover, whether a law is moral or immoral should be left to the parliament to decide.

Arguments from Respondent

Section 377 targets the LGBT community about their sexual orientation. Sexual rights are guaranteed under Article 21. So, Section 377 deprives them of moral citizenship. ‘It outlaws sexual activity between men which is by its very nature penile and non-vaginal, it impacts homosexual men at a deep level and restricts their right to dignity, personhood, and identity, equality and right to health by criminalizing all forms of sexual intercourse that homosexual can indulge in’. Sexual intimacy is important to psychological well being and homosexuals are deprived of it. The society is changing and so the laws should also change with changing times. Article 14 and 21 are interlinked with each other. ‘Section 377 does not lay down any principle or policy for exercising discretion as to which of all the cases falling under the broadly phrased law may be investigated. It is silent on whether the offense can be committed within the home’. Criminalisation also increases discrimination and act as an obstacle to HIV prevention programmes.

Judgment

The panel of two Supreme Court judges overturned the judgment of Delhi High Court on 11 December 2013, allowing the appeal and declaring the decision as “legally unsustainable”. They held that Section 377 of Indian Penal Code is constitutional and is not violative of Constitution. The Supreme Court and High Court have the power to declare the validity of the laws, but the Parliament is deemed to act for the people and hence would not make any law which would go against the Constitution. Unless a clear constitutional violation was proved, the court was not empowered to invalidate the law. Also, ‘Section 377 does not criminalize a particular people or identity or orientation. It merely identifies certain acts which if committed would constitute an offense. Such a prohibition regulates sexual conduct regardless of gender identity and orientation’. The High Court could not find sufficient details regarding discrimination against gays and lesbians. Also, judicial intervention was not required on this issue. Section 377 does not violate Article 14, 15 and 21 of the Constitution. The Legislature was free to consider Section 377 and can declare it unconstitutional if necessary. The Court held Section 377 of IPC constitutional and re-criminalized homosexuality, i.e., sexual intercourse against the order of nature.

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6. INTERNATIONAL LEGAL POSITION ON HOMOSEXUALITY AND INDIA’S STAND IN UN RESOLUTION

Views on homosexuality are divided in the world. It is thought-provoking to see how religious teachings influence attitude towards “natural sex tendencies of a human being”. About 81 countries have criminalized homosexuality including India and Pakistan. The scenario in Europe is somewhat different from third world countries. Right to have sex is a fundamental right which is part of Right to Life. Denying people of sexual rights is regarded as an act of cruelty and so no legislature, no country should try to abolish the right to sex. LGBT rights are human rights.

The stand taken by United Nations Organisation regarding LGBT rights is always progressive. A resolution supporting LGBT rights was first moved at General Assembly by French/Dutch representatives in 2008. It included condemnation of harassment, violence, discrimination, and prejudice based upon gender identity and sexual orientation which undermine dignity.

India has been holding on to its traditional stand on the sensitive issue of LGBT rights. India did not become a signatory to resolutions concerning LGBT rights only to confirm its conservatism and insensitivity against homosexuality. The European Parliament strongly opposed the moves of criminalizing LGBT people in India, Uganda, and Nigeria in the resolution adopted on 16th January 2014.

The United Nation Human Rights passed a strange resolution on 26th June 2014 on “protection of family”. This Resolution called upon the High Commissioner for Human Rights for drafting a report on the status of the ‘family’ asking for a panel discussion on the issue of protecting the family. But the resolution does not define ‘family’, the implication to a singular family could be used as a criterion to oppose rights for homosexual couples, single parents and other types of families in future UN negotiations. The concept of the family should not be limited only to the heterosexual families. There are families of homosexuals, families of homosexuals and their adopted child/children and families of a single parent. Due to lack of clear-cut definition of ‘family’ in the resolution, there are high chances that it would be directly used to violate the rights of LGBT Community who are willing to have a family of their own. India, by becoming a signatory to this resolution, multiplied the plight of LGBT community that already existed. The hostile stand taken against the LGBT community by Indian Diplomats representing Government of India at UN Human Rights Council is stigmatic to its international image as world’s progressive constitutional democracy.

7. RAY OF HOPE IN THE DARK AGE OF REASON

15th April 2014 was not an ordinary day. Something exceptional happened on the summer of 15th of April that ‘blown life in the “constitutionality” dead members of the sexual minority of India’. It was that day which brought light and euphoria to the life of ‘Hijras’. For the first time in the history of India, ‘Third Genders’ was given recognition and was officially recognized as another gender as male and female. The Hon’ble Supreme Court of India in the case of National Legal Services Authority v. Union of India in its landmark judgment in 2013 created the ‘third gender’ status for hijras or transgenders. Earlier, while writing their gender, they were forced to write male and female, but now after this judgment, they can proudly describe themselves as ‘third gender’.

The Government of India has been directed by the Supreme Court for treating the members of ‘Third Gender’ as socially and economically backward. The Supreme Court further opined that absence of law recognizing hijras as the third gender could not be continued as a ground to discriminate them in availing equal opportunities in education and education and employment. The third gender would be categorized as Other Backward Classes [OBC] which will help them to avail the opportunities of reservations in educational institutions and government jobs. The ideals enshrined in the constitution of India by our founding fathers are defended by the Supreme Court’s judgment. The verdict though pertains to only eunuchs or transgender people; it is indeed a ray of wisdom that at last penetrated into the dark chambers of the mystery of human sexuality to illuminate the dark age reason.

On 2 February 2016, criminalization of homosexual activity was reviewed by the Supreme Court. In August 2017, the Supreme Court unanimously ruled that the Right to Privacy is an inherent and fundamental right under Article 21 in the Indian Constitution, providing hopes to LGBT activists that the Court would soon strike down Section 377. The Court also ruled that a person's sexual orientation is a matter of privacy issue. In January 2018, the Supreme Court agreed to refer the question of the validity of Section 377 to a large bench for examination before October 2018. The Supreme Court is going to hear petitions on Sec 377 on May 1, 2018.

8. CONCLUSION

Homosexuality is not a mental disease. It is as natural as heterosexual. The human mind has no control of it. The situation of LGBT community is worst in India. They are subjected to harassment, violence, and mockery. European countries have protected the sexual rights of the members of the LGBT community. The resolution passed by UN have created a positive impact all over the world. Stand of India at UN regarding LGBT issues has been so far very disappointing as India have been stigmatizing its own image as a democratic republic by persistently opposing LGBT rights at international level. It is very important to make people aware of the presence of LGBT community. Human rights are natural rights which are indestructible and inalienable that are conferred upon man since birth. Homosexuals are not aliens, they are not sick, their sexual behavior is perfectly in tune with the dictate of nature. The Government of India should wipe away its conservative nature and take concrete steps for the welfare of sexual minority. Re-criminalisation of sexual activities between homosexuals was the “biggest setback to the movement of LGBT rights”. A single judgment severely affected the rights of the entire community causing immense damage to self-esteem and self-respect of the LGBT community. Just and fair struggle for social recognition by LGBT will go on. The world will evolve and one day, it would illuminate the dark age of reasoning.
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