

Constitutional Conquest - Disgrace Remains

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ABSTRACT

India has now become a member of 17th Common Wealth Nations who decriminalized homosexuality. This worldwide controversial topic arose in India after the judgment of 2009, 2013 and 2016 given by the High Court of Delhi and Supreme Court which brought several mental changes in the humanity. The landmark judgment was given by the India's highest court of justice that decriminalizes consensual gay sex, which concluded in the victory of a big fight, which was being fought since an era. The verdict of the court was a major milestone for LGBT community. I have chosen a provocative adjective in the title to draw your attention and stimulate your concern. Even being minority in country this community enjoys no such privileges which they should be given to them as citizens of the country. They have suffer a lot which makes them fall in the category of marginalised people in India as they are also deprived of their basic rights of life such as marriage, cohabitation with partner without any interference and many others. The basis of this research work lies in the circumstantial development and to uplift this community. The next major step to be taken for the welfare of LGBT community is to bring rules and regulations related to marriage, property rights and joint banking and insurance services, so they accept there is a long battle to face in upcoming years. The lack of social recognition has an effect on the capacity of LGBT people to access and accept themselves as the citizens of the country so far. The inequalities include isolation, social discrimination, and negative mental and physical health and many more, which finally cause them to face separation from this growing society. It has always been a debateable topic that either these people will get their rights or they will stand at the back. The complimentary part of the study is to help minority community to get an identity amongst the majority in the society. This research paper examines various stages of fight to get the real victory and the challenges which are being faced by the community members despite the legal victory.

Keywords: LGBT Community, Challenges faced by this community, Marginalised Population

I INTRODUCTION

"It takes no compromise to give people their right, it takes no money to respect the individual, it takes no political deal to give people freedom, and it takes no survey to remove repression.

Harvey Milk

These words of a famous personality who was also the first open gay person to be elected in the public office of California shows how respect of choice of individual is the essence of liberty. The abbreviation LGBT stands for "Lesbian, Gay, Bisexual and Transgender", it refers to the broad alliance of groups that are distinct by sexual preferences, gender and social and economic status. These people can be homosexual, bisexual or heterosexual, after their sexual orientation. The basic intention of Human Rights is to treat all humans equal and help them to have a life full of liberty as well as dignity. Anything that hampers the dignity and freedom of an individual is the violation of their basic principles. The Human Rights mainly focus on this LGBT Community and their preference helped this group to get identity around the world. The Preamble in the Constitution of India speaks about justice, social and equality of status, for all the citizens of the country. India is a diversified nation and attitude of the people fluctuates when it comes to LGBT Individuals. No matter it is rural or urban area but the though process differs.

In current scenario, there has been improvement in the rights of each minority group. In April 2014, S.C. in NALSA v. UOI said that all the rights and freedom should be granted to the LGBT community as well, and stated that the protection will be granted to them under the Constitution. A new judgment was written down thorough nail point of quill pen—by the bench of Supreme Court on 6th of September 2018 striking down 158 year old law. A bench consisting of five judges of the Supreme Court decriminalised homosexuality by striking down the colonial era up to an extent. The Bench was led by the Chief Justice of India, Justice Dipak Misra and four other judges who constituted Justice Rohinton F. Nariman, Justice A.M. Khanwilkar, Justice D.Y. Chandrachud and Justice Indu Malhotra, all the respected judges gave four separate but agreeing judgments. Sec 377 was decriminalised but is society looking up at them just the way they look towards their circle? The basic motive of passing of this judgment was to help up-liftment of these groups. Though the judgment was a positive step towards equality but can easily be criticised since society is not able to accept the minority. Struggling with all these situations, these minority groups are still not able to take a breath of freedom. Both the judgments of the years 2014 and 2018 are the important moments for the LGBT to get their rights. This is a victory but it never meant that LGBT people are fully free and can perceive equal status amongst the other citizens. It is totally dependent on how much more work has to be done in our country and other countries of the world to reverse these pre-historic and undemocratic gay laws.

The paper would state that just by saying that there are certain events which took place after decriminalization of 377 and are quite satisfying when seen in reference of LGBT community but still there is a major section of the LGBT community which are deprived of their rights and struggling to get justice in true sense and working in a determined way to get the fruitful result of the Landmark judgement. And there it shows where the marginalized people (one of which is LGBT community members) in India are still lacking justice despite such a treat legal victory. The paper would like to suggest that if some major reforms and initiative is taken by the people and the government to educate others and protect the rights of the LGBT members then something better can take place as it is correctly said, **“If the government and citizens world together then who is left to create problems”**. All section of the society including the LGBT community members which comprise of 2.5 million population of the country need to develop in order of the complete development of the society.

II GRADUAL CHANGE

The Government in the British Era incorporated Sec 377 in the Indian Penal Code, to criminalize non-conceptive sex. Religion always played an important role in shaping homosexual behaviour. Homosexuality is often categorised as a negative concept. This has been witnessed in the hold books of Jews and Christians, also in the book Quran. The practice of same sex relationship is denounced by all the religions. The Quran specified that the people who are involved in the same sex relationship destroyed society’s sentimental views and are against God’s beliefs.

The relationship of LGBT community and Religion differs greatly across the globe according to time and place. Amongst different sections acceptance differs and has been interpreted in different forms. LGBT people are barred from participating in any rituals of the Christianity. There are several portions of Hinduism that do not accept LGBT people as their members, while in the mythology the members of this community was made the part of the dignified society. They were accepted and things were usually in their favour. It is often read that Hinduism never boycotted homosexuality. Buddhism never accepted men to men and women to women behaviour, as according to them it was sexual misconduct which gives negative impact on the society at large. There is no mention of homosexuality in the holy book of Sikh. But according to the views of other Sikh homosexuality is a personal matter and societal interference is infringement of privacy.

Numerous LGBT people are elevated in religious families and have to face a great negotiation of internal pain and conflict as they try to harmonize their own beliefs with the reality of who they are. Relationship amongst the same sex is a controversial issue within the religion. Homosexuals face dangers within the walls of society’s brains. Having been accepted in the past but

not been given a proper identity in present is something which is against humanity. However, within the religious communities, homosexual behaviours are given a specified place and became a supportive sector of the society. Some reforms such as Judaism and Episcopalian church have openly accepted the members of LGBTQ.

Across the globe: lesbian, gay, bisexual, and transgender people (LGBT), come over legal discrimination, indigenous violence, and other human right violations on the basis of their sexual orientation or gender identity. An International Day is celebrated against Homophobia, Transphobia and Biophobia to mark pride in whole US. The only belief of all, regardless the sexual orientation or gender identity, is to fulfil the exercise of human rights on equality and to help them attain their fundamental rights. The NAZ Foundation is a NGO, working in the field of sexual health and HIV/AIDS. They questioned the constitutional validity of the Section 377 since it infringed the fundamental rights of the minority groups, these rights includes right to privacy, right to dignity and health, right to equality and right to freedom of speech and expression. LGBT community was facing violence across the globe and is still facing discriminatory behaviour from their family members and their workplace.

While raising section 377 as a legal issue in court of justice that was done by Naz foundation and ABVA together in the year 1994 but disconsolately the petition was dismissed and subsequently later on the second petition filled in the year 2004 was also dismissed. But a sudden momentous change came on July 2nd, 2009. In the case of Naz foundation v/s Govt. of NCT of Delhi two bench judges consisting of Chief Justice Ajit Prakash Shah and Justice S. Muralidhalaid down a judgement decriminalising a portion of section 377 stating that decriminalization of act consented adult gay sex is a unheeding violation of fundamental right of the country men such as right to life and liberty and equality before law enshrined in section Article 21 and Article 14 of Indian Constitution. Other breakthrough came to the doorstep of the LGBT community, when in the case of National Legal Service Authority v/s Union of India in the year 2014. The Supreme Court asked government for, “declaration of transgender as a third gender and to add them in OBC quota”, and in addition the court said that all the fundamental rights are equally applicable on to the transgender people. Then came the date of decision September 6th, 2018 when a path breaking judgement was laid down. The Apex Court of India spoke in the case of Navtej Singh Johar and Ors.v/s Union of India, that decriminalization of a portion of section 377 of IPC will be done. The decision was delivered, to obtain which a lot of hard work was done and decision was brought with a lot of hope by petitioners and other activist to protect the fundamental rights of LGBT community and to remove their stigma in the society.

III CURRENT SCENARIO

The Supreme Court pronounced the judgment stating that, “consensual sexual acts between adults cannot be a crime, pronouncing that the old law was irrational, random and impenetrable.” After the above stated judgment the situation of this community was improved in the eyes of law only, but is never upgraded in the eyes of the society. The question which is very important to be thought about is, whether decriminalising few portions of section 377 sufficient enough to help the LGBT Community live life with dignity or still there are some major milestones which are left unturned?

Some of the population in South Asia, states that there is urgent need for the protection of third gender. The protection can be done in many ways, through pension schemes, welfare benefits, and surgeries in Government Hospitals as well as development programmes. Notwithstanding the political movements in favour of LGBT community, there remains a dislike present in the Indian population.

Some of major incidents which took place after the decriminalization of section 377 and are question on the effectiveness of the decriminalization:-

- (a) One of the most overlooked topics of the year 2019 was the acceptance which was made by Ace sprinter Dutee Chand that she has been in a same sex relationship since three years. Dutee said that, decriminalization of the section 377 gave her strength to accept the reality in public. But the first sportsperson who admitted about her reality faced trauma from the side of her family.
- (b) Many of the Indian Athletes have been exposed to discrimination, disgrace and loss of identity, work and medals after their sex verification. Middle distance runner Santhi Soundarajan won silver medal in 800m in 2006 Asian Games in Doha. Her medal was burgled from her and later she committed suicide.
- (c) Two lesbian women of Shamli District of Uttar Pradesh sought police protection from their own family members when they frightened them of the dire consequences of their marriage. The step of seeking protection from their own family member's shows the extent of trauma and insecurity which is residing in the minds of the students.
- (d) A middle class boy named Avinshu Patel hanged himself from fan of his residence in Chennai after suffering years of mental harassment from his own friends. In his Facebook post he seek apology from his parents, mother and sisters. He said that it was not his fault that he had such orientation of a Gay even though he was born as boy he used to walk, talk and think like a girl. This incident shows that even though section 377 of IPC has been decriminalized, but still there is a lack of education in the people. There are some obligations that each member of society holds towards the LGBT community, “which is to serve them with equal respect” and, the members of the LGBT community

are still unaware of the law and statutes for their protection from such harassment.

- (e) A petition was filed by Pune resident Varun Sardesai to urge Indian authority not to maintain its last position on LGBT rights and not to abstain itself on resolution that was formed by Latin America at the UN Human Rights Council, the resolution is seek to do mandate independent expert to abolish violence and discrimination which is based on identity of individual's gender and sexual orientation. Millions of people who signed petitions in order to help and support the LGBT community. This petition was signed by only 8% of the population of the country. Some are the members of Parliament, these members include Shashiv Tharoor, Supriya Sule, Priya Dutt and Apsara Reddy signed the petition urging the prime minister and his government to vote in favour of renewal of the mandate of the expert on violence and crime. These non-grants of vote shows that still after passing of such a historic judgment the Indians are not ready to accept a big change especially when it comes to the LGBT community.
- (f) Under Islamic Law- those engaging in same sex sexual acts can be sentenced to death in nearly a dozen countries or in large areas of the: Iran, Saudi Arabia, Yemen, Sudan, the northern states of Nigeria, southern parts of Somalia, two provinces in Indonesia, Mauritania, Afghanistan, Qatar, the United Arab Emirates.
- (g) In the year 2019, the Transgender Persons Bill, 2019 was adopted. The bill bans the biasness against the transgender in education, healthcare and private employment.

The Bills has following provisions:-

- (i) there should be no discrimination against transgender in employment, education institutions, health care, etc.
- (ii) they have full right of residence with their parents and their family members.
- (iii) there are provisions of welfare schemes and programmes for education, security from society and health of this community.
- (iv) National Council for Transgender Persons is formed to advise and to inform the members for the protection of their basic rights which are enshrined in the constitution of the country.

The bill was made with the intention to benefit a large group of transgender community, tone down the stigma and discrimination against the marginalised population and help them to get a status in the society.

- (a) **Effective and positive consequences:** World Health Organization's decided in 1990 to declassify homosexuality as mental disorder. In the light of the decision, government documents such as Bank Forms, Passports and Voter ID Cards, initiated with the third gender option along with male (M) and female (F), usually designated as “other” (O), “third gender” (TG) or “transgender” (T).

There are always two sides of a story; if one is sad then the other is a happy one. Same is applicable in this situation too, if society is not able to accept this reality, then these minority groups by themselves are taking step for their well-being. It is very important to take a step to safeguard the rights of these minority communities. Being the citizens of the country, every single person has access to Article 21. The word “life”, in Article 21 means a life of dignity but not just a life of an animal; this was given in the case of *Budhadev Karmaskar v. State of West Bengal*.

Some of the events which took place after decriminalization and are showing positive changes in favour of the LGBT community members are as follows:-

- (i) Transgender and gender activists Gopi Shankar Madhurai and S. Swapna from Srishti Madurai, put on a protest in the collectorate of Madurai on October 7, 2013, pleaded reservation to allow all the genders either male- female or transgender to give examinations conducted by UPSC, SSC BANK EXAMS and TNPSC. “Swapna is the 1st first transgender to clear TNPSE Group IV Exams.” Also, Gender status is a matter of self-respect for every citizen same took place Vaigha who is the first transgender in Kozhikode district to get ration card in her own gender status.
- (ii) Before decriminalization there was no frequent or enthusiastic participation of this group on television but latter the number enhanced. Tamnanna Simhadri became the role model; she was the first transgender to be the part of reality shows.
- (iii) A Hindu Muslim same sex couples Anjali Chakra and Sundas Malik shared their photo-shoot photos on social-sites. The ordinary people were applauded on social media with 44,000 shares for breaking the barriers of gender and religion.
- (iv) An NGO of Pardi Town in Valsad District handmade has for the first time made two transgender as their brand ambassador for its Aarambh and Menstrual hygiene day.
- (v) Article 14, talks about the theory of equality which is positive in nature. Court can direct the State to give equal treatment but cannot issue a mandate that the State should commit illegality or pass wrong order. “Article 14 cannot be invoked for perpetuating irregularities or illegalities, as stated in the case of *Usha Mehta v. Government of Andhra Pradesh*.”
- (vi) A transgender woman, who was one of the petitioners in *NALSA Case*, spoke that after the judgment she can feel how far this decision brought them, further that they are human beings as well, and need recognition within the communities they live in. Also, there are many more things to come regarding their civil rights and identification in the society without any fear of violation and humiliation.

IV COMPARATIVE STUDY

- (a) **In comparison with ISLAMIC WORLD** – Homosexuality is forbidden in Islam. All the majors of Islam do not agree with the concept of Homosexuality. Islam believes that same sex desires are an unnatural temptation; and same sex relationships comes under infringement of basic human lifestyles. A recent killing of almost 49 people was done at a gay night club in the State of Florida of United State on June 12th, 2016 by Omar Matin Claiming allegiance to Islamic State has raised questions of intolerance and hate towards LGBT Community. Gay sexual intercourse in Pakistan is punishable by imprisonment for life. In Afghanistan and Iran, homosexuality is banned and penalties have been enforced against it. In 2011, three men were executed in Iran for homosexual acts. Iran is prominent for hanging men accused for homosexual behaviour. In Saudi Arabia, homosexuality can be punished by death of the people. Promoting homosexual acts in front of the society as whole is a punishable offence. The punishment exceeds jail, fines, etc.

Though at many places of which follow Islamic Laws has passed LGBT anti-discrimination laws like in Albania, Kosovo, and Northern Cyprus. There are also several organizations for LGBT Muslims either to reform their sexual orientations or to support LGBT rights for them. No matter how many changes came in the laws relating LGBT relationships still considered as illegal way of living.

- (b) **In comparison with Germany and India** - No one may be prejudiced or favoured because of sex, birth, race, language, national or social origin, faith, religious or political opinions or sexual orientation. Some constitutions of the states have even established anti-discrimination laws; the basis of it included gender identity and sexual classifications. Same sex couples were legally recognized in Germany since 2001. Same sex wedding was celebrated in Germany in October 1, 2017. The couple, Karl Kreile and Bodo Mende was together for 38 years in Berlin. The couple exchanged their vows under the new law in town hall of Schoenberg, Berlin. Same sex marriages are not legalized in India, yet. In the year, 2011, an appeal was filed in Haryana Court for same sex marriage involving two women. The appeal was accepted by the Court, allowing them to marry. After the marriage, the couple received threats from relatives and the friends of their residence. Same sex marriages were permitted in 2017 in Germany, and it permitted the couple to adopt the child. Full rights were given to the couple for adoption. On October 10, 2017, in Berlin a district court of Kreuzberg approved the application for adoption of a child by same sex couple. In the year 2017, the citizens advanced a draft of a new UCC, that it should legalise same sex marriages to the Law Commission of the country.

V REALITY: A MIRROR TO PUBLIC PERSPECTIVE

The truth is no matter how many constitutional amendments are enforced but these people won't be able to attain their position in society. There has been no explicit law framed for the minority group to help them have their respectable place in society. Our country does not have any anti-discrimination law passed for discrimination and harassment in private employment. LGBT people are prohibited from openly serving in the Indian Military. In December 2018, a bill was introduced to the Indian Parliament for amendment of the Army Act, 1950, Navy Act, 1957 and the Air Force Act, 1950. The bill stated that LGBT group should be allowed to serve in the military of the country.

LGBT Community faces discrimination on daily basis. The Transgender Persons (Protection of Rights) Bill, 2016, was introduced in August 2016, to Parliament. This bill was re-introduced in the Parliament in 2017. On December 17th, 2018 the bill was approved by the Lok Sabha after making 27 Amendments. It included a clause which was controversial in its nature, it prohibited transgender from begging. The bill was lapsed when the 16th Lok Sabha was dissolved.

In India, the situation is very multiplex. The educated in the country also, hold grudges against this minority group. For the country, which is very traditional and heritage, it is difficult to accept that homosexuality also have their roots in the country. According to a survey, amongst the whole population of the country only 35% are in favour of legal rights to be granted to this community. The 69% of the LGBT citizens accept that they want equal rights, which is enshrined in the Constitution of the Country. But the other half of these people prefer, to demolish discrimination in employment. Basically, the only perspective is to get gender equality.

Acceptance of this community is most in the Hindu Community. 39% of the Hindus and 13% of the Muslims accepted the community in their circle. This is a positive step but it also consists of some loopholes of this society.

VI CONCLUSION

Homosexuality is about love, sometimes it's also about the physical attraction with another person. Transgender are basically deprived from their legal and Fundamental Rights that is, Right to Marry, to Adopt, to Vote, and at times to Life. This is only because, in older times the law recognised only two genders that is Male and Female. The amendments made in the laws are difficult to accept by the people. This kind of discrimination is heart breaking. Even in *Arthshastra* they gave many descriptions about homosexual behaviours whether performed by any of the gender. The ancient Hindu text *Kamasutra* consists of a proper description about homosexuality. Hence, we can assume that the

homosexuality was given identification in the early ages.

Transgender is a rare situation. This situation is stumbled across many times. In this world, six hundred crores transgender are estimated as a whole. This group has been the victim of sexual assault, humiliation, detention by police and many more. This community play the role of victimization, as a result of their identity or expression. The most common problems faced by this community are mental health issues. Due to a common network of social, economic and culture, this group is at its highest to face psychological problems such as, anxiety, depression, trauma, stress disorders and thoughts of committing suicides. In addition there is multiple health problems faced, which is the cause of drug addiction. Usually, this group become victims because of their personality. There are many dimensions in which victimization is faced by the transgender groups. There are many factors which are still unexplored by the Court of Justice. Few of them are:

- (a) Rejection by friends and family,
- (b) Expel by their place of worship,
- (c) Victims of criminal offences,
- (d) Instead of support, abuse faced because of media.

In an interview, a LGBT Communist claimed that the whole fight is for equal protection by laws and equal citizenship. The basic fundamental rights are being infringed. The Supreme Court like-minded gave the decision that Gay Sex is not a criminal offence. There was several opposition to repeal Section 377. They resisted that, this is harmful for society to make people of this group walk with them and it will morally degrade the society.

The LGBT Community is the minority population of the country and not less than the marginalised group according to the judgment. Although, the country has taken its first step by decriminalizing Section 377 and allowing consensual carnal intercourse. But somewhere we still straggle behind in the most practical aspects, where there is the need to make civil rights available for this community. Till today's date there is denial of education, right to enjoy in public places and many more, to the LGBT Community. These people are left with no other option then begging and other inappropriate jobs.

However, this cannot be denied that these judgments has advanced the society and made us walk on the path of acceptance.

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