
RIGHTS OF LGBTQ AND JUDICIAL PRONOUNCEMENTS

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ABSTRACT

The idea of having human rights mainly means that all human beings have dignity and they should be treated equally. Anything which undermines the dignity of a human violates the equality principle and it leads to discrimination. The rights of LGBTQ community are coming into spotlight worldwide with legal advancement in many countries. This advancement includes the adoption of new legal protection for this community. Sexual orientation and gender equality are the intrinsic part of our personality and it should never be a basis for discrimination. In many countries the LGBTQ people face daily violence and discrimination. Denying, these people, the legal rights on the basis of sexual orientation leads to discrimination. The human rights are the ray of hope for these people on this planet. Today, the most of the continents are legalizing the same-sex marriages, giving them freedom of speech and expression. In Indian context, the preamble of the Indian constitution mandates justice - social, economic and political for all, Article 14 of Indian constitution guarantees “equality before law” and “equal protection of law” which includes LGBT community too.

LGBTQ teenagers are more probable than cisgender and heterosexual youth to experience without habitat, unstable accommodation, and homelessness or live in foster care frequently due to family rejection or society rejection. Indeed, HRC Foundation’s 2018 Report on 2 LGBTQ Youth has texted how over and over LGBTQ individual face family rejection, as 67% of People stated that their family makes negative remarks about LGBTQ people. Thus, present research intends to explore the rights of LGBTQ and examine related cases and their judgements in Indian scenario. According to Rosario, Scrimshaw, Hunter, Braun (2006) “I call myself bisexual because I acknowledge that I have in myself the potential to be attracted romantically and sexually to people of more than one sex and or gender, not necessarily at the same time, not necessarily in the same way and not necessarily to the same degree”.

Keywords: LGBTQ, IPC, Rights, cases and judgements.

INTRODUCTION

People who have romantic and sexual attraction to the people of same sex do not necessarily identify themselves as Gay, Lesbian or bisexual. The term LGBT is only to describe sexual orientation and gender identify with regards to human rights in social, political, cultural and economic spheres. It covers both identity and expression also, but the sexual practices of people are not always seen in their identity. There are two terms MSM & WSW. MSM used for (men who have sex with men) and WSW used for (women who have sex with women). This has avoided mentioning that what are observed as set identifies. This means lesbians or Gay do not necessarily define themselves as homosexual or bisexuals. It is important to keep in mind that the identities accept by the term do not clear themselves in the same way around the world, and the categories it changes with time and place.

Historical background

Pre – colonial Period: An ancient literature like Manusmriti and Katila's Artshastra are the proofs that in the ancient society, the homosexuality was the part of the society. In Manusmirti, the same sex 34 relationships between women were considered to be very atrocious and serious punishments are also prescribed for it. The Art Shastra, religious texts and mythologies provides that the homosexual community existed in the earlier society whether between men and women. In these texts, the homosexuality was only a minor offence which was punished with fine only and small punishments. There are evidences which show that the homosexual relationships existed between the god and goddesses also. The temples on which the same sex relationships are shown. The mythologies held within the proofs that the god and goddesses were indulged in the homosexual activities. They used to have relationship with the both sexes also and also have changed their sexes. But when the time went on, the concept of homosexuality was totally changed and punished with the rigorous punishments.

Colonial Period: At that time, in India, the sodomy was the capital crime. In Mughal Empire, the Muslim Shariat law considered the homosexuality a capital crime and punishment for it was also of serious nature. The unlawful intercourse between the same sexes was known as Zina. The punishments ranged from the 50lakhs for a slave, 100 for a free infidel and death by stoning. Therefore, the homosexuality existed in each and every society of the India but their recognition and punishment were different according to the cultures and religions. At the time of British Empire, the codification of the law was started in 1860 and the result was the Indian

Penal Code. According to the IPC, the homosexual activities came under the head “against the order of nature” and were a criminal act which was punishable with some kind of punishments. The punishments for these activities were under the Sec. 377. But the homosexual people always existed in silence because of fear of the punishment and never dared to come forward. In the 19th century, as on the international level, the revolutions started by the LGBT community and various Non – governmental organizations make aware the Indian society also and the minorities started to come forward. They started to raise their issues by demonstrations and accepting their identities openly.

Post-Colonial period: In the 20th century, the LGBT community met an exposure as the enforcement of human rights by the UN. The Human Rights Committee held that the laws against the rights of privacy and expression were discriminatory and the sodomy laws were held void. And the decision of the UNHRC in *TOONEN V. AUSTRALIA* Case, gave a hope to the minorities in India to fight for their human rights. The same movements were also organized in India by the NGOs and the LGBT and other minority communities. In India, according to IPC, the homosexual activities were punishable. But until 2009, there were no convictions for the homosexuality in the case of *NAZ Foundation V. Government of India* in the year 2009. Section 377 of IPC 1860 and other prohibitions were held in violation of the human rights provided by the UN and of fundamental rights given in the Indian Constitution against same sex marriages. Even after the pronouncement of the judgment in this case, there were rare incidents of harassment of homosexual groups. In 2012, when the appeals were filed in the court against the discrimination of gay sex, the court held that: The concept of homosexuality was unaccepted in the earlier societies. The single parenting, live – in – relationships, artificial fertilization, surrogacy did not prevail in the earlier society and considered immoral. As the society is dynamic and changes with time and as same the law, the various components of the society also change. Now, at present, the live – in –relationship, surrogacy, single parenting is no newer concept and is accepted by the society. In the same way, the homosexuality also related to the personal aspect of the person and it is his right to choose their preferences without any interference and harassment. The concept of homosexuality is also dynamic and readily would be accepted by the society.

LGBT community and privacy rights

There are different types of international human rights organisations which protects the

fundamental rights of every individual. If any individual has interfered unlawfully and arbitrarily and violate the right of freedom of other then every individual has right to protect their basic rights which provide to them by Constitution.

The ICCPR prohibits “arbitrarily or unlawful interference”. According to Privacy right grants, the legal rules must be provided without any interference. The African character on human and peoples, rights is the only regional instrument that says nothing about privacy or freedom from state interference in the family. The right to private life is an umbrella term it covers integrity of the home family; it covers also the determination and development of one’s own personality and inter- personal relationships.

The ACHR has started that, “the right to privacy guarantees that each individual has a sphere into which no one can intrude a zone of activity which is wholly one’s own. “It would be too restrictive to limit the nation to an ‘inner circle’ in which the individual may live his own personal life as he chooses and to exclude there are entirely the outside world not unopposed within that circle, Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings” related to Sexual orientation and gender identity and the right to privacy.

The concept of privacy may be defined as relational, zonal and decisional. The term decisional privacy indicates to intimate and personal choices of an individual’s life. These are central to personal dignity. Relational privacy refers to those activities which happen within the home. In the case of *Toonen v Australia* ruled that a decisional theory of privacy, surround on adults intimate and prostate decision. It may be involvement in sexual activities with a same sex partner. Above all these recommendations given by UNHR committee, it optioned that art-17 of ICCPR is worrying; the adult’s same sex activity in private is covered under the concept of ‘Privacy’. The HR committee consulted that it could not prevent HIV / AIDS from progressing by criminalizing homosexual activities. It is not basic ground for criminalization of same sex activities.

The court of South Africa address by pointed out that equality & privacy were being violated by the anti-sodomy laws. Court observed that there it is the infringement of the Rights of Lesbian, Gay, Bisexual and Transgender People, right to equality by the intrusion into private life based on disrespect of homosexual person, consequences in dispensing unfair treatment. Secondly in the case of *Bowers v Hardwick* court adopted a construction of privacy.

Ecuador: 1997- courts ruled that Act 516 of CC (con homosexuality) violates law & const. Law also because both legislation guarantees equal enjoyment of P.R by all persons.

Colombia: 1994 Constitutional court ruled that homosexual activities among adults are protected by the law. Same sex relation is protected by the concept of equal protection by the law and LGBT community have same F.R, that normal persons have, no one can discriminate on the basis of sexual orientation.

Nepal: - In Dec 2007, the SC ruled that the steps should be taken by govt. to curb the problem of discrimination against homosexuals. Court also ruled that LGBT are required the same rights as other citizens. In the decision SC judges said that, The Govt. of Nepal should enact the new laws & amend the existing laws for the protection of LGBT community.

Indian Context: Rights and Protection

India is a democratic country that has attempt to up hold state surveillance and other violation of privacy rights by observing that it is necessary for national security, and good governance. A nine-judge bench observed that the right to privacy is a fundamental right and it cannot be denied for LGBT community nearly because they have unconventional sexual orientation chief justice J.S Khehar, justice R.K Agarwal, D.Y Chandrachud they were part of the nine-judge bench and they said that discrimination on the basis of sexual orientation is an offence to the dignity and self-worth of the individual. The word equality means that the sexual orientation of every person must be protected. No discrimination can made against any individual in society on the basis of sexual orientation. Art 14, 15 and 21 of the Indian constitution protected LGBT community & every individual in society.

Art 15 of the Indian constitution states that “Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them (2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) Access to shops, public restaurants, hotels and palaces of public entertainment; or (b) The use of wells, tanks, bathing Ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public”.

In *Navtej Singh Johar v Union of India* (2018): The SC held that constitution of the India prohibited the discrimination on the ground of sexual orientation and gender discrimination. On the other side in the case of *National Legal Services Authority v Union of India*, The Supreme Court ruled that discrimination on the ground of gender identity is prohibited by Indian constitution.

Sec. 377 of IPC: The sec. 377 is an antiquated principle which was introduced during British era in 1860s which criminalizes the certain homosexual activities or the gay sex under the head of unnatural offences in IPC. It was introduced in the British Raj and was applicable on the British colonies. In the British Colonies, for the homosexual relationships, the punishment was very rigorous. The people engaged in the homosexual activities were burnt alive. So, the persons having same sex love used to conceal their identities from the fear of the punishment. After this, the Buggery Act, 1533 was passed which criminalized the homosexual practices and according to this act, the homosexual people were hanged till death. At that time, executions for the homosexual community were common.

What is Section 377 of IPC? existence which made the homosexual relationships illegal in the British colonies. The same sex relationships were considered to be immoral and unacceptable. If the homosexual persons have sexual relationships with the age of majority and consent even then they were punished. Because full age, consent and privacy were immaterial and then punishable. After this when the British Empire started to flourish in India then the person named Lord Macaulay drafted the Indian Penal Code in which the same section was inserted which was against the homosexual community. And from that time, the Sec.377 is going on in the IPC and remained applicable in all the times which the India had faced. The sec. 377 is not only applicable in India but it is also applicable in other nations by providing the homosexuality illegal.

This sec. is provided in the IPCs of India, Pakistan, Bangladesh, Bhutan, Brunei, Malaysia, Papua New Guinea, Somalia, Sudan, Botswana, Fiji, Australia, New Zealand and Hong Kong. But some countries such as Fiji, Australia, New Zealand and Hong Kong have repealed the laws making homosexuality illegal. In India, it is inserted in IPC from the time of drafting. This Sec. can be explained in the following point:

- i. The sec. 377 covers the oral and anal sex and penetration of openings of the body such as nostrils or anus etc. All the type of sexes or penetration which not vaginal

or other than the vaginal penetration is offensive and criminally penalized.

- ii. There is no relevancy whether the person involved in the same sex activity has attained the age of maturity (21 for male and 18 for female) or not and whether the persons are involved with their consent or not. So, the different components like age and consent does not matter. And any person of whatever age with or without consent, shall be punishable with the imprisonment. The section also makes the sexual activities punishable which are performed with the animals, homosexuals and having sexual feelings towards the children. The word used in the sec. 377 “against the order of nature” includes all the sexes except the vaginal penetration as mentioned above and interpreted as unnatural and not procreative and held illegal and punishable with minimum imprisonment of 10 years. Thus, the criminalization of the non – procreative sex leads to the criminalization of the homosexual activities. The Human Rights Watch held that this section has no beneficial application as it is used only to harass the sex workers, homosexual people, HIV/AIDS victims and other minor groups of the society and misused to harass the transsexuals.
- iii. In the earlier cases, *R. V. Jacobs Russ & Rye* and *Govindarajula*, the court held that the inserting the penis in the mouth is not amounted to an offence. Later the section 377 was interpreted to cover oral sex, anal sex and penetration in other holes of the body which are not made for the natural sex.

In the *Lohana Vasantal Devchand V. State* and *Calvin Francis V. Orissa*, the court held that the mouth is not meant for the sexual intercourse and the oral sex fell within the section 377. The criteria for attracting the laws and punishments have changed from the non – procreation to the sexual perversity which means that the person has desire to behave in an unacceptable way. Now the question arises that whether this is a violation of Art 14 and 21. Art.14 provides the right to equality and there is no question of confusion between it as the sec 377 infringes the right to equality.

Art. 21 deals with the right to life with dignity then how can be any person allowed to behaviour violently or discriminately on the basis of their sexual preferences. Right to Privacy is the other right introduced by the Supreme Court in a historical case, and held that it can be violated.

Judiciary had given its views and it interprets the law in its own ways and changes its previous judgments according to the circumstances and facts of the case. So, it depends upon the court how it will define the concept of homosexuality. The Indian society is also not ready to accept this principle and in favour of the sec. 377. The people who are broad minded understand the homosexual concept and are ready to accept them and get to know that they are their brothers, colleagues, friends, sisters etc. The society which changes itself with the changing of time will understand the circumstances and situations happening around them and they wish that the Sec. 377 should be strike down.

Naz Foundation V. Government of India Case

The NAZ Foundation V. Government of India is a historic Indian judgment in the favour of the homosexual community decided by the two Judges bench of the Delhi High Court in 2009. The court held that the consensual sex between the two adults is not a crime and if the sexual acts of the homosexuals are considered as a crime, then it will be the violation of the fundamental rights of these people enshrined under the Constitution of India. It ended all the ill treatment against the people who were always targeted because of their sexual orientation and gender identity. The court declared that the elements of the sec 377 are unconstitutional. The judgment decriminalized the homosexual acts between the adults who were engaged in the homosexual activity with the consent of both. However, this decision was challenged in the Supreme Court later.

Facts: A writ petition was filed by a non – governmental organization, NAZ Foundation Trust (India) in Delhi High Court in 2001. The writ petition was filed to legalize the homosexual relationships between the consenting adults. Before this, the first writ petition was filed by the AIDS Bhedbhav Virodhi Angolan in 1994. The NAZ Foundation submitted its arguments that the Section 377 violates the fundamental rights enshrined in the Indian constitution under Articles 14, 15, 19 and 21. It was held by the foundation that it works with the AIDS Bhedbhav Virodhi Angolan and help in skirmishing the spread of HIV/AIDS and their work is being hindered by the discrimination exercised within the homosexual and minority communities. The petitioners submitted that the because of such discrimination, the homosexual people are exempted from the exercise of their fundamental rights. The people having same sex relationships are harassed by the public authorities and acts of violence and abuse against this community is common in every society. But the Delhi High Court refused to entertain the

petition by stating that the NGO had no locus standi in this case which means that the party is not able to show the connection to and harm from that particular law for which the writ petition has been filed. Then the NAZ Foundation filed an appeal to the Supreme Court for dismissing the decision of the High Court on the technical grounds. The Supreme Court quashed the decision of the High Court for dismissing the petition and sent back the case to the Delhi High Court to reconsider it. Sec. 377 is entitled with the heading “of unnatural offences” which is in the IPC since 1860 and had been criminalize the sexual activities between the persons of the same sex.

Section 377 states: “Whoever voluntarily has carnal intercourse against the nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for term which may extend to ten years, and shall also be liable to fine”. It was submitted that the legislation criminalizing consensual and oral sex is outdated and has no place in modern society. In fact, the studies of the section 377 revealed that later, it is generally been used in cases of child abuse and assault. By criminalizing the private and consensual same sex conduct, this section is used to public abuse, extortion, harassment, forced sex, spreading of discriminatory beliefs towards same sex relations and sexual minorities.

The Legal Arguments Submitted: The petitioner NGO has been working with another NGO in the field of HIV/AIDS intervention and prevention. This involves the interaction with the different sections of the society which is in contact with HIV/AIDS and which include the homosexual communities. According to the petitioner, the gay community is most vulnerable to HIV/AIDS. It was claimed that due to the differentiation between the homosexuals, their efforts against the prevention of the AIDS/HIV are impaired in the application of the section 377 as a result of which the fundamental rights of this community are sustained and this whole community is subjected to the abuse, violation, discrimination and assault by the community as well as the public authorities.

The petitioner submitted that the right of privacy is also a part of the right to life and liberty and freedom of expression is guaranteed to each and every Indian citizen without any distinction. The concept of the happiness of the people those involved in the right of privacy, human dignity and freedom of expression, giving some private space for the sexual and consensual relations and are protected under the fundamental right to life and liberty given under Art. 21. The petitioner held that the sexual relationships are the most private part of one's

life and should not be abridged on any distinction basis. The fundamental right of privacy is can only be limited when it is against the state interest but here, in this case, there is no threat to the interest of the state in any way.

Further, it was held that the word “unnatural sexual acts” does not include the differentiation and classification on the basis of procreative and non – procreative sexual acts and it is in violation of the Art. 14. Further, in the Art. 15, the expression ‘sex’ is used which is not limited to the word ‘gender’ but it includes “sexual orientation”. Thus, the concept of equality is applicable on all without any gender distinction. The criminalization of the sexual orientation would be the violation of Art. 15. Art. 19 provide the freedom of expression, to assemble or to move freely anywhere. So, the homosexuals also have the right to speak about their identity and sexual preferences, to associate and to move freely to involve in the homosexual activities. Therefore, between the two adults, the consensual homosexual activities are the private part of their lives and should be protected under the right to privacy and the section 377 should not have any application in case of homosexuality.

The Government of India: There were contradictory views of the respondents. The respondents were Ministry of Home Affairs and the Ministry of Health & Family Welfare which were on different stands. The ministry of Home Affairs was with the statement that the sec. 377 should be continued. And the Ministry of Health and Family Welfare insisted the continuance of the section 377 which was affecting the HIV/AIDS prevention program. The Ministry of home affairs justified their statement by saying that the Section 377 is not only applicable for the homosexuality but it is important in the cases of sexual abuse of children. And by discontinuing it would result in the increase in cases of child related crimes and for the homosexuality. It was held that if the concept of homosexuality comes under the right of privacy, then the protection of the public morals, health and safety is the duty of the state and public authorities. The 42nd report of the Law Commission was submitted in which a survey was introduced for the homosexuality and most of the population of the country was against the decriminalization of the homosexual activities whether in private or public. And the law and the society can’t run away from each other separately. Further, it was argued that to decriminalize the homosexual laws, the public tolerance is more needed so as to adjust with the change going to be in the society and according to the ministry of home affairs, the adaption and tolerance level of the Indian society is not on that level that they can handle or accept the homosexual practices as a

part of society. Thus, it was clear from the arguments of the ministry of home affairs that it was in favour of continuance of the Section 377.

NACO (National Aids Control Organization) submitted its response with the joint statement of the ministry of health and family welfare. The NACO held that when the groups were identified having the greater risk of HIV/AIDS were the groups in which men have sexual relations with men and sex workers. These groups do not reveal their identity because of fear. Hindustan times, It is govt's job to protect LGBT rights: Harsh Vardhan, of arrest, punishments, shame in the society. It will lead to extinction of these groups as they will never reveal their identities and will become invisible and underground and it will become for the health workers to find out them and to protect from the infection.

Other 12 organizations were also raising their voices in favour of removal of the section 377 which were related to the child rights, human rights, health workers, women rights as well as the rights of the people attracting towards same sex including Lesbian, Gay, Bisexual, Transgender, Hijra and Kothi. On the survey of these different organizations, a report was made named: 'Rights for All: Ending Discrimination under Section 377' was published in 2004 to create awareness about the negative impacts of this law on the LGBT community and on society.

Right to privacy: It was affirmed by the Supreme Court that in Indian constitution, there is no separate provision for the Right to privacy. That's why the court interpreted this right in the context of the Art. 19 which states the freedom of expression and movement and Art. 21 which includes the right to life and liberty. The court gave the reference of the Yogyakarta Principle on the Application of Human Rights in Relation to Sexual orientation and Gender Identity and asserts that each individual has right for equal enjoyment of basic rights regardless of their sexual orientation and gender identity. The court made references to the various case laws related to the privacy as *Kharak Singh V. The State of U.P.*, in this case the right to privacy was traced with the right to life under Art. 21. The extensive references were made from the United States jurisprudence as *Roe V. Wade* and *South-eastern Pa V. Casey*. With reference to all these cases, the court held that the section 377 violates the right to privacy, criminalizes their identity and dignity of such individuals. The arguments by the MHA that the decriminalization of sodomy will lead to the increase of HIV/AIDS were dismissed by the court on the ground that there was no medical evidence to 76How the LGBTQ Fight in India Went from Being a

Health Issue to Civil Rights, prove it. This argument also contradicts to the surveys made by the NACO and the Ministry of Health and Family Welfare. Mere public morality can't be the basis of putting restrictions on the enjoyment of fundamental rights. The court cited the foreign judgments as *Norris V. Republic of Ireland* in which the court held that the only morality which matters is constitutional morality. The court determined that the Indian constitution promotes diversity and to criminalize the homosexuality will be oppose the constitution morality.

Right to Equality: The right to equality is the fundamental right provided in Art. 14 which states that “any distinction or classification should be based on an intelligible differentia which has a rational relation to the objective sought and is not unfair or unjust”. The Section 377 does not make any difference between the consensual or forced relations, no relation with the age. So, without any evidence, it seems arbitrary and unreasonable to make the homosexual activities criminalized. The court considered the Art. 14 and the legal principles related to it and considered the Declaration of Principles of Equality and use the Principles 1, 2 and 5 which involves the right to equality, equal treatment and definition of discrimination respectively. The court held that the section 377 is neutral and led the court to conclude that Section 377 is discriminated against the LGBT Community.

Article 15: The court interpreted the Article 15 as the word ‘sex’ includes not only the gender but also the sexual orientation. It referred to the case *Toonen V. Australia* decided by the Human Rights Committee in which the laws in Tasmania, making the homosexual activities criminalized, were considered violating to the Article 2 of the International Covenant on Civil and Politics Rights where the sex word include the sexual orientation also.

CONCLUSION

LGBT people are now more confident to express themselves, grow personally, and own their relationships without the fear of discrimination and harassment. However, this change has primarily been for the urban, privileged few. Also, the lives of transgender people have not really improved much,” Mr. Chakravorty said. Hence, we can say government has taken a step for protection of LGBTQ but it is not possible without the social acceptance. Now, we have to change our prospective about them and need of acceptance. Indian legislative framework is more sufficient and effective as compare to other Asian countries. Recently Odisha is the first state of India to give transgender social welfare benefits. It includes pension for transgender

housing and food grains for them. Aim of these benefits is to improve the social and economic status of transgender.

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