

Gender Identity and Sexual Orientation –Legal Tussle for Promoting Equal Rights And Protection From Discrimination

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Abstract: Gender identity etymologically means a personal perception in which they identify themselves as a male or female. So gender identity means the how an individual identifies himself whether as a male or female or any other. This is different from what the biological sex of the individual is. Sexual orientation is what we refer to a person being sexually or romantically attracted to another person. This attraction needn't always be between different sex but it can also be among persons of same sex. A person's emotion, affection and sexual interest or attraction towards the person of a different gender or the same gender or more than one gender is termed as sexual orientation according to the Yogyakarta Principles². As per the Yogyakarta principles heterosexuality, homosexuality and bisexuality are all sexual orientations. This paper will focus on the need for protecting and promoting equal rights among LGBT Community. The study will examine the legal provisions relating to sexual orientation and gender identity and the impact of the latest judgment on the LGBT community through case study among LGBT people.

1.1 INTRODUCTION

The gender journey begins at birth and at times even before birth. Our society is too orthodox on matters of child birth with focus on whether it a boy or a girl, once a child is born we decide what his future ought to be and create a dream for him/ her rather than the child having a dream. In this ongoing tussle of fulfilling dreams the child face a crisis on account of gender. Being born a boy or a girl does not determine the gender identity of a person; it is the behavior and identity which determines orientation. Sexual orientation and gender identity are actually a cause of discrimination among the people and it results in the LGBTQ community being looked down upon or ostracized in the society. Individuals who do not conform to the set accepted sexual norms of the society are marginalized, criminalized or discriminated. The struggle the LGBTQ community has had to suffer has been many fold but they have come meritorious in their fight for their rights for recognition in our country which is shadowed by tradition, cult and religion. It was only in the year 2014, where recognition was accorded to the transgender community by the Supreme Court in *NALSA v. Union of India*.³ By recognizing transgenders, the court guaranteed their natural and constitutional rights and also in upholding rule of law. Imparting social justice is imbibed in the constitution which has to be upheld not only in papers but also in spirit.

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²Human Rights Watch, Yogyakarta Principles a Milestone for Lesbian, gay, bisexual and transgender rights, available at <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights> (last visited Nov 27, 2019)

³ (2014) 5 SCC 438, AIR 2014 SC 1863

The initial step for recognizing the rights of LGBTQ started off with the *Naz Foundation v. Government of NCT Delhi*,⁴ where it was held by the Delhi High Court that Section 377, IPC is in violation of the Article 14, 15 and 21 of the Constitution of India that is the fundamental rights of an individual and termed legal consensual sexual activity among two consenting homosexual above 18 years not an offence. However, on appeal this ruling of the Delhi High Court was struck down by the Supreme Court of India in *Suresh Kumar Koushal v. Naz Foundation*.⁵ Several petitions for reviewing the judgment was filed which led to Supreme Court assenting to review the pleas afresh by a five judge constitutional bench. A feather of hope for the LGBTQs came through when the Supreme Court in August 2017 upheld right to privacy as a fundamental right under the Constitution. It further observed that “sexual orientation is an essential attribute of privacy”⁶. In September 2018, the five judge Constitutional bench in a unanimous decision stated that “Section 377 is irrational, arbitrary and incomprehensible as it fetters the right of equality for LGBT community LGBT community possesses same equality as other citizens.” “Freedom of choice cannot be scuttled or abridged on threat of criminal prosecution and made paraplegic on mercurial stance of majoritarian perception”. This decision of the SC is a progressive notion taken in the light of the rights of people in contemporary India.

1.2 Understanding gender identity and sexual orientation

Sex and gender has been used interchangeably and whenever a child's sex is identified it is based on genitals. "Gender" is very difficult to define, as it refers “to the role of a male or female in society, known as a gender role, or an individual's concept of them, or gender identity”⁷. However, gender is not to be confused with sex as gender of an individual is an interrelation between body, identity and social factors, Here, *body* is one's own body and its interaction with others, *identity* is how a person identifies himself in terms of gender and *social factor* is how a person portrays oneself in the society⁸. Gender identity refers to “a personal understanding of gender, it is how they see themselves a male or female or third gender and their personal perception towards themselves may or may not be similar to the sex with which they are born”. Normally a person's gender corresponds to his anatomy. This is what is termed as gender assignment which needn't always be what a person perceives himself to be. Gender identity is the self-realization a person has in terms of gender and accordingly it will impact a person's behavior, appearance and clothing sense.⁹ An outwardly expression of one's gender identity is gender expression.¹⁰

⁴2010 CrLJ 94

⁵(2014) 1 SCC 1

⁶Justice K S Puttuswamy v. UOI, (2017) 10 SCC 1

⁷Medical New Today, Sex and gender: What is the difference?, available at <https://www.medicalnewstoday.com/articles/232363.php> (last visited Nov 27, 2019)

⁸Genderspectrum, *Understanding gender*, available at <https://www.genderspectrum.org/quick-links/understanding-gender/> (last visited Nov 27, 2019)

⁹BMZ, Federal ministry for economic and development, “sexual orientation and gender identity as human rights issues in development cooperation” (2015) available at: https://www.institut-fuer-menschenrechte.de/uploads/tx_commerce/e-info-tool_sexual_orientation_and_gender_identity_as_hr_issues_in_dc.pdf (last visited on Nov 10, 2018)

¹⁰Shivangani Misra, “A discourse on LGBT” IJLDAI 142 (2016)

Sexual orientation is a “personal sexual identity in relation to gender to which they are attracted, like the fact of being heterosexual, homosexual, bi-sexual or asexual”.¹¹ An inherent or immutable enduring emotional, romantic or sexual attraction to other people is known as sexual orientation¹². Everyone has a Sexual Orientation and Gender Identity (SOGI). Sexual orientation refers to “a continuing pattern of emotional, romantic, or sexual attraction towards men, women, or both sexes”. Sexual orientation relates to a person’s identity based on attraction, related behavior and membership in a community of similar people.

There is a thin line of difference between sexual orientation and gender identity the main difference is that gender identity categorizes a person as a male or female or a boy or girl and sexual orientation is about whom a person has romantic attraction with emotionally and which draws a person towards the same sex or to the opposite sex. The terms lesbian, gay and bisexual also refer to an individual's sexual orientation.¹³ Most societies have a biased principle towards sexual orientation and they are on the presumed fact that only two corresponding sexes, male and female are present, and that heterosexuality is normal while homosexuality is abnormal. Those who do not conform to the norms of society are perceived and treated as a menace.

1.3 Analyzing the legal provisions pertaining to LGBT

The introduction of Section 377 in the Indian Penal Code, 1860 has a little history attached to it. When the framers of the first draft of Penal Code introduced the topic they were reluctant to discuss the details of the provisions. Initially Section 377 was included as Clause 361.¹⁴ Macaulay the President of the Indian Law Commission in 1835 abhorred the idea of discussing the topic as can be seen from the following paragraph:

“Clause 361 and 362 relate to an odious class of offences respecting which it is desirable that as little as possible should be said [...we] are unwilling to insert, either in the text or in the notes, anything which could give rise to public discussion on this revolting subject; as we are decidedly of opinion that the injury which would be done to the morals of the community by such discussion would far more than compensate for any benefits which might be derived from legislative measures framed with the greatest precision.”¹⁵

This provision found its introduction through the Buggery Act in 1533, which later got converted into the Offences against Person Act, 1861. The Buggery Act 1533 was enacted during the reign of King Henry VIII and the word buggery is derived from the French word ‘bougre’ which means anal intercourse. This act was the first law of England which made the act of sodomy

¹¹Oxford dictionary, Available at:https://en.oxforddictionaries.com/definition/sexual_orientation (Last visited November 16, 2018)

¹²Human Rights Campaign (HRC), “Sexual Orientation and Gender Identity – Definitions” (2018) available at <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> (visited on Nov 13, 2018).

¹³ International justice resource center, available at: <https://ijrcenter.org/thematic-research-guides/sexual-orientation-gender-identity/> (last visited on Nov 10, 2018)

¹⁴Cl 361: “Whoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to 14 years, and must not be less than two years”

¹⁵Report of the Indian Law Commission on the Penal Code, October 14, 1837, pp 3990-91.

punishable with death by hanging.¹⁶ If a person was found guilty of an offence and is convicted under this act such person will suffer a pain of death and will lose all his possession, the right of his possession to be inherited by his kin terminates, the government will confiscate the property of a convicted sodomite. The Act of Buggery is termed to be “an unnatural sexual action against God and man”.¹⁷ However, later the courts redefined the act to include anal penetration and bestiality. The act criminalized those who have sexual intercourse against the order of nature.¹⁸ The need for inclusion of such an act which was against the order of nature was a requisite of the time as it was against the principles of Christian morals and decency.

However, the Buggery Act got replaced with the Offences against Person Act in 1861 just a year after the Indian Penal Code came into force. The new act abolished death penalty for buggery and provided that a person will have to serve a life term in prison or for a term not less than 10 years if found guilty of the offence.

There is no provision in India which directly pertains to the LGBT community. However, there is a provision in the Indian Penal Code (IPC) which reads as follows:

“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 10 years, and shall be liable to fine.”

“Explanation – Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”¹⁹

Having a natural sexual orientation was considered a taboo and to prevent such instances from occurring it was brought within the ambit of an offence thereby curtailing the privacy of individual's.

It is pertinent to know that such acts of same sex love and gay paradise was promoted in the Greek, Egyptian and Hindu mythology. In Hindu mythology one of the Hindu God, Lord Ayyappa was born to Lord Shiva, the supreme God who is the embodiment of masculinity and Mohini which is the female version of Lord Vishnu. Here Mohini changes her gender which is what we know today as transgender. Yet another instance where a transgender makes an appearance is in the Mahabharata epic where there is a *Shikhandi*²⁰ who is a warrior. She was born a female but later got transformed into a man for fulfilling the promise given to her that she would be able to kill Bhishma a strong warrior.²¹

Almost all religions be it Christianity, Islam, Buddhism and Jews has a mention of homosexuality and it being a sin. These sins are abominations which is not accepted as per the

¹⁶Encyclopedia Britannica, Gay rights movement, available at <https://www.britannica.com/topic/gay-rights-movement#ref1077994> (last visited Nov 28, 2019).

¹⁷Sensagent dictionary available at : <http://dictionary.sensagent.com/Buggery%20Act%201533/en-en/>

¹⁸ Tracing the history of section 377 IPC available at: <https://factly.in/tracing-the-history-of-ipc-section-377/>

¹⁹The Indian Penal Code, 1860, s. 377

²⁰A person who is neither a male or a female

²¹Krishna Kosh, Shikhandi, available at <http://en.krishnakosh.org/krishna/Shikhandi> (last visited Nov 27, 2019).

scriptures or religious texts and hence not endorsed. Religion has always played a pivotal role in our lives, our faith and belief depend upon the religion we follow as it forms the basis of our morality and accordingly we worship and persecute.

All human beings from the moment they are born have basic human rights. The freedom to enjoy life, the right to be treated equally by law, non-discrimination and equal protection are some of the basic human rights. Every person regardless of their sexual orientation or gender identity are equal or should be treated equally by the law irrespective of their gender, gender identity or sexual orientation, status, religion, or place of birth or colour.

The LGBTQ community has faced persecution from ancient times till date and hence, there is a need to protect and safeguard the rights of the LGBTQ community. Even though there isn't a separate legal provision for protecting the LGBTQ community the protection can be enforced through the Human Rights Instruments and the rights enshrined in our Constitution. Every individual has the right to be treated equally and not be discriminated.

Article 2 of the UDHR, clearly forbids discrimination on the grounds of race, religion, sex, colour or ethnic minorities, it can also be assumed that it discreetly prohibits discrimination against LGBTQ persons.²² In other words, the words "other status" in article 2 can be interpreted as comprising of the LGBT community. In a way it can be said that the fundamental rights of LGBTQ community are secured through the inclusion or the interpretation of the word "other status" in the UDHR.²³

Further, Article 6 states "*Everyone has the right to recognition everywhere as a person before the law*" Here the excerpts is that an individual has the right to be recognized irrespective of which category he or she belongs to. Similarly Article 7 goes on to dictate "*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination*"²⁴. Yet again human rights encompass every individual with equality before law and equal protection of law without any discrimination. Individuals are not to be discriminated and this would extend to the LGBT community as they are not to be discriminated on the grounds of gender and sexual orientation.

In consonance with Article 7 of the UDHR, the Indian Constitution has Article 14 that reads as such: "*Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*"²⁵. Equality before law prohibits discrimination and equal protection of laws enshrines upon the state to protect persons in different situations in order to establish equality among all. It means no one shall be discriminated on grounds of religion, race, caste, gender or place of birth. In the present situation the LGBT community has been discriminated on the basis of gender and it is a violation of the fundamental right. Along with this Article 19(1) (a) and Article 21 supplements the right to

²² United nation, "Universal Declaration of Human Rights" available at: www.un.org/en/universal-declaration-human-rights/index.html

²³ *Ibid*

²⁴ *Ibid*

²⁵ Constitution of India, art 14

equality. In *Bachan Singh v. State of Punjab*, Justice Chandrachud stated “*there are three fundamental rights in the Constitution which is of prime importance and which breathe vitality in the concept of rule of law. They are Article 14, 19 and 21 which constitutes the golden triangle*”²⁶.

Article 21 confers on every person the fundamental right to life and personal liberty. Interfering into the freedom of another must be in accordance with law and by established procedures. The procedure ought to be just and fair and not arbitrary, fanciful or oppressive and right. If the procedures are not in consistency with the prescribed terms of Article 14 then it would be an interference into Article 21.

1.4 Judicial response to issue of LGBT

The need for protecting the LGBT community was highlighted when the issue came before the Delhi High Court in the *Naz Foundation v. Government of NCT Delhi*²⁷, where Naz foundation acted as a petitioner in challenging the constitutional validity of section 377 of IPC which criminalized consensual homosexual act among adults thereby infringing the fundamental rights of individuals. Section 377 criminalized homosexual act and in turn they are subjected to abuse, harassment and assault from police (or police abuse) and public authorities. They were also forced to neglect their health because the law criminalized the act of homosexuality there by forcing them to disregard their sexual health condition and become the most vulnerable class in contracting HIV/AIDS.²⁸ The right to life and personal liberty guaranteed in Article 21 to the people of the nation is not by depriving the right to privacy. There is really no right to life and personal liberty if there is invasion of privacy of a person. The intimate consensual sexual relation or sexual preference is an exclusive relation between two persons is the core of “private space”.

The court examined the purpose of the law and the interest of state against the rights of the petitioners, and did not find a valid interest of the state to uphold the statute and termed the classification of homosexuals to be in violation of the Constitution. In *Francis Coralie Mullin*²⁹ dignity was defined “as the requirement of adequate shelter, nutrition, clothing as well as the ability to freely socialize and the state must fulfil everyone's right to access the highest attainable standard of health as part of right to life”. The Court came to a conclusion that “criminalization of homosexual conduct pushes homosexuals into isolation and impedes access to adequate information for prevention of HIV/AIDS”. Further the laws regarding privacy, dignity, right to health and sexual orientation did not favour Sec 377 IPC hence it was declared unconstitutional on account of violating fundamental rights.

²⁶(1982) 3 SCC 24

²⁷*Id at 4*

²⁸ Equal rights Trust, “ERT case summary: Naz foundation V. government of NCT Delhi and others” available at: https://www.equalrightstrust.org/sites/default/files/ertdocs//Naz%20Foundn%20v%20%20Govt%20of%20NCT%20of%20Delhi%20_2_%20_3_.pdf

²⁹1981 AIR 746

However, the order of the Delhi High Court was reversed by the Apex Court in *Suresh Kumar Koushal v. Naz Foundation*³⁰. The Supreme Court discussed the ground for restriction of fundamental rights on the ground of morality. It was observed that “popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21”. “Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong”. “If there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality”.³¹ The court also found that the treatment brought upon the LGBTQ community is not because of the section 377 but because of the public perception towards this community and that this section doesn’t mandate those kinds of power to the public and the police to misuse this section.

Hence it was held that Section 377 IPC is not violating any fundamental rights and the high court decision was legally unsuitable. Supreme Court overturned the judgment of the Delhi High Court holding that the NAZ Foundation had failed to prove their point in stating that section 377 is discriminatory to LGBT community, as section 377 does not explicitly distinguish gender whereas it laid down punishment for everyone who are found in act of unnatural offences and does not mentioned homosexuals in particular.

The judgment of SC in Sushil Kumar case was not acceptable among the LGBT community and NGOs and it led to hue and cry and India was portrayed as being stuck with archaic laws which criminalize consensual homosexual act between adults. Hence, a number of petitions were filed challenging the decision of the SC and in a landmark decision a 5 judge bench unanimously decriminalized section 377 IPC and paved a way for recognition of the LGBTQ community.³²

The Petitioner Navtej Singh Johar, is a renowned dancer and yoga instructor who is a part of the LGBT community. The petitioner argued that Section 377 which was prevalent during the Victorian era was used mainly for procreation, but it is not so in modern days and because of this the gay communities are subject to prosecution. Even though recognition of third gender has been granted, indulging in consensual sexual activity is also an offence under this very section.

The Petitioner argued that section 377 is discriminatory and violate of Article 15, 19 and 21. As article 15 prohibits discrimination however, section 377 is discriminatory on the basis of the sex and preference is given only for heterosexual and not to other class of sexual orientation. It also violates Article 19 (Freedom speech of Expression). The right to express oneself is denied as it barred people within the LGBT group from expressing their sexual identity through speech and choice of romantic or sexual partner, and lastly it violates the right to life and personal liberty under article 21. As the right to life and personal liberty is an important and intrinsic part in the life of a human being, this right becomes violated due to invasion on personal liberty. Violation of article 21 is from exposure of ones most intimate relations which later is criminalized because of their intimate actions.

³⁰*Id* at 5

³¹Ms.Divya Sharma, “Suresh Kumar Koushal& another v. Naz foundation and another available at:MShttp://docs.manupatra.in/newslines/articles/Upload/E2A84BBD-B1F0-417C-8E82-49436B6FCA4B.pdf

³²Navtez Singh Joharv. Union Of India (2018) SCC 791

The respondents argued there is no invasion of personal liberty and personal liberty to abuse one's organs should not be given as it is derogatory and unconstitutional. It was argued that the rights of transgender community have also been safeguarded and were already accorded recognition and giving any further right would be against the concept of dignity and morality. Further, declaring section 377 as unconstitutional would only provoke homosexuality and the mind of the young teens would be corrupt. It would also disturb the institution of marriage and would result in rampant homosexual activities. It was further argued that fundamental rights are not absolute right, and section 377 does not violate these rights and even if it does, there is no unreasonableness in terms of section 377.

The five-judge bench of the Indian Supreme Court unanimously delivered a decision on section 377 IPC, 1860 and partially struck down section 377 in the matter of consensual sexual activity between adults. The Court overruled its judgment in *Suresh Koushal v. Naz Foundation* that maintained Section 377 constitutional. The court held that Section 377 is infringing on the freedom of expression by imposing unreasonable restriction. The practice of consensual carnal intercourse in private "does not in any way harm public decency or morality" and retaining it in the statute will have an adverse effect that would violate the privacy right under Art. 19(1)(a). The Court declared that "intimacy between consenting adults of the same sex is beyond the legitimate interests of the state" and the law stands as a barrier to equality and violate Article. 14 and Article 15 of the fundamental rights of the Constitution as it prohibits and discriminate on the ground of sexual orientation.³³ Choosing a life partner is solely the liberty of an individual.³⁴

The court relied on the principles of transformative constitutionalism and progressive realization. The constitution must fiercely guard the fundamental right of the citizens and guide and steer the society's transformation from an archaic to a pragmatic society. Also, "constitutional morality would prevail over social morality" so as to safeguard the human rights of LGBT people. Further, all efforts ought to be taken to disseminate this judgment and measures ought to be taken to eliminate stigma on the LGBT community in our society by sensitizing the issue.

"Law should not discriminate against same-sex relationships but must also take constructive steps to accomplish equal protection and to ensure equal citizenship in all its manifestations." Homosexuality is to be understood "not as an aberration but a variation of sexuality". The right to privacy does not only include the right to be left alone but also extends to "spatial and decisional privacy".

1.5 Need for protecting LGBTQ community

With the advancement of time, we have become so orthodox that we are not willing to acknowledge a person who has a gender identity crisis or accept a person's sexual orientation. Some of the major issues that the LGBT people face are they being socially excluded and marginalized in the society and at home; family not supporting; homelessness; homophobia (dislike towards gay people); psychological distress; poor economic conditions; no proper

³³*Id* at 37

³⁴*ShafinJahan v. Asokan K.M*, AIR 2018 SC 357 and *Shakti Vahini v. Union of India*, AIR 2018 SC 1601

medical facilities; hate crimes and so on. This creates a fear in the minds of the LGBT people which results in them facing issues like depression, anxiety, substance abuse, gender dysphoria (doubtful about one's own gender), coming out openly etc.

After the pronouncement of the verdict there has not been any radical change in the treatment meted out to the LGBT community. They remain to be ostracized and sexually abused. It can even be said that almost all trans person had faced sexual abuse in their life. In spite of facing abuse, they refrain from approaching the enforcement officials for fear of facing abuse again. It has also been observed that the general public are not very receptive towards the LGBT people and they are always looked down on. It is now time to join hands and help in protecting and safeguarding the rights of these sexual minorities groups. The study brought to light the problems that the LGBT faced even at their home as the family members are not willing to accept the fact that their child has a different sexual orientation which forces them to approach a psychologist for treatment. The American Psychological Association (APA) which used to diagnose homosexuality as a mental disorder have removed homosexuality from their official list of mental disorder in 1973 and in turn diagnosed those homophobic persons as having a mental disorder. This attitude of the family puts pressure on the individuals and results in them being depressed. Hence, it is high time to recognize the need for protecting the rights of the LGBT community and fight against all forms of discrimination.

1.6 Conclusion

LGBTQ people all over the world have faced discrimination, persecution and stigmatization. They were marginalized and pushed to the core to an extent where they can no longer exercise their rights. People often perceive homosexuality as something which can be cured or something which needed to be cured. They were forced to live a life of secrecy and exploring sexual preferences freely is never an option to them. They live in a world where their sexuality and gender identity stand in their way for they fear being ostracized. Society's perception is different and people are not willing to change their stereo typical perception about the LGBTQ community. According to the statistical data of Equaldex³⁵, 71 region all over the world still criminalise homosexuality and there are more than eight countries which still gives death penalty for homosexuality. In this context we are at a better position as through the SC decision we have acknowledged the rights of LGBT community.

Now it is upon every citizen to accept the sexual orientation of such person's and let them live. As our society has preconceived notions and we act according to such notions which are deeply rooted in our religious beliefs. Just a verdict by the Supreme Court will not bring in change we have to have laws like special legislations for LGBT to protect them from discrimination. There ought to be counseling cells even in schools, as it is at the teenage years that the gender identity crisis starts to pop up. Public sensitization is the need of the hour and this will be possible only if all the religious groups come together to uphold the rights of the LGBT along with the NGOs. But the big question remains will the religious leaders promote such groups. It is upon us to promote equal rights for LGBT and protect them from discrimination which has to happen in the mindset of the public and not in a court room.

³⁵Equaldex, available at <https://www.equaldex.com/> (last visited Nov 29, 2019)